

MAKEH ENTERPRISES (PVT) LTD**Versus****ZB FINANCIAL HOLDINGS**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 17 MAY 2012 & 8 – 10 MAY &
7 SEPTEMBER 2017**Civil Trial***G. Nyoni* for plaintiff*Ms D. Ndawana* for defendant

NDOU J: At the close of the plaintiff's case, the defendant applied for absolution from the instance. The application is basically pivoted on the following:

- (1) The plaintiff has sued the wrong entity.
- (2) No evidence was placed before the court in respect of the basis for damages of £6 500, US\$500 and US\$12 314.
- (3) No proof was placed before the court to prove the fluctuation of currency.

The application is opposed by the plaintiff. The facts giving rise to this litigation are the following. On 2 September 2003 plaintiff approached Syfrets Bank and opened a current account. Plaintiff alleges that Syfrets Bank was a division of defendant. Thereafter plaintiff made a number of deposits into that account in foreign currency. It was on this basis that a banker-client relationship ensued between the parties. On 26 September 2003, as per exhibit 1, plaintiff wrote to Syfrets Bank requesting the following:

- (a) To facilitate and establish a US\$150 000,00 drawdown loan facility to meet its expenses.
- (b) Once the loan was established, Syfrets Bank was instructed to make various payments to different entities including C. M. Hartshorne & Co. Ltd of US\$20 000,00. Plaintiff

alleges that it ultimately gave an instruction to Syfrets bank to pay to C.M. Hartshorne the sum of US\$72 000,00.

Plaintiff alleges that in breach of its duty as a banker, Syfrets Bank failed to pay the amounts due within a reasonable time thereby resulting in plaintiff suffering damages in the sum of US\$12 314,00; US\$500 and British Pounds 6 500,00. Plaintiff issued summons claiming these amount and has led evidence in this regard. In this application, defendant alleges that the evidence led by plaintiff falls far short of it establishing a *prima facie* case. In this regard defendant applies for absolution from the instance. The application is premised on the provisions of Order 49 Rule 437 (1) of the Rules of this court. Under R437 (1), absolution from the instance can be granted at the close of plaintiff's case where defendant applies for it. A defendant may apply for absolution where it argues that the case presented by plaintiff is insufficient to put him to his defence i.e. that is plaintiff as failed to put forward a *prima facie* case. The requirements of granting of the absolution from the instance at the close of the plaintiff's case are now settled. The application is granted where the plaintiff's evidence is insufficient for a finding to be made against the defendant. The defendant must show that after the plaintiff has led all evidence in his case, the plaintiff's burden of proof has not been discharged. In other words the defendant must show that, there is no prospect that the plaintiff's case might succeed. The legal test to be applied at this stage is: Whether there is evidence upon which a reasonable court might find for the plaintiff. "Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make ..." per *Supreme Service Station (1969) (Pvt) Ltd v Goodridge* 1971 (1) RLR (A); See also *Gascoyne v Paul Hunter* 1917 TPD 170; *United Air Charterers v Jarman* 1994 (2) ZLR 341 (S) at 343B-C; *Dube v Dube* 2008 (1) ZLR (H); *Delta Beverages v Rusito* SC-42-13 and *Stewart v NRZ* HB-184-15.

I now proceed to apply the law to the facts of this case.

No cause action

The defendant's argument in this regard is that it did not have any banker – client relationship with the plaintiff. In other words, the plaintiff sued the wrong entity. The defendant argues that throughout its pleadings, the plaintiff indicates that it had a bank-client relationship with Syfrets Bank and not the defendant. The defendant further argues that the evidence led by the plaintiff also suggests that the relationship in existence was between the plaintiff and Syfrets Bank and the plaintiff's account was closed by ZIMBANK. The plaintiff sues the defendant because it alleges that Syfrets Bank is a division of the defendant. The defendant argues that there is no evidence adduced proving that Syfrets Bank is a division of the defendant. *In casu*, Syfrets Bank in all its documentation and letterhead described itself as "A Division of Zimbabwe Banking Corporation Limited". The defendant used Zimbabwe Banking Corporation Limited, Syfrets Merchant and Corporation Bank Ltd and ZIMBANK. All these entities had the same directors. In page 45 of the defendant's bundle of documents C. Nyamutswa, the Group Legal and Compliance Department Head for the defendant never disputed the defendant's liability on the basis that the plaintiff was suing a wrong entity. In fact she stated, *inter alia*, "... we have checked our records ...". She never alluded to such record being held by any other institution. Further she states "... The defendant has in its possession and power the documents ...". The defendant has shown that it is aware of the matter and what actually happened. There is no way it can express total ignorance and distance itself from a transaction when it has all the nitty gritty of the particular transactions. The plaintiff has shown on a *prima facie* basis, that the defendant was connected to the said Syfrets Bank which is no longer in existence. In cases where a defendant trades in one name and changes to another, the court can intervene to protect the plaintiff who has claims against the defendant or any one of the divisions, especially in a case like this where the entities have the same directors. Page 8 of the defendant's bundle of documents shows that even though the defendant is saying the plaintiff dealt with and only had a relationship with Syfrets Bank, it would write to the Reserve Bank of Zimbabwe, borrow and lend plaintiff money using another name – Zimbabwe Banking Corporation Ltd. The defendant cannot therefore, operate with little regard to any differentiation of its divisions and expect the plaintiff to have regard to same. It is on this basis that the plaintiff sued the entire group that

houses all the entities, existing and defunct. If the plaintiff had cited Syfrets Bank, the defendant would have clamored that such a bank does not exist.

In the circumstances of this case, plaintiff must not be lightly deprived of its remedy without first hearing the defendant – *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H) and *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H).

Lack of proof of loss/damages suffered

It is trite that in assessing damages in such cases, it is invariably impossible to have resort to precise arithmetical calculations. That notwithstanding, both the fact that damages have been suffered, and if so, the quantum of such damages must be proved by the plaintiff. In other words, the onus rests on plaintiff proving not only that he has suffered damage, but also the quantum thereof – *Erasmus v Davis* 1969 (2) SA 1 (A) at 9E; *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 784F-G and *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (c) at 163E-F.

The sole witness for the plaintiff, one Martin Mabvira, testified how the plaintiff suffered damage and how plaintiff arrived at the quantum of such damages. Admittedly he did not produce some of the documents requested by the defendant during cross-examination. This issue cannot be raised at this stage. It may be raised and considered at the end of the defendant's case.

From the foregoing, I hold the view that the defendant has not made a case for granting of absolution from the instance at the close of the plaintiff's case.

Accordingly, the application is refused with costs being costs in the cause.

Messrs Moyo & Nyoni, plaintiff's legal practitioners

Messrs Gill, Godlonton & Gerrans c/o Messrs Masiye-Moyo & Associates, defendant's legal practitioners