AFRICAN BANKING CORPORATION OF ZIMBABWE
LIMITED t/a BancABC
versus
STELIX TELECOMS (PRIVATE) LIMITED
and
MOREBLESSING JINJIKA
and
GEORGE GWATIDZO
and
ROBERT RUSIKE
and
PHILANI MPOFU
and
METRO CONSTRUCTION (PRIVATE) LIMITED
and
BRIAN VAMBE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 January 2019 & 6 February 2019

Opposed Application

R. Chatereza, for the applicant
F. Moyo, for the respondents

MATHONSI J: After hearing arguments in this matter l granted an order, the effect of which was the registration of a deed of settlement signed by the parties in July 2018 in terms of which the 7 respondents admitted liability to the applicant, a commercial banking institution, in the sum of $51 830.77 together with interest at the rate of 15% per annum from 1 May 2018 to date of payment. The respondents had also undertaken to pay the money in certain instalments commencing on 30 June 2018. These are the reasons for the grant of the order.

On 9 May 2018 the present applicant sued out a summons against the respondents, jointly and severally, for payment of the sum of US$51 830.77 together with interest from 1 May 2018 and collection commission and costs of suit on a legal practitioner and client scale. The applicant

also sought an order declaring stand 9592 Bulawayo Township of Bulawayo Township Lands specially executable. Subsequent to that, the parties signed a deed of settlement aforesaid whose clause 8 provides;

> "In the event of the defendants defaulting and / or failing to comply with the paragraphs 1 – 4 above, the amount then outstanding shall become due and payable and the plaintiff shall be entitled to apply to the High Court for registration of the agreement as a court order and proceed with the enforcement of the judgment without giving the defendant any further notice."

As is so often the case in this country, the respondent defaulted, prompting the applicant to file a chamber application for judgment in accordance, purportedly in terms of r 148 of the High Court of Zimbabwe Rules, 1971. The rule allows a person who has accepted an offer or tender made by another to make a chamber application for judgment in accordance with the offer or tender as well as for costs of the application. Clearly that rule has no application to the present case where the applicant seeks a court order in terms of a deed of settlement.

In the founding affidavit deposed to by Absolom Muchandiona, the legal practitioner of record for the applicant, the point is made that the applicant relied on clause 8 of the deed of settlement because the respondents had breached the agreement by failing to pay the instalments for the months of July and August 2018 and had underpaid the June 2018 instalment by $500.00. The inconvenience of such little detail could not be allowed to stand in the way of the respondents' desire to find something with which to defend the application. They opposed the application solely on the ground that it "is fatally defective" because in Form 29, it is stated that the application is made in terms of r 148 dealing with offers and tenders when "no offer or tender exists as between the parties." No other ground for opposition was raised by the respondent whose legendary opposing affidavit signs off with a prayer for the dismissal of the application.

In my view there is absolutely no merit in the opposition and the fact that such a frivolous defence was prosecuted right up to the end is a source of extreme bother to the court. In fact it is a strain to the mind as it constitutes nothing at all but a worry about form than substance. A court of law should not be subjected to such trivialities. It is the kind of stout determination to deflate the process of the court which BERE J (as he then was) criticized in *Zimbabwe United Passenger Co. Ltd*. v *Packhorse Services & Ors* 2016 (1) ZLR 5 (H) at 8 E-F. He said;

> "The view that I take is that in looking at and applying rules of court, we have to avoid dogmatic application of such rules. Rules must never be allowed to obstruct the smooth conclusion of a legitimate court process. It is not just a question of clinging on to and desperately holding on to a

> technicality. What our law envisages is that a judgment debtor must demonstrate unquestionable enthusiasm to pay its judgment debt."

More importantly, the courts in this jurisdiction have always been clear that the fact that an applicant describes the application as one of a certain form when it is not does not change the substance of what it is. Where the facts contained in the founding affidavit sufficiently set out the basis of the application and the relief sought, it matters not that the applicant may have erroneously described the application as something else, like a review when it is not. See *Zimbabwe Post (Pvt) Ltd* v *Communication & Allied Services Union* 2016 (1) ZLR 10 (S) at 14 C.

Surely an application cannot be defeated merely because a wrong rule is cited in the heading when the correct cause of action is set out and established in the body of the application. The applicant has made out a good case for the relief sought. On the other hand, the respondents' lack of *bona fides* is there for all to see. This is an application which should not have been opposed at all. The fact that it was contested all the way to the wire means that valuable court time was wasted unnecessarily. At the same time the applicant was forced to incur unnecessary costs. The respondent must therefore suffer the consequence of by lumbered with costs at the superior scale.

In the result it is ordered that:

1. Judgment be and is hereby entered in favour of the applicant as against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents in HC 4209/18 jointly and severally the one paying the others to be absolved in the sum of US$42 153.00 together with interest thereon at the rate of 15% *per* annum from 22 January 2019 to date of full and final payment.
2. Stand 9592 Bulawayo Township of Bulawayo Township Lands measuring 843 square metres in extent held under Deed of Transfer No. 239/12 is declared specifically executable.
3. The respondents shall pay the costs of suit jointly and severally on a legal practitioner and client scale.

Danziger & Partners, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners