MESHACK MUDYARIWA
versus
NMB BANK LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 19 October 2021 & 24 June 2022

COURT APPLICATION

R G Zhuwarara, for the applicant
N Tonhodzai, for the respondent

MANZUNZU J

INTRODUCTION:

This opposed court applicant seeks a compelling order in the form of a mandatory interdict in the following terms;

"IT IS ORDERED THAT:

1. The application for a compelling order be and is hereby granted in the following terms:
a. Respondent be and is hereby ordered to unfreeze and allow applicant to withdraw USD 300 000.00 or any other money held in NMB Bank Account No. 4211145430, for card number 4211 5901 1004 4846 within 48 hours from the date of the order.
b. Respondent be and is hereby ordered to pay costs of suit on an attorney-client scale."

BACKGROUND FACTS

The simple facts of the case are that the applicant holds an account with the respondent. On 24th March 2021 an amount of USD300 000 was deposited into this account. However, the applicant's funded account did not show any contra record on mirror account in T24 core Banking System which raised the question of legitimacy of funding on the applicant's account. As a result, the respondent suspected the money funded could be proceeds of money laundering. This was more so because the funded amount did not reflect as was expected in the VISA prefunded Credit Card suspense on the T24 core banking system. The respondent expected the applicant's card to have a contra T24 record which provides the origins of the funds. The respondent says it had a statutory obligation to suspend the applicant's account while investigations of the origins of the funds were carried out.

It is common cause that the applicant was invited by the respondent to assist with information in its investigations. Due to the process of funding the respondent was unable to

identify and verify the identity of the originator; to obtain and maintain the account of the originator or obtain and maintain the originator's address, ID number, or date and place of birth. This information, the respondent said was a statutory requirement per section 27 of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24*] (the Act).

The applicant's story is that he obtained the money as a loan from two South African companies which happen not to be the originators of the funds. During their several engagements with the respondent's officials the applicant gave the respondent a document which he said was an agreement between him and the two companies. The identity of the originator of funds was kept under lock and key. The applicant said he does not know. The director of the two South African companies, one Gwekwerere is said to have refused to reveal the identity of the originator of funds giving reasons that the funders were acting contrary to their domestic law which prohibits such funding in Zimbabwe being a country under sanctions. According to the respondent, having failed to obtain the required information from the applicant and Mr Gwekwerere, a report was then made to the Financial Intelligence Unit of the Reserve Bank of Zimbabwe on 7 May 2021 and later to Police. The matter is said to be under investigation.

The applicant's case is that the respondent was holding his money for no cause. He maintains that the money deposited in his account was legitimate. To the contrary the respondent says it is suspicious that the money is the proceeds of money laundering, more so when its origins has been kept under the armpit.

ISSUES

1. Does the respondent have a legitimate cause to suspend the applicant's account, in other words can the respondent freeze applicant's account without a court order.
2. Does the application meet the requirements of a final interdict.

THE LAW

a. Mandatory Interdict (*Mandamus)*

The requirements for a final interdict are settled. These are:

(a) A clear right

(b) Irreparable injury actually committed or reasonably apprehended

(c) Absence of a similar protection by any other remedy.

See *Setlogelo* v *Setlogelo 1914 AD 221*

Pauline Mutsa Makoni v Julius Tawona Makoni & Ano HH -820-15

Econet Wireless Holdings v *Minister of Information 2001 (1) ZLR 373 at 374 B*

Airfield Investments (Pvt) Ltd v *Minister of Lands & Ors 2004 (1) ZLR 511*

LEGITIMATE CAUSE

The respondent says it acted according to law to allow it to fulfil a statutory obligation to suppress a possible abuse of the financial system. Reference was made to the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] (the Act), whose main thrust is to **suppress** the abuse of the financial system and enable the unlawful proceeds of all serious crime and terrorist acts to be identified, traced, frozen, seized and eventually confiscated. In particular s 27 of the Act creates obligations upon financial institutions to help in the suppression of abuse of financial systems. It provides that;

> "(1) When undertaking wire transfers equal to or exceeding one thousand United States dollars (or such lesser or greater amount as may be prescribed), financial institutions shall—
> (a) identify and verify the identity of the originator; and
> (b) obtain and maintain the account number of the originator or, in the absence of an account number, a unique reference number; and
> (c) obtain and maintain the originator's address or, in the absence of an address, the originator's national identity number or date and place of birth; and
> (d) include information referred to in paragraphs (a), (b) and (c) in the message or payment form accompanying the transfer.
> (2) For cross-border wire transfer of any amount below one thousand United States dollars, a financial institution shall ensure that such transfer is accompanied by—
> (a) originator information, namely—
> (i) the name of the originator; and
> (ii) the originator account number, where such an account is used to process the transaction, or in the absence of an account, a unique transaction reference number which enables traceability of the transaction;
> and
> (b) beneficiary information, namely—
> *(i*) the name of the beneficiary; and
> (ii) the beneficiary account number, where such an account is used to process the transaction, or in the absence of an account, a unique transaction reference number which enables traceability of the transaction.
> (3) Where several individual cross-border wire transfers from a single originator are bundled ma batch file for transmission to beneficiaries, the batch file shall contain—
> (a) accurate originator information, including the originator's account number or unique transaction reference number; and
> (b) full beneficiary information.
> (4) Despite the foregoing requirements, a financial institution is not required to verify the identity of a customer with which it has an existing business relationship, provided that the financial institution is satisfied that it already knows and has verified the true identity of the customer.
> (5) Subsections (1) and (2) do not apply to transfers—
> (a) executed as a result of credit card or debit card transactions, provided that the credit card or debit card number accompanies the transfer resulting from the transaction; or
> (b) between financial institutions acting for their own account.
> (6) The Director-General may issue a directive modifying the requirements set forth in subsection (1) with respect to domestic wire transfers, as long as the directive provides for full originator information to be made available to the beneficiary financial institution and appropriate authorities by other means.

(7) When acting as an intermediary financial institution in respect of a cross-border wire transfer, a financial institution shall transmit all (fl originator and beneficiary information received by it to the bene-ficiary financial institution and shall, in addition, retain such information.
(8) Where technical limitations prevent the required originator or beneficiary information accompa-nying a cross-border wire transfer from remaining with a related domestic wire transfer, the intermediary financial institution shall keep a record for at least ten years, of all the information received from the ordering financial institution or another intermediary financial institution.
(9) Intermediary and beneficiary financial institutions shall have in place risk-based policies and pro-cedures for determining—
(a) when to execute, reject or suspend a wire transfer lacking required originator or required benefi-ciary information; and
(b) the appropriate follow-up action.
(10) For a cross-border wire transfer of one thousand United States dollars or more, a beneficiary financial institution shall verify the identity of the beneficiary, if the identity has not been previously ver-ified, and maintain this information in accordance with the record-keeping requirements set out in section 24.
(11) If a financial institution receives a wire transfer that does not contain the complete originator information required under that subsection, it shall take measures to obtain and verify the missing infor-mation from the ordering institution or the beneficiary.
(12) A financial institution which provides money or value transfer services shall comply with all the relevant requirements of this section in every country where such financial institution operates, whether directly or through agents.
(13) A financial institution which provides money or value transfer services and which controls both the ordering and the beneficiary side of a wire transfer, shall—
(a) take into account all the information from both the ordering and beneficiary sides in order to determine whether a suspicious transaction report has to be filed; and
(b) file a suspicious transaction report in any country affected by the suspicious wire transfer and make relevant transaction information available to the Financial Intelligence Unit."

Mr *Zhuwarara* for the applicant argued that the respondent has no authority to freeze the bank account without a court order. He said s 27 cannot be used as authority to justify the respondent's conduct in suspending the applicant's account. He said s 80 (1) of the Act should have been used, a process which he said required the Attorney General to apply for a civil forfeiture order or s 40 (1) of the Act where the Prosecutor General to seek for an interdict. It was also alleged there was no reasonable suspicion to support the respondent's actions. Mr *Zhuwarara* relied on the *South African case of South African Petroleum Guild* v *RMB Private Bank, Case No. 2014/27890* which has similar facts except that it is based on the agreement between the parties as opposed to a statutory obligation pleaded by the respondent *in casu*.

Mr *Tonhodzai* for the respondent argued that the relief sought by the applicant if granted will destroy the spirit, object and purpose of the Act. The freezing of the account, he said, was a preliminary measure to allow an investigation. He further said the Act is designed in such a way that the respondent can suspend an account while conducting investigations.

The Act is designed in such a way as to curb the use of financial institutions as conduits for crime. This is why the Act imposes certain obligations on the financial institutions under the supervision of the Reserve Bank of Zimbabwe. There is every reason why there must be a purposive interpretation of s 27 of the Act. It is mandatory as per s 27 of the Act for the respondent to have the information of the originator of funds. The bank systems could not pick the funders' details thereby raising suspicion that the funds could be illegitimate. Given the mandatory provisions of s 27, I think the suspicion was reasonable especially in this era of rampant corruption. The respondent did not only suspend the applicant's account, but invited the applicant to explain why the move was taken and asked applicant to assist with the missing information. The applicant's explanation did not lead to the information required. This in my view confirmed the reasonableness of the respondent's suspicion. It even became more so when a Mr Gwekwerere who was brought into the picture by the applicant, refused to identify the funders and gave reasons for such refusal which may amount to a breach of the law within the funders' location.

It will be self-defeating for the respondent while making efforts to comply with the law, take no action to freeze the account. What that would practically mean is that the applicant would withdraw all the money irrespective of the outcome of the investigations. The matter has been reported to the Intelligence Unit and the Police and is said to be under investigation. It will be inappropriate at this stage to order respondent to unfreeze the account.

In any event while the applicant has shown a clear right over the account and the possible injury he will suffer, he has not shown absence of an alternative remedy. An alternative remedy lay with the applicant for the review of the decision taken by the respondent. Such a remedy gives him similar protection. In any event had the applicant assisted with the identity of the originator of funds as required by the Act, that will stand as an alternative remedy.

DISPOSITION

The application be and is hereby dismissed with costs.

Saunyama Dondo, applicant's legal practitioners
Musendekwa – Mtisi, respondent's legal practitioners