

INTERFIN BANKING CORPORATION LIMITED
t/a Interfin
(Represented by Deposit Protection Corporation
In its capacity as Liquidator)
versus
FENHAVEN INVESTMENTS (PRIVATE) LIMITED
and
KWANAYI KASHANGURA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 8 October 2018, 28, 29 January & 12 June 2019

Civil trial

D Halimani, for plaintiff
B Mahuni with *GRJ Sithole*, for defendants

TAGU J: The plaintiff issued summons against the defendants claiming payment in the sum of US\$1 779 718.82 which it claimed arose from credit facility loans which were for purposes of assisting the defendants to finance their investment initiatives, interest on the above sum at the rate of 25% per annum calculated monthly in advance and compounded monthly in arrears reckoned from 5 October 2012 to the date of full and final payment, collection commission calculated in accordance with the By-laws of the Law Society of Zimbabwe and legal costs on an Attorney and client scale as well as an order that the 5 860 200 ordinary shares held by the first defendant in Africom Holdings Limited and pledged to the plaintiff and 3 043 479 ordinary shares held by the second defendant in Africom Holdings Limited be specially executable in favour of the plaintiff.

The undisputed facts are that at all material times the defendants were customers of the plaintiff with the first defendant operating corporate account number 1716-618006-180 and the second defendant operating personal account number 1703-241505-150 respectively. On or about

the 4th of March 2010 plaintiff and second defendant entered into an agreement in terms of which plaintiff agreed to provide the second defendant with certain banking facilities, namely a corporate multi-purpose facility comprising of Cash Advance and Foreign Currency loan for purposes of assisting in financing the second defendant's investment initiative. The total amount available under this facility was not to exceed US\$700 000.00 outstanding at any one time and was to run until 30th September 2011. As security for the debt the second defendant pledged 3 043 479 shares held in Africom Holdings Limited in favour of the plaintiff. On or about the 10th of March 2010 the plaintiff and the first defendant being represented by the second defendant entered into another agreement in terms of which plaintiff agreed to provide the first defendant with certain banking facilities, namely a corporate multi-purpose facility of Cash Advance and Bankers Acceptances for purposes of assisting in financing the first defendant's investment initiatives. The total amount available under the second facility was not to exceed US\$1 347 846.00 outstanding at any one time. The second facility was to expire on the 30th September 2011. On expiry of the aforesaid facilities on the 30th of September 2011, the parties agreed that the borrowings made in terms of the aforesaid facilities be combined under the first defendant's account. Consequently, a new inclusive facility agreement was drawn up in or around October 2011 in terms of which plaintiff agreed to provide the defendants with certain banking facilities, namely a composite multi-purpose facility comprising of Cash Advance and Bankers Acceptances for purposes of assisting in financing the first defendant's investment initiatives and to cover the existing exposures of both the first and second defendants arising from credit extended to them under the previous facilities. The total amount available under this new facility was not to exceed US\$3 100 000.00 outstanding at any one time.

Despite presentation of the combined exposure facility the defendants failed or neglected to sign the facility as agreed between the parties. Notwithstanding the defendants' failure to formally sign the combined exposure facility, the second defendant agreed to and promised to provide the plaintiff with a repayment plan for the combined exposure that included paying it from proceeds of alleged new investors of the first defendant. The defendants proceeded to withdraw from the accounts and the plaintiff debited the defendants' accounts with such withdrawals in the aggregate sum of US\$3 157 899.48. As security for the repayment of the debt owed by the defendants to the plaintiff, the first defendant pledged its 5 860 200 Africom Holdings Limited

shares held in the said company and second defendant pledged his 3 043 479 Africom Holdings Limited shares also held in the said company. The net outstanding aggregate sum owed by the defendants was US\$3 915 326.44 of which the sum of US\$2 135 607.62 was ceded by the plaintiff to Al Shams Global (Private) Limited after plaintiff was put under curatorship. Consequently, the plaintiff is now claiming from the defendants the sum of US\$1 779 718.82 after the defendants breached the terms of the facilities by failing to repay the debt on demand.

The plaintiff led evidence from one Raymond Njanike and one Lewis Tendai Gususu while the defendants led evidence from Kwanai Kashangura and one Clive Mphambela.

The net effect of the plaintiff's witnesses' evidence was that the monies which it said it advanced to the defendants were actually later transferred to a third party (Africom Holdings Limited) and that such transfer of funds was made for the benefit of the defendants and that the purpose of the transfer of funds was to enable the defendants to exercise their rights in the Africom rights issue. In their closing submissions the defendants submitted that the plaintiff was now deviating from the allegations contained in the summons and declaration as to who was given the money and for what purpose.

After hearing the evidence of the plaintiff and the defendants, it became quite apparent (in fact unmistakable) that the issue of determining liability which arises in this matter turns on the narrow issue of whether or not the money admittedly transferred by the plaintiff into the Africom Holdings rights issues account was for the acquisition of shares by the plaintiff itself or for the acquisition of shares by the defendants in the exercise of their rights issue in Africom Holdings? Put differently, it is not in dispute that there was money transferred from the plaintiff into the Africom Holdings rights issue account consequent to which share certificates were issued by Africom Holdings Limited. The question that the Court must grapple with *in casu* is, on whose behalf was such transfer of funds effected? Whose shares were issued by Africom Holdings Limited?

The plaintiff strongly contended that the transfer of funds was made for the benefit of the defendants. From the evidence it is clear that the plaintiff advanced funds in favour of the defendants to enable the defendants who had earlier approached the plaintiff for loans to among other things exercise their rights in the Africom rights issue. It is common cause that the shares were issued in favour of the defendants as appears on the Share Certificates at pages 38 and 39 of

exhibit 1. The second defendant conceded that some money was indeed paid into the Africom Holdings rights issue account though he contended that the money was paid into the Africom rights issue account to enable the plaintiff or one Farai Rwodzi (it was not clear from their evidence) (as opposed to the defendants) to acquire additional shares in Africom pursuant to the plaintiff's own exercise of the rights issue. Thus the monetary figures in this action are not really in dispute. Again the issue of the account opening or operation is a non-issue.

On a balance of probabilities the plaintiff managed to prove that the defendants borrowed money from the plaintiff to enable them to exercise their own rights issue in Africom Holdings Limited which increased their shareholding respectively as shown by documentary evidence which the defendants failed to satisfactorily explain or controvert. The defendants' version of events which was adduced by the second defendant was uncorroborated as he did not call Farai Rwodzi whom he claimed to have had an unofficial agreement or dealings with. The evidence adduced by the second defendant who apparently is a self –confessed deceiver on behalf of the defendants was so manifestly unreliable and unbelievable that the court could not objectively rely on it. The signed written contracts reflect the parties' free will and the law respects such choices by enforcing the contracts. In any event, if a party to a contract creates the impression that the parties had reached consensus and the other party reasonably relies on this impression, the parties will be bound to the contract even if there was no subjective consensus. Public policy demands as a fundamental principle to uphold the freedom and sanctity of contract and requires that commercial transactions be not unduly trammled by restrictions on that freedom.

I will explain my position that it was not the plaintiff that applied for its benefit but the defendants. As a starting point, at page 1 of exhibit 1 is a letter for a loan application made on behalf of the first defendant, which was signed by the second defendant. The letter is very clear and was admitted by the second defendant as having indeed been submitted to the plaintiff. He also admitted his signature on it. The second defendant however, claimed that this application was rejected by the plaintiff. This to me is clearly false. There is no indication elsewhere that the plaintiff had indeed rejected the application as alleged. This assertion was made for the first time under cross examination and not earlier when second defendant was giving his evidence in chief. In fact given the second defendant's own evidence about his close personal relationship with Farai Rwodzi who was a major shareholder of the bank at the time, this application could not have been

conceivably rejected. If it was rejected this should have been in writing as the application for a loan had been in writing. The second defendant lied about the rejection because if this letter had been produced it would have killed off his narrative that documents were created after the event, especially regard being had to its date.

Secondly, at page 2 to 5 of exhibit 1 is an executive loan application form for the second defendant. It is the second defendant who duly completed the form. At page 3 of the form the loan amount of US\$700 000.00 is stated and the purpose of the loan is stated as being to follow rights issue. The proposed security for the loan were given as “Africom shares issued to Kwanayi Kashangura.” At page 4 is the second defendant’s signature, which the second defendant acknowledged to be his. Again this confirms that quite apart from the first defendant’s application for a loan, the second defendant on his own behalf also sought a loan of US\$700 000.00 from the plaintiff.

Thirdly, at pages 8 to 13 of exhibit 1 are plaintiff’s internal documents relating to the processing of the loan application. The handwritten notes therein are instructive and clearly prove that a loan application for US\$700 000.00 had indeed been made by the second defendant. The second defendant’s application was approved for among other reasons that he “is well known to the bank.” At page 8 it is reiterated that “the client would want to follow his rights on the Africom rights issue,” and that “the advance will be secured by the shares from the said rights issue” it is absurd to think that the endorsements written on the application form were fraudulent, that is written for the purpose of giving a false impression as the second defendant wanted the court to believe. What is clear is that the second defendant benefitted from the fact that he was “well known to the bank” and hence the processing of his loan application was expedited to the extent that the likelihood of an advance having been made before all the normal paperwork had been signed cannot be discounted. However, the defendant subsequently signed the relevant contract documents to confirm the advance.

Fourthly, at pages 14 to 30 of exhibit 1 are two typical credit facility agreements duly signed by the parties. The second defendant acknowledged his signature on both agreements. The agreements were confirmed by one of plaintiff’s witnesses Raymond Njanike, who is one of the signatories thereto. The credit facility at page 14 to 21 is between the plaintiff and the second defendant in his personal capacity. It reflects that a total amount of US\$700 000.00 was advanced

in favour of the second defendant to assist him “in financing his investment initiatives.” The agreement confirms that security was to be in the form of a pledge of 3 043 479 Africom Holdings Limited shares. Whilst admitting to signing the agreement, the second defendant sought to hide behind the fact that the credit facility agreement was undated. However, legally speaking nothing turns on the fact that the second defendant deliberately omitted to insert the date on which the agreement was signed. The key fact is that the second defendant signed it and acknowledged his signature. There is no law which says that a duly signed agreement is invalidated by reason of not being dated, especially when the issuer of the date is not really material.

The reason why the court went at great length to make these observations was to try and show that although the plaintiffs made payments to a third party it was because the defendants had requested the plaintiff to do so because they wanted to exercise their rights in the third party. Generally there is nothing wrong for a person to apply for a loan and then direct that the money be paid to a third party. I therefore find that the defendants applied for the loans from the plaintiff. The applications were granted. Money was disbursed for the benefit of the defendants. The defendants failed to pay back the full amount. I therefore find the defendants liable.

IT IS ORDERED THAT

1. The Defendants jointly and severally, the one paying the other to be absolved:
 - a) Pay the sum of US\$1 779 718.82,
 - b) Interest on the above sum at the rate of 25% per annum calculated monthly in advance and compounded monthly in arrears reckoned from 5 October 2012 to the date of full and final payment,
 - c) The 5,860,200 ordinary shares held by the 1st Defendant in Africom Holdings Limited and pledged to the Plaintiff and 3,043,479 ordinary shares held by the 2nd Defendant in Africom Holdings Limited be specially executable in favour of the plaintiff
 - d) Legal costs on an Attorney and Client scale.

Scanlen & Holderness, 1st and 2nd defendants' legal practitioners