CBZ BANK LTD
versus
AXIS MEDICAL CORPORATION (PVT) LTD
and
JULIUS CHIKOMWE
and
PHILLIP CHIKOMWE
and
ARTINA ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 1 and 2 August 2017, 19, 20 and 21 September 2017, 2, 3, 18, 19 and 20 October 2017 & 9 October 2019

**Civil Trial**

*K Kachambwa*, for the plaintiff
*L Uriri*, for the 1st to 4th respondents

FOROMA J: Plaintiff sued the four defendants for breach of a loan facility agreement claiming against all the defendants jointly and severally the one paying the others to be absolved the following amounts:

i) Capital sum of USD59 977.96
ii) Interest in the sum of USD26 685.95
iii) Bank charges in the sum of USD202.80
*iv)* Interest on the outstanding capital sum at the rate of 28% *per* annum calendar from 1 September 2013 to date of full payment.
*v)* Bank charges levied on first defendant's amount from 1 September 2013 to date of full payment.
*vi)* An order declaring stand 500 Ruwa Township of Stand No. 2015 Ruwa Township registered in the fourth defendant's names speciallyexecutable to satisfy the judgment and costs of suit on an attorney and client scale.

Defendants defended plaintiff's claims and filed a claim in reconvention against the plaintiff claiming

a) damages in the sum of USD458 933.32
b) interest on the said sum at the prescribed rate from 12 December 2011 to date of payment in full.
c) collection commission calculated in terms of the Law Society of Zimbabwe By-Laws 1982.
d) An order declaring second, third and fourth defendants wholly released from suretyship as from the 12 December 2011.
e) An order directing plaintiff to tender to the defendants' legal practitioners within 7 days from the date of the court order all necessary papers and consents to give effect to para (d) above.
f) In the event of plaintiff failing to tender papers to defendants' legal practitioners within 7 days as directed in para (e) above, the Master of the High Court shall be authorised to sign a consent to cancellation in respect of the mortgage bond that was registered in favour of the plaintiff and to apply for duplicate title deeds in respect of the immovable property held under deed of transfer No. 0001323/2006.
g) Costs of suit on the higher scale of attorney and client.

Although defendants in their plea to plaintiff's declaration sought to challenge the validity of the loan facility granted to first defendant this position was not persisted with as evidenced by the reliance by defendants on the said loan facility as a foundation for their claim in reconvention. For the avoidance of doubt in para 25.1 of the claim in reconvention defendants pleaded their claim as follows:

In respect of the Loan Facility Agreement

25.1 First defendant concluded a loan agreement with the plaintiff at Harare on 8 November 2011 in terms of which the plaintiff lent and advanced a loan in the sum of USD 60 000 to first defendant.

26 The material terms of the agreement were that:

26.1 The plaintiff would make the facilities available to the borrower (first defendant) upon receipt by the bank of a signed copy of the letter of agreement indicating acceptance of the terms and of the loan and upon perfection of all proposed securities that is (a) mortgage bond, and unlimited guarantees that were to be provided by second and third and fourth respondents as sureties---

It was pursuant to the fulfilment of the terms and conditions aforesaid that Defendants bound themselves to plaintiff and became liable to plaintiff in terms of plaintiff's

claim as pleaded in plaintiff's summons and declaration.

It is common cause that in terms of the loan facility the said loan would expire by 31 December 2012 upon which date all monies outstanding should be repaid. While plaintiff's claim was based on failure to pay the loan by the 31 December 2011 defendants' claim in reconvention was on account of defendants' contention that plaintiff breached the loan facility agreement resulting in first defendant breaching its contract with a Dubai company called Paramed International Free Zone Company (hereinafter referred to as Paramed) resulting in substantial damages as claimed.

After listening to evidence at the trial the following facts clearly are considered common cause—

1. After the loan facility had been granted to first defendant but before the securities had been perfected first defendant instructed plaintiff to effect a telegraphic transfer to Paramount for the sum of USD9753.00 in favour of Paramed.
2. The said telegraphic transfer was to satisfy a contractual commitment of first defendant to Paramed with which first defendant had contracted to convert certain 4 vehicles to ambulances.
3. As a result of plaintiff's failure to timeously effect the telegraphic transfer first defendant's contract with Paramed was exposed to breach by first defendant.
4. First defendant was given an ultimatum regarding payment of the USD9 753.00 by Paramed which demanded that if proof of payment of USD9 753 had not been furnished by 12 December 2011 then Paramed would not be able to commence working on first defendant's order until the first week of April 2012 as Paramed had a big order from the Iranian Government which they would need to complete before commencing work on first defendant's order.
5. In the ultimatum Paramed advised first defendant that in the event of the delay in the commencement of the work on its order the vehicles would be sent to a storage facility where they would incur storage costs at USD130 *per* container *per* day.
6. On receipt of the ultimatum aforesaid third defendant on behalf of first defendant addressed a letter of complaint to plaintiff highlighting that the bank's delay in effecting the telegraphic transfer had potentially disastrous consequences and implored plaintiff to immediately effect the transfer so that first defendant would not breach the Paramed dead line.

Despite this letter the plaintiff did not meet the 12 December 2011 deadline and only effected transfer of the USD 9 753 on 14 December 2011. On 15 December 2011 first defendant e-mailed proof of telegraphic transfer to Paramed's Mohammad Hadi Hob Haydar. In the said e-mail third defendant and on behalf of first defendant addressed one Ross as follows;

> "Dear Ross
> Please find attached hereto swift message confirming remittance of USD9 753. We regret the delay it was our bank's fault and the bank has since sent us an apology forwarded to you here below.
>
> We would be most grateful if you can give us indications as to when we may expect the ambulances to be shipped.
> Many thanks and kind regards
> Good day
>
> Phillip Chikomwe"

The apology sent by plaintiff to first defendant dated 14 December 2011 and referred to in the e-mail to Paramed sending proof of payment of USD9 753 aforesaid read as follows;

> "Dear Mr Chikomwe – Herewith your swift message attached. As explained earlier accept our apologies for the delay in processing your TT instruction. We hope that future transactions will be carried out swiftly.
>
> Yours sincerely
> Roland Murapa"

On 18 December 2011 at 8.40 Paramed responded to first defendant's email of 15 December 2011 by e-mail addressed to third defendant. The text of the e-mail is reproduced below.

> "Dear Mr Chikomwe
> This is to acknowledge receipt of USD9 715.00. Thank you for your payment.
> Note: <u>Production will commence soon but delivery would be delayed by 3 – 4 weeks</u>.
> Thanks and regards
> Carolyn M Somera
>
> Accountant
> Paramed International Freezone Company (the underlining is mine for emphasis)."

Third defendant forwarded to second defendant (Julius Chikomwe) on the 19 December 2011 together with the email of 15 December 2011 the email from Carolyn Somera to Sales Paramed; (Mohammad Hadi Hob Haydar aforesaid).

The forwarding of this correspondence to second defendant is significant as will be illustrated herein below. It is however significant at this point to note that neither the

correspondence forwarded to second defendant nor any part thereof was forwarded to the plaintiff.

An important development took place about a month after receipt of the e-mail from Carolyn M Somera of 18 December 2011 by the defendants. It is important to quote extensor the correspondence that took place between first defendant and Paramed as well as between plaintiff and first defendant to illustrate the said development.

At 9.10 a.m. on 23 January 2012 Phillip Chikomwe dispatched an email to Paramed's Mohammad Hadi Hobhaydar the subject of which was Request for update. The e-mail read as follows:

> "Dear Mr Hadi
> Could you please advise us on progress regarding the completion of our ambulances. I asked Ms Somera this morning but she directed me to you. I have tried calling you on the mobile number she gave me but could not get through.
> Your swift response will be greatly appreciated.
>
> Phillips Chikomwe"

In response to this request for an update MH Hobhaydar at 11.55 a.m. on 23 January 2012 addressed an e-mail to third defendant copying second defendant as follows;

> "Dear Sirs
> Please be advised that l sent your ambulances to warehouse on 15 December 2011. You did not send your proof of payment as *per* my e-mail of 5 December 2011. We did not have any other alternative.
> Best regards
>
> MH Hobhayder
> General Manager
> Paramed International FZCO"

On the same date i.e. 23 January 2012 first defendant sent a letter to the plaintiff in regard to the loan facility in which first defendant indicated that as a result of the delay in effecting payment of USD9 753 its supplier was unable to commence production and that production only commenced after the manufacturer finally received the sum of
USD9 753 deposit. First defendant also indicated in the said letter that the manufacturer had advised that because of the delayed payment delivery of its consignment would be delayed by a further 3 – 4 weeks.

On the same day i.e. 23 January 2017 first defendant wrote a letter to plaintiff retracting the contents of the earlier letter. In the said letter of retraction first defendant addressed plaintiff's Roland Murapa as follows: "Further to our letter to you earlier today, we have since received advice from Paramed via its general manager Mr Hadi that our four vehicles were

moved into a storage facility on or about 15 December 2011 as *per* his ultimatum of 5 December 2011. The above position is different from the one that we communicated to you earlier this morning. What we communicated earlier was the position as we had been told by Paramed's accountant, Ms Caroline Somera around the 17th last month when she confirmed having received our USD9 753 payment and mentioned that production would commence soon but delivery would be delayed by 3 – 4 weeks. Unbeknown to her our consignment had long been moved to a storage facility by then."

First defendant appears to have accepted liability for storage charges as claimed by Paramed's general manager without ado. As a result of first defendant's failure to challenge Paramed's attempt to go back on its undertaking to commence production soon as communicated by Ms C Somera first defendant unnecessarily exposed itself to a very substantial bill for storage costs which it struggled to raise resulting in the contract with Paramed being a total loss. As a consequence, first defendant suffered total loss of the 4 ambulances which loss first defendant sought to recover from plaintiff by lodging a claim in reconvention against plaintiff based largely on plaintiff's delay in processing the TT transfer for US$9 753.00.

At the pre-trial conference the parties agreed the issues for trial to be the following

1. Whether or not

   1.1. the loan facility agreement that was signed by the plaintiff and first defendant is subject to the provisions of

   (a) the Consumer Contracts Act [*Chapter 8:03*] and/or

   (b) the Contractual Penalties Act [*Chapter 8:04*]

   1.2. The facility agreement is vague and ambiguous in respect of a material point and if so whether or not the *contra proferentum* rule should be invoked against the plaintiff.

   1.3. The plaintiff is entitled to recover in contract or at all from the defendants the capital sum, normal interest and penalty interest on the facility.

   1.4. The *exceptio non adumpleti contractus* applies to this case.

2. Whether or not the plaintiff breached the terms of

   2.1. The banker/client contract that subsisted between the plaintiff and the first defendant.

   2.2 The loan facility agreement that was signed by the plaintiff and first defendant.

3. Whether or not

3.1. The 4 ambulances that first defendant was importing were an integral and material part of the subject matter of the facility agreement.

3.2. by failing to effect payment timeously the plaintiff acted prejudicially towards the second, third and fourth defendants as sureties.

3.3 The plaintiff is contractually liable for the damages that were sustained by the first defendant and if so the *quantum* of damages that the first defendant is entitled to be paid.

4. As an alternative to the claim founded in contract; whether or not

4.1. The plaintiff is delictually liable for damages that were sustained by the first defendant because of the wrongful and negligent conduct of the plaintiff.

4.2. The quantum of damages thereof.

Each party ventilated its case at trial which was quite a protracted battle. It is not necessary for the purpose of this judgment to regurgitate the evidence led at the trial as the court's decision does not much turn on the oral evidence in court.

At the end of trial i.e. recording of evidence the parties requested and the court grant them the opportunity to file written closing submissions. As the court sat down to prepare judgment an issue arose which neither side to the dispute had addressed during trial or in their closing submissions. As the issuewas so significant in the determination of the dispute it became necessary for the court to invite the parties to address the court on it before settling its judgment. The court accordingly invited the parties to address it and comment on the relevance or otherwise of the following documents produced by the defendants through its Bundle B:

1.1. E-mail dated 5 December 2011 appearing at p 39 Bundle B

1.2. E-mail from R. Chikomwe to Mohammed Hobhaydar dated 15/12/2011 – pp 41-42 Bundle B.

1.3. E-mail dated 18 December 2011 from Paramed to P Chikomwe acknowledging payment/receipt of the deposit of USD9715 at p 40 Bundle B.

1.4. E-mail from P Chikomwe dated 15 to J Chikomwe at p 40-41 Bundle B.

1.5. Two E-mails one from P Chikomwe to Mohammed Hobhayder and (2) the response from M Hobhaydar to P Chikomwe page 55 Bundle B.

1.6. Correspondence on p 104-106 Bundle B.

In plaintiff's counsel's supplementary submissions plaintiff makes the following pertinent observations:

(i) On 15 December 2011 Mr Phillip Chikomwe sent an e-mail of even date at

2:04 p.m. to "sales paramed" and Mohammad Hadi Hob Haydar confirming payment of (USD 9753)

(ii) Paramed's accounts department confirmed receipt of payment and informed Phillip Chikomwe that production of the ambulances would commence (soon) but delivery would be delayed by 3-4 weeks *per* e-mail at p 40 Bundle B.

It is clear from the e-mail on p 40 Bundle B that the work on ambulances was to commence soon. In his email of 15 December 2011 Phillip Chikomwe had on behalf of the first defendant implored Paramed (sales Paramed) to indicate when first defendant may expect the ambulances to be shipped. This is clear from the following sentence in the email "We would be most grateful if you can give us indications as to when we may expect the ambulances to be shipped." (The underlining is mine for emphasis)

In response to the e-mail of 15 December 2011 from the first defendant by Phillip Chikomwe aforesaid Paramed Accounts Department confirmed receipt of payment and informed the first defendant's Mr Chikomwe that production would commence soon but delivery would be delayed by 3-4 weeks. (The underlining is mine for emphasis). This is made abundantly clear in the following sentence in Carolyn M Somera's response which say "Note: production will commence soon but delivery would be delayed by 3-4 weeks." (The underlining again is also mine for emphasis).

The issue that arises from this correspondence is whether the first defendant could in the circumstances still expect that Paramed would still send the ambulances to a storage facility as had been threatened in exh 43 i.e. e-mail of the 5/12/2011 by Mohammad Hadi Hob Haydar pending commencement of production in the first week of April 2012.

In fact, the first defendant must have breathed a sigh of relief to receive the assurance that production would commence soon even though the delivery would be delayed by 3-4 weeks. This is apparent from the e-mail that Phillip Chikomwe sent to Julius Chikomwe pp 40-42 of Bundle B and is further confirmed by the fact that on January 2012 Phillip Chikomwe, (third defendant) requested Paramed's Mohammad Hadi Hob Haydar and Accounts via e-mail to advise on progress regarding the completion of the first defendant's ambulances. The next important issue that arises from the series of emails is whether Paramed's response to Phillip Chikomwe's enquiry (request for update) was binding on the first defendant? If it is accepted that Paramed had advised first defendant in very clear terms on receipt of the payment of USD97 523 that production of the ambulances would commence soon even though completion of production would be delayed by 3 – 4 weeks it would be strange to say the least for the first

defendant to acquiesce in this apparent attempt by Paramed to go back on its word by purporting to have implemented the threat to send the ambulances to storage without so much as seek an explanation of its earlier condonation of the of breach.

In the circumstances the question arises "Whether the consequences of first defendant's failure to hold Paramed to its undertaking and commitment to commence production (soon) as opposed to doing so in the 1st week of April 2012, *per* its e-mail aforesaid can be visited on the plaintiff. The answer must be a clear NO.

Had the defendants been diligent in their enforcement of their contractual rights against Paramed they would not have acquiesced. in Paramed's claim that the ambulances had been sent to storage in terms of the 5 December 2011 demand as any alleged breach had been condoned as was abundantly clear from the e-mail from Ms Somera aforesaid. Therefore, the court finds that first defendant's acceptance of or acquiescence in Hadi Hob Haydar's claim that the ambulances had been sent to the storage in warehouse on the 15 December 2011 was neither justifiable, advisable nor was it tenable. By its own conduct first defendant authored its own considerable and yet unnecessary hardship by accepting liability for storage charges which it had no obligation to assume. Paramed ought not have been allowed to go back on its condonation of the defendant's breach.

The entire claim in reconvention filed by the defendants is inextricably linked to defendants' failure to hold Paramed to its condonation of breach. For instance, the storage charges that Paramed sought to recover from the first defendant need not have arisen. Once Paramed had made a decision not to delay production of first defendant's ambulances to 1st week of April 2012 despite first defendant's failure to meet the 12 December 2011 deadline and once production had commenced as had been indicated (that it would commence soon) then that would not have left the ambulances in the warehouse (assuming they had in fact been sent to storage in the first place). The reinstatement of ambulance production had not been conditional on any payment of accrued storage charges which itself is an indication that no storage charges had been incurred as at the date of reinstatement of production per C Somera's communication.

The defendants' counsel in his addressing the issue raised by the court suggested that when Hob Haydar informed Phillip Chikomwe that the first defendant's ambulances had been consigned to a storage facility as per his e-mail of 5 December 2011 this superseded the first defendant's understanding of the status of its job with Paramed as communicated by Carolyn Somera's e-mail of the 18 December 2011. This cannot possibly be so. As a matter of fact, it

was not the first defendant's understanding of the status of its job that the production had been reinstated subject to the delay in completion and hence delivery by 3-4 weeks as Paramed had expressly indicated that the production would commence soon but that delivery would be delayed by about 3-4 weeks. It is quite apparent that first defendant shot itself in the foot by accepting as it did that C Somera the accountant may have acted without instructions/authority when she responded to first defendant's enquiry as to when shipment of ambulances would take place. As a matter of fact, there is no evidence that Mohammed Hadi Hob Haydar disowned the communication by Carolyn Somera condoning the breach (failure to provide proof of the telegraphic transfer by 12 December 2011) and reinstating the production of ambulances. It should be borne in mind that the first defendant expressly sought an indication as to when it could expect shipment to be done. It is highly unlikely that Carolyn Somera could have responded to this enquiry without liaising with Hob Haydar or the sales department. Whatever the case may be first defendant does not appear to have sought an explanation from Paramed for sending conflicting signals to first defendant on such an important matter (i.e. when delivery of ambulances was likely to take place.) Julius Chikomwe took a lot of trouble negotiating terms of payment of storage charges which storage charges were in fact not due in light of Carolyn Somera's e-mail aforesaid (which had been forwarded to him by third defendant as aforesaid). The defendants cannot possibly seek to blame their woes on plaintiff in circumstances where they were grossly negligent in the protection and enforcement of their contractual rights. For the foregoing reasons it will not be necessary to debate the issues the parties referred for determination at the pre-trial conference as clearly the dispute can be determined on a different basis as highlighted above. For the avoidance of doubt the directors of the first defendant slept on the job. None of them raised an obvious and compelling defence of condonation to the claim for storage charges which defence was contained in the e-mail of the 18 December 2019 from Paramed Accounts (Carolyn Somera) aforesaid.

It is clear that any breach of the agreement between defendants and Paramed as a result of plaintiff's delay in sending the USD9 753 was condoned by Paramed as is evident from the reinstatement of the production (conversion) of the ambulances which Paramed granted subject to a 3-4 weeks delay in the delivery of the ambulances when it said production will commence soon. Once the delay in the payment of the deposit of USD9 753 had been condoned as confirmed by Carolyn Somera's e-mail of the 18/12/11 Paramed could not seek to enforce the consequences of a breach of the 12 December 2011 deadline as Hob Haydar purported to do

by e-mail to Phillip Chikomwe on the 23 January 2012 as any blame attaching to plaintiff's delay in processing the TT instruction had effectively been wiped out by condonation.

Had Paramed intended to enforce the deadline of the 12 December 2011 then on late receipt of proof of payment on 15 December 2011 it should have made the position clear that they had already sent the vehicles to storage when the first defendant had failed to comply with the 12 December 2011 deadline *per* their correspondence of the 5 December 2011 instead of sending the response contained in the e-mail from Accounts sent by Carolyn Somera which clearly conveyed a condonation of the delay of the payment of the deposit by advising that production would commence soon but delivery would be delayed by 3-4 weeks. It should be emphasised that Carolyn Somera's response addressed the enquiry by the first defendant namely "We would be most grateful if you can give us indications as to when we may expect the ambulances to be shipped" was an express condonation of any breach or delay in producing proof of the TT Transfer. It is also worth noting that Phillip Chikomwe did not address his e-mail providing proof of payment of USD9 753 to Carolyn Somera but to Mohammed Hadi Hob Haydar. The fact that Phillip Chikomwe'se-mail was responded to by Carolyn Somera can only mean and could only have meant that Mohammed Hadi Hob Haydar directed Carolyn to respond in the terms communicated.

That defendants have admitted that plaintiff's claim is due by them admits of no doubt. Phillip Chikomwe wrote a letter to Gambe and Partners (Mr Chirorwe) dated 21 October 2013 admitting as much. He addressed Mr Chirorwe as follows: "Further to your letter dated 16 October 2013 we respond as follows:

> "We are committed to settling the account in full by way of a once off payment as soon as we receive proceeds from the property sale. We expect to have received the payment by 15 December 2013. Please expect to hear from us in about 4-6 weeks regarding progress."

In earlier correspondence from Phillip Chikomwe to Mr Chirorwe of Gambe and Partners the same undertaking had been given. Mr Chikomwe wrote in the following terms Re <u>Loan Account with CBZ Bank</u>

"As discussed in our meeting of 9 October 2013 we write to record that:

(1) We are in the process of disposing of the property that was used to secure our indebtedness with your client
(2) Proceeds of the sale will be applied to satisfy your client's claim first
(3) The purchaser has applied for a mortgage bond and we expect feedback during the coming 4-6 weeks.
(4) Please expect to hear from us in about 4-6 weeks

Yours faithfully

Phillip Chikomwe"

In the circumstances the defendants clearly have no defence to plaintiff's claim nor do they have any basis for a counter-claim against the plaintiff as has been demonstrated herein above. In the circumstances it is ordered that:

1. Defendants pay plaintiff jointly and severally the one paying the others to be absolved.

'(i) capital sum of USD59 977.96

(ii) interest in the sum of USD26 685.95

(iii) Bank charges in the sum of USD202.80

(b) interest on the outstanding capital sum at the rate of 28% *per* annum calculated from 1 September 2013 to date of full and final payment.

(c) stand number 500 Ruwa T/ship of Stand No 2015 Ruwa Township registered in fourth defendant's name is ordered specially executable to satisfy the judgment.

(d) Defendants pay plaintiff's costs of suit on an attorney and client scale.'

*Messrs Mawere & Sibanda*, plaintiff's legal practitioners
*Farai Nyamayaro Law Chambers*, defendants' legal practitioners