MEGA MARKET (PRIVATE) LIMITED APPLICANT

versus

NEDBANK ZIMBABWE LIMITED RESPONDENT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 4, 8 and 12 April 2019

Urgent Chamber Application

Advocate G Sithole with *N Nhambura*, for the applicant
Advocate T Magwaliba, for the respondent

MUZENDA J: The applicant, Mega Market (Private) Limited, is based in Mutare and is a registered commercial company which specialises in the business of buying and selling various goods, groceries being eminent. Given the economic situation in Zimbabwe the applicant has joined other competitors in outsourcing groceries outside the boundaries of Zimbabwe. In such a cutthroat operating environment applicant's drawback became the slippery green back for it to be able to pay the suppliers abroad. Invariably where the uncertainty of the economic hang up is experienced disputes arise and more [particularly where the source of the foreign currency is a commercial bank.

In December 2018 towards the euphoria of the festive period when everyone including the needy miraculously strive to raise money to celebrate Christmas and reminisce the "glorious" past events where one would store bread for a month just to wait for the 25th of December and gather with the family and enjoy that sweet momentary period.

The applicant became aware of the respondent's bond note deposit promotion where respondent wanted to encourage its clients to deposit bank notes which incidentally were also scarce in the respondent's retail banking department. According to the respondent, a client who deposit bond notes would be entitled to a foreign currency allocation equivalent to 50% of the bond notes that were deposited. The applicant joined the attractive promotion. It subsequently made an application for foreign currency indicating that it had deposited sufficient bond notes that was equivalent to the amount of the application it made. Annexure "C" attached to the

applicant's application reflects that from 10 August 2018 the applicant was running an account with the respondent and from 25 September 2018 applicant instructed respondent to make offshore payment of ZAR2, 179, 397, 12, that is equivalent to USD155, 893, 93 and the respondent approved it and proceeded to debit applicant's RTGS account in the sum of USD155, 893, 93. This translates to the rate of one bond note to one US dollar.

On 7 September 2018 applicant also requested respondent to make an offshore payment and respondent approved. These offshore applications made by the applicant were done on several occasions and equally approved by the respondent without any queries by the respondent. On all these divers occasions the exchange rate was one bond note to one US dollar. Business went on for close to months and relations remained cordial.

In February 2019, a new monetary policy was introduced by the Minister of Finance and Economic Development under SI 33 of 2019 where there was distinction between US dollar and RTGS. On 21 March 2019 the respondent unilaterally debited and credited applicant's bank accounts virtually applying the new monetary policy. The rate being used by the respondent showed that the exchange rate was now market orientated and a large sum of RTGS was debited to offset the balances due to the respondent from the applicant's accounts resulting in the applicant's accounts showing a debit balance of $1, 188, 191, 38 after the respondent debited to applicant's account an amount of $2, 174, 871, 54 without giving prior notice to the applicant.

Applicant discovered this forced overdraft when it obtained its statement from the respondent and on 21 March 2019 applicant's legal practitioners of record wrote to the respondent protesting the action of the respondent. The respondent replied the letter on 29 March 2019 justifying its action against the applicant. Having known the position of the respondent about the deduction, the applicant filed an urgent chamber application on 2 April 2019 seeking the following relief:

> "INTERIM RELIEF/PROVISIONAL ORDER GRANTED
> IT IS HEREBY ORDERED THAT:
> 1. Respondent shall reverse all the unlawful banking transactions it effected into applicant's bank accounts on the 21st March 2019 and it is hereby ordered that it shall do the following:
> (i) Reverse the unlawful debit of the sum of two million one hundred and seventy four thousand eight hundred and seventy one RTGS Dollars and fifty four cents [RTGS $2, 174, 871, 54] and credit the same amount into Applicants RTGS account such that the *status quo ante* of the bank account on the 21st March 2019 is restored.
> (ii) Reverse the credit it made to Applicants RTGS account in the sum of seven hundred and twenty one thousand five hundred and eighty nine RTGS Dollars and seventy six cents [RTGS$ 721, 589, 76] and restore the *status quo ante* of the bank account as of the 21st March 2019.
> (iii) Reverse the debit it made to Applicants FCA account in the sum of two thousand two hundred and thirty four United States Dollars and forty one cents [USD2, 234,

41] and reverse the credit it made to Applicants RTGS account in the same amount such that the *status quo ante* of the bank account is restored.

2. Respondent shall cease perpetuating unlawful debits or credits of Applicants bank accounts pending the finalization of this urgent chamber application.

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court, why a final Order should not be made in the following terms:-

1. The Respondent was and is not entitled to retrospectively and unilaterally debit Applicant's RTGS account in the sum of $2, 174, 871, 54;
2. The Respondent was and is not entitled to unilaterally and retrospectively debit Applicants FCA account with the sum of USD2, 234, 41;
3. Respondent was and is not entitled to unilaterally and retrospectively credit Applicant RTGS account with the sum of RTGS $ 721, 589, 76;
4. Consequent to the relief sought above Respondents actions of unilaterally and retrospectively debiting and crediting Applicant's bank accounts is hereby declared unlawful and Respondent shall not engage in any act of debiting or crediting Applicant's account without any lawful authority or justification;
5. Respondent shall pay costs of suit on a high scale of attorney-client."

The application is strongly opposed by the bank/respondent. The respondent raised two points in l*imine* basically on two thematic grounds of format and that of urgency. The respondent argues that there is no application before the court because the applicant did not use the prescribed forms set out in the rules. Secondly the respondent contends that the application is not urgent at all and ought to be struck off the roll of urgent matters.

WHETHER THERE IS NO APPLICATION BEFORE THIS COURT

On the day of hearing I directed the parties to have a global approach to first address the court on the preliminary points and then proceed on to the merits. This was to save time of both counsel who had travelled from Harare and to afford each party to cover all portions of the application so that if the preliminary points succeed the application could be disposed of, but if the points in *limine* are dismissed the court could deal with the merits.

The first point in *limine* by the respondent is that there was nothing before me to determine because the applicant's application is neither in Form No. 29 nor Form 29B as required by r. 241 (1) of the Rules of this court. The applicant was supposed to use Form 29B with necessary changes hence the application is fatally defective. The respondent further submitted that not only did the applicant use the wrong form but the application has absolutely nothing as to what the respondent has to do upon receiving the application and applicant has not informed the respondent how and when to oppose the relief that is being sought. The

respondent adds that that the failure to comply with the rules goes to the root of the application and prays that the application be struck of the roll.

The applicant's application reads as follows:

> "Application is hereby made for an order in terms of the draft provisional order attached hereto on the grounds that…."

As observed by MAFUSIRE J[1] this format adopted by the applicant in *casu* seems so popular among legal practitioners and the court wonders where such a format originates from. The applicant cautiously admitted that it did not comply with the requirements of r. 241 and in its heads of argument filed of record and on the hearing date applied for condonation and urged this court to use its discretion spelt out in r. 4C. The concession made by the applicant and the application for condonation is accepted by this court and in the interest of justice the non-compliance with the rules by the applicant is accordingly and duly condoned. In any case the main purpose of r. 241 is spelt out what ought to be done by the respondent upon receipt of the application. Respondent has since recalled the application and filed opposing papers. As clearly pointed out by HLATSHWAYO J (as he then was)[2]

> "the applicant used either of the forms prescribed in the rules, the use of the form instead of the another would not in itself institute sufficient ground for dismissing the application, it being necessary for the court to conclude that some, interested party had thereby <u>suffered prejudice</u> which could not be remedied by directions for service on the injured party, with or without an order of costs. The court could have exercised its discretion under r. 4C." (my emphasis).

There is no prejudice established on the part of the respondent and I grant the application for condonation. The matter is of great public interest and cannot be disposed of based on technicalities. In such a situation the determination of a case of this nature cannot be impeded or stalled unnecessarily for failure to follow rules more so an application for condonation has been properly made by an applicant.

<u>WHETHER THE APPLICATION IS URGENT</u>

This is the second point in *limine* raised by the respondent. The respondent contends that the accounts in question were debited on 21 March 2019. Applicant was advised of the reversals and the reasons thereof by letter dated 20 March 2019. To the respondent, applicant ought to have taken action immediately thereafter. The applicant waited until 2 April 2019, respondent goes on to make the application. The respondent is of the firm belief that applicant

[1] Marick Trading (Private) Limited v Old Mutual Assurance Company of Zimbabwe (Private) Limited and Anor HH 667/15 at p.3 of cyclostyled judgment
[2] In Zimbabwe Open University v Mazambare 2009 (1) ZLR 101 (H) on p. 101

failed to take urgent steps. According to the respondent, the subject accounts have since been debited and urgency is not created on account that the litigant no longer has any money to discharge its obligation. Respondent disputes that applicant is in serious jeopardy arising out of the economic paralysis brought upon by the action of the respondent. The respondent further adds that the applicant failed to demonstrate that the matter is urgent and as that it should be dismissed.

The applicant on the other hand submitted that the application beyond doubt is urgent. The absence of an instruction by the applicant makes the respondent's actions unlawful. The applicant is unable to settle its debts to its creditors. The delay that respondent points to has been well explained by the applicant, applicant argues. Between the period 20 March 2019 to 2 April 2019 the applicant did no sit on its laurels, applicant immediately wrote to the respondent in order to find alternative ways of resolution of disputes and on 29 March 2019, the respondent flatly justified its action and respondent was not keen to engage with the applicant and once the applicant got the information of 29 March 2019 letter from the respondent it embarked on the application. If there was a delay, the applicant winds up on the issue of delay it was at most ten (10) days. Such a delay cannot bar a litigant to come to court for relief. The respondent strongly argued that the applicant's urgency is self-created.

It is not controverted by the respondent that it did not notify the applicant about the debits, it only did so well after the action. The applicant took the respondent to task and proffered a meeting to possibly iron out the creases but the respondent refused. In my view, a delay of 10 days from 20 March 2019 cannot be said to be inordinate so as to constitute self-created urgency. As aptly put by MATHONSI J[3]

> "Quite often in recent history we are subjected to endless points in limine centred on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded evidence. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

I am more fortified on this decision further in agreeing with the applicant that it has established on a balance of probabilities, grounds for commercial urgency.[4] In the matter of Silver Trucks, it was held that the court has power to hear an application as matter of urgency not only where there is a serious threat to life or liberty but also where the urgency arises out

[3] The Prosecutor General v Phibeon Busangabanye & Anor HH 427/15 at page 3 of the cyclostyled judgment
[4] Silver Trucks (Private) Ltd & Anor v Director of Customs & Excise, 1999 (1) ZLR 490 (H)

of the need to protect commercial interests[5]. I am satisfied that this application was brought within a reasonable time and was brought to protect applicant's commercial interests and that it is one which deserves to be heard on an urgent basis.

I accordingly dismiss both points *in limine*.

ON MERITS

The applicant opened an account with the respondent following an application that was made by the applicant on 7 December 2015 which copy of the application was attached by the respondent to its opposing papers. The respondent moved this court to interpret the terms and conditions spelt out in that application to equally apply to the bond promotion which was introduced by the respondent towards the last quarter of 2018. Respondent seeks to rely on clause 6 of the application which allegedly permits the bank to act in the manner in which it did, on its own, without informing applicant retrospectively charging the exchange rate from 1:1 and apply the new form of exchange rate introduced by the law in 2019.

The court has examined the terms outlined in clause 6 of the application form signed by both parties in 2016 and concluded that: the application was meant for the sole purposes of opening a bank account for the use of the applicant for it to deposit its collections with respondent and thus far; it could go; the application form does not confirm a provision of the applicability of the terms and conditions to future contracts and the application form does not allude or encapsulate the subsequent promotion of bond notes and forex introduced by the respondent. I am satisfied that it will not make business sense and equity to allow the terms and conditions outlined in the application form to apply to the new contract created out of the need by the respondent to avail foreign currency to its customers. I hold therefore that the 2015 agreement between the parties does not apply to the dispute before me.

I have also sought clarity from the parties as to how the promotion introduced by the respondent in 2018 was marketed or offered by the respondent to the public. The promotion was not electronically advertised, it did not have any written contract and there were no written terms and conditions spelt out by the respondent the only explanation relating to that promotion appears in the respondent's opposing affidavit where respondent contends that the applications for forex that were made by the applicant's representative were made on the misrepresentation that the applicant had deposited sufficient bond notes.

[5] See also SSSZ Mining Syndicate v Takawadza Chitoro and 4 others HMA 46/18

When the respondent discovered this, the reversals were made and at the time the reversals were effected the exchange rate of the RTGS to the United States dollars was applied. The respondent further explained that when it was discovered that external payments had been made for and on behalf of the applicant "improperly" the applicant's nostro account was debited. The respondent reversed the payments and the respondent in doing so applied the interbank rate. The court failed to comprehend the comparative benchmark used by the respondent in reversing the transactions more so where no terms and conditions relating to the promotion had neither been written nor explained to the applicant. On which terms did the applicant fraudulently misrepresent?

The respondent admitted during proceedings that no contract was signed between the parties relating to the bond-forex promotion. The court fails to understand the respondent's averments when it contends that the applicant failed to abide by the terms of the agreement or promotion. In the absence of a written operational contract between the parties relating to the bond-forex promotion. The court has to decide based on the available evidence whether indeed a contract between the parties pertaining to the transactions was reached. What was produced by both parties which is common cause is over-the-counter account statement showing that the applicant held an account with the respondent and that on various occasions the applicant deposited into the account large sums of bond notes and against those bank balances the applicant applied to the respondent for forex for payment of such towards applicant's suppliers and various payments in SA Rands, Euro and greenback were made and immediately against the then exchange rate of 1:1 was used and United States equivalent amounts were debited to applicant's accounts.

What is in dispute is whether the applicant made misrepresentations to benefit from this facility or got the benefits out of an agreement entered between itself and the respondent. It is clear that the respondent made an offer to the applicant relating to the promotion and applicant accepted it and actually went on to utilise the promotion. The respondent recouped its forex deductions against the bond deposits held by the respondent on behalf of the applicant from Annexure "C" it is explicit that the transactions were smoothly operating and as at the date applicant's accounts were debited by the respondent, the applicant did not owe the respondent any money. As can be deduced from the attitude of the respondent, the respondent's position is that there was no contract between them as far as forex was concerned, on the other hand the applicant contends that there was a contract and it fulfilled its own obligations and that the respondent acted unlawfully in debiting its accounts well after the transactions.

Given the weird circumstances of this matter, I have come to a conclusion that the doctrine of quasi-mutual assent is applicable and come to the conclusion that there was an agreement, the existence of the contract has been proved by the applicant.

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would behave that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."[6]

Equally so:

> "When a man makes an offer in plain and unambiguous language which is understood in this ordinary sense by the person to whom it is addressed and accepted by him bona fide, in that sense, then there is a concluded contract. An unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention and of which the other party was unaware."[7]

It will be observed that from the foregoing these two classical quotes of the doctrine of quasi-mutual assent that its object is:

> "to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right mindedness."[8]

I am therefore satisfied and agree with the applicant after the introduction of the promotion by the respondent, applicant agreed to the terms that 50% of forex would be availed to it against a credit balance of its accounts held by the respondent at the rate of RTGS to US dollar and the payments of foreign currency by the respondent to the applicant's suppliers who are offshore was in fulfilment of the agreement honoured by the respondent. In my view the allegations of fraud raised by the respondent are baseless. The offer for a promotion introduced by the respondent was accompanied by an *animus contrahendi*, the intention of putting the conclusion of the negotiations out of one's further power and enabling the oferee by its acceptance, to create the contract.

Large sums of foreign currency were paid by the respondent and on its own computed the US dollar equivalent and debited the applicant's account. Each transaction constituted a complete contract once the respondent debited the US dollar equivalent against applicant's account. There was no basis for the respondent to revisit such a transaction post the debiting in my view.

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[6] Springvale Ltd v Edwards 1968 (2) RLR 141 (a) at 148-9, Levg v Banket Holdings (Pvt) Ltd 1956 R & N 98 (or 1956 (3) SA 558) at 562
[7] Musgrove and Watson (Rhodesia) (Pvt) Ltd v Rotta 1978 (2) SA 918 @ 922
[8] Pollock: Contract 1

Advocate Magwaliba for the respondent brought in an impeccable argument to the effect that once a customer deposits money into the bank, the money automatically ceases to be that of the depositor and becomes the bank's. He cited the matter of *Standard Chartered Bank Zimbabwe Limited v China Shongang International*.[9] A creditor and debtor relationship is created and the bank can use such deposit as it pleases so long as it pays the depositor on demand, the equivalent of the amount deposited in the account.

> "The general rule is that money deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit." [10] (my emphasis)

The applicant's prayer deals with the reversals of the debits and not ownership of the funds in the bank. The credit balance has been adversely affected and there is a minus on the figures showing a debit balance and the question to be determined is whether such a reversal of the transaction by the respondent was lawful or not. Put differently does the action of the respondent attract legal sanction or interference by the court? The legal requirements for an interdict are spelt out in the matter of *Zesa Staff Prison Fund v Mushambadzi* [11] where the Supreme Court held that the following must be established:

a) a clear right which though prima facie established, is open to some doubt.
b) a well grounded apprehension of irreparable injury.
c) The absence of any other remedy,
d) The balance of convenience favours the applicant.[12]

From the examination of the honoured applications by the respondent large amounts were paid to the applicant's suppliers abroad and in return huge volumes of goods were imported to the benefit of the applicant's customers. The applicant holds two bank accounts with the respondent and those very accounts are the ones which applicant uses to receive payments from the debtors and to settle its indebtedness to the existing debtors. From 2008 the ability by commercial entities especially those trading goods and commodities especially to source; access and transport such products and put them on the shelves and pay the suppliers in hard currency has not been a stroll in the park.

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[9] SC 49/13, page 2 of the cyclostyled judgment
[10] Standard Bank of South Africa v Echo Petroleum. ZASCA 18 at paragraph 27
[11] S-57-02
[12] Eriksen Motors (Welkom) Ltd v Protea Motors & Anor 1973 (3) SA 685 (A) at 691.
Duma (Pvt) Ltd v Siziba 1996 (@) ZLR 636 (S) at 641

It has been incredibly difficult for sundry business people to get products into the shops and meet the customers incessant demand and this has been exacerbated by the constantly changing economic and financial environment that had seen the country going through three currency types in the last six (6) months and it is not easy for business when one has to constantly having to change. Those who could not cope with those fast devastating changes have closed scops. One cannot effectively hedge against these vagaries of change and this is the impetus which drove the respondent to attempt to sew up a gap which it perceived had been brought about by the ever-changing exchange rates. The respondent bank owes the applicant a duty of care to ensure that any cash deposited is correctly recorded and protected.[13]

The applicant has managed to prove on a balance of probabilities all the four requirements outlined above. There was no legal basis in this court's view why the respondent without the requisite mandate of the applicant proceed to debit applicant's accounts not an instruction or notice as the jealously guarded etiquette of banking practice.[14] Though the respondent does not openly concede, the interbank exchange rate applied by the respondent effectively was to apply Statutory Instrument in retrospect. That Statutory Instrument does not provide for retrospective application. It is trite that a statute cannot be applied in retrospect to accord or align or achieve an individual vested rights unless the concerned legislation expressly states so and that principle equally applies in *casu*.[15]

Whereas it is accepts that there are circumstances in which a bank is entitled to correct patent errors on a customer's account or where it can exercise its right of view, such instances are not proved in this application or were proved by the respondent. The bank must act on the mandate of the account holder. The argument advanced by the respondent that it was recovering a debt due to it does not apply. Each transaction was complete in its own and did carry any provision relating to changes on the exchange rates applicable in the foreseeable future. To uphold and accept such an argument would lead to an outcry in the banking sector.

The debiting of the applicant's account resulted in the paralysis of its operation and the balance of convenience demands that the *status quo ante* be restored. Accordingly the following provisional order is granted:

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[13] Kircos v Standard Chartered Bank of South Africa Ltd 1958 R + N 661

[14] R. Granston: Principles of Baking Law 2nd ed at p. 140-1 American Express Services Europe Ltd v Tuvyahi, CA 12 July 2002
D. A Ungaro & Sons (Pty) Limited v Abson Bank of SA Ltd v Kaplan, 1922 CPD 214

[15] Greatermans Stores (1979) (Private) Limited t/a Thomas Meikles Stores & Anor v Minister of Public Service, Labour and Social Welfare & Anor CCZ 2-18

1. Respondent shall reverse all the unlawful banking transactions it effected into Applicant's bank accounts on 21 March 2019 and it is hereby ordered that it shall do the following:
   (a) Reverse the unlawful debit of Two Million One Hundred and Seventy Four Thousand Eight Hundred and Seventy One RTGS Dollars and Fifty Four Cents (RTGS$2 174 871-54) and credit the same amount into applicant's RTGS accounts such that the *status quo ante* of the bank account on 21 March 2019 is restored.
   (b) Reverse the credit it made to Applicant's RTGS account in the sum of Seven Hundred and Twenty One Thousand Five Hundred and Eighty Nine RTGS Dollars and Seventy Six Cents (RTGS $721 589-76) and restore the *status quo ante* of the bank account as of 21 March 2019.
   (c) Reverse debit made to Applicant's FCA account in the sum of Two Thousand Two Hundred and Thirty Four United States Dollars and Forty One Cents (USD2 234-41) and reverse the credit it made to applicant's RTGS account in the same amount such that the *status quo ante* of the bank account is restored.

Respondent shall cease unlawful debits and or credits of applicant's bank accounts pending the finalisation of this urgent chamber application.

Mugadza Chinzamba & Partners, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners