

MANASE & MANASE
LEGAL PRACTITIONERS
vs
FIRST MERCHANT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 31 September 2001 and 3 September 2003

Mr A.G. *Matika*, for the Plaintiff
Mr D.M. *Foroma*, for the Defendant

HUNGWE J: The plaintiff is a law firm of the same name. The defendant is a merchant bank. Plaintiff claims payment of its professional fees, collection commission and the Deputy Sheriffs' costs totaling \$637 076.80, interest and costs of suit.

At the pre-trial-conference the issues were agreed as:

- (a) whether plaintiff was given instructions to sue on behalf of the defendant or of Bruno Fungai Takawira (Pvt) Ltd;
- (b) whether or not the plaintiff is entitled to collection commission and costs in the sum claimed.
- (c) whether or not the defendant is entitled to \$82 000,00

The matter went to trial on those issue but as I perceive the matter the main issue really is whether plaintiff was given instruction to sue on behalf of the defendant or of Bruno Fungai Takawira (Pvt) Ltd. If the court finds for the plaintiff on that issue, it succeeds on all the other issues. If plaintiff fails, then that is the end of the whole claim as defendant will succeed in its counterclaim.

Plaintiff called and relied on the evidence of its two partners, Mr Wilson Tatenda Manase and Mr Muyengwa Motsi.

At the beginning of his evidence, Mr Wilson Manase indicated that his firm was no longer persisting with the claim for collection commission totaling \$276 875,00. It was expressly abandoned.

He however persisted with the claim for the professional services rendered and disbursements made to the Deputy Sheriff on behalf of the defendant.

His evidence was that the claim arises out of the following events. On 16 February 2002, he was in his office when one Bruno Fungai Takawira and Garikai Rakabopa called. Although they had no prior appointment to see him he had agreed to see them. Mr Rakabopa introduced himself as a Manager at the defendant bank. Takawira who was known to him, was a client of the bank. Rakabopa gave him the background of the visit as being that Takawira's company Bruno Fungai Takawira (Pvt) Ltd had entered into an agreement in terms of which it had supplied RMS (Pvt) Ltd ("RMS") a subsidiary of the National Railways of Zimbabwe. ("NRZ") with spare parts on credit. That arrangement had been financed by money advanced to Bruno Fungai Takawira by the bank. RMS had failed to pay in terms of the agreement between it and Bruno Fungai Takawira (Pvt) Ltd. The defendant had obtained from RMS (Pvt) Ltd irrevocable letters of undertaking and guarantee that they (RMS) would pay directly to the bank money due to Bruno Fungai Takawira (Pvt) Ltd. The letter of guarantee were handed over to him as was the letter of instruction to sue RMS (Pvt) Ltd. The latter letter is Annexure 'A' to the Summons. It states:

"Our customer Bruno Fungai Takawira Private Limited is owed money by RMS (Private) Limited for spares sold to the company. The spares were financed by the Bank and RMS (Private) Limited provided letters of undertaking to pay for the spares in terms of its letters of undertaking and it has therefore become necessary to take legal action against RMS (Pvt) Ltd. We would like to enlist your assistance to recover the money plus interest at a rate of 76,5% per annum as from 1 January 2000.

Kindly confirm your fees of \$100 000,00 payable on recovery of the outstanding amount.”

It was signed by G Rakabopa whose title is given as Account Relationship Manager. The letters of guarantee are Exhibit ‘12’ and ‘13’.

He assigned Muyengwa Motsi to handle this matter. His firm carried out the instructions by issuing summons against RMS (Pvt) Ltd citing the defendant as plaintiff. Judgment was obtained and a writ of execution served. The Deputy Sheriff proceeded to remove property belonging to RMS (Pvt) Ltd. In between these events, Muyengwa Motsi moved from the plaintiff to set up practice under the name and style of Mabalala & Motsi Legal Practitioners. He took this particular file with him. He issued the writ.

It was then that the defendant’s Managing Director, Francis Dzanya wrote to Manase & Manase asking that the whole process be suspended and the goods held by the Deputy Sheriff be released as the process jeopardised the bank’s relationship with NRZ a major client of the bank as well as a shareholder. Mr Manase says that because the goods were clearly under attachment, they asked for a meeting with defendant. He, Dzanya, Rakabopa, Motsi attended this meeting.

At that meeting, the defendant’s position was that the instructions given were wrong in that Rakabopa could not bind the bank. In any event Rakabopa acted outside his mandate with the bank. Besides, were they to choose between Mr Takawira and RMS and NRZ they would choose the later due to the magnitude of the business these two gave to the bank. In that meeting, which Mr Manase says was frank and cordial, his concern was whether the bank would pay the firms’ fees, the Deputy Sheriff’s costs and collection commission. Dzanya expressly undertook to pay the firm’s fees and Deputy Sheriff’s expenses but refused to pay collection commission saying Rakabopa will have to pay for it. Should the bank pay it, it would deal with Rakabopa internally. Mr Manase says that it was

agreed that his firm would rescind the judgment as requested by the bank in that meeting. He then addressed a letter to Mr Dzanya the next day 28 August 2000, Exhibit '9' dated 29th August 2000. Then two days after, Dzanya wrote back - Exhibit '16' disputing liability for the fees, collection commission and the Deputy Sheriff's costs.

Manase and Manase decided to sue.

Under cross-examination Mr Manase maintained this evidence. In explanation of the letters written by defendant to Mabalala & Motsi legal practitioners where the bank refuted any liability for costs Mr Manase stated that firstly Rakabopa was on a collusion course with his boss at the bank hence the tone of his letter of 9 August 2000, Exhibit '2'. Secondly after the meeting of 28 August 2000 all these issues had been discussed and agreed upon and an undertaking to pay made by the bank. The bank, according to Mr Manase, changed its mind as reflected in Exhibit '1' after getting legal advice from its legal practitioners of record.

Mr Motsi confirmed that Mr Rakabopa and Mr Bruno Fungai Takawira visited the plaintiff's offices on 16 February 2002. He had spoken to both men and had been briefed of the background to the matter.

After he left the plaintiff's firm, he continued to act as Mr Manase's agent and had obtained judgment and writ. When the goods belonging to RMS were attached, he received a telephone call from Dzanya who queried his mandate. He explained but Dzanya was not convinced. He then proceeded to Dzanya's office and showed him Annexure 'A' to the summons and the rest of the process.

Dzanya pointed out that Rakabopa had no power to give instructions to lawyers as he did in Annexure 'A'. Motsi confirmed the meeting of the 28th August 2002 and what was agreed upon by the

parties. According to Motsi, Dzanya stated that the bank would meet their fees, and Deputy Sheriff's costs but will consider the collection commission. In return they would proceed to apply for rescission of judgment. At the time Exhibit '16' was received they were expecting payment for the two items.

That was the plaintiff's case.

The defendant's case was captured in their plea filed of record on 21 November 2000. Defendant claims that Annexure 'A' to Plaintiff's declaration contains an instruction to plaintiff to institute court proceedings on defendant's client's behalf.

Pursuant to plaintiff's failure to implement the defendant's instructions correctly, defendant had to make an Urgent Chamber Application to avert a sale-in-execution that was imminent. Defendant counter claims for the legal costs connected with that urgent chamber application.

In support of its claim the defendant's managing director Francis Dzanya, the Account Relationship Manager Garikai Rakabopa and Joseph Sibanda gave evidence.

First to give evidence was Garikayi Rakabopa. According to Rakabopa, he wrote Annexure 'A' to the declaration quoted above. He however denies taking it to the plaintiff's office. He denies that that was an instruction to plaintiff to sue on defendant's behalf for a debt owed to a client. In that regard he says that he had written the letter in an effort to get the debt paid to the client through the bank.

This witness' evidence must be approached with caution. He, together with Bruno Takawira, is responsible for the position the bank found itself. He wrote Annexure 'A' to the declaration, the letter giving

instructions to plaintiff to sue. He initially denied any knowledge of the letter to his superiors until the letter was shown to him. His explanation, on being confronted with Annexure 'A' was that indeed he had written it but had not given it to Mr Manase as claimed by the latter.

From the onset, he told the court that the defendant's policy was to give notice at the beginning of each year in a circular to all managers which legal practitioners the bank would use for that year. That policy according to him could not be changed by management willy-nilly. What he intended to portray was that he, with that knowledge could not have given instructions to plaintiff to sue on the bank's behalf. Yet when his authority to write Annexure 'A' was challenged, he firmly maintained that he had the requisite authority to do so. When it was put to him that the plain language in Annexure 'A' was that he had asked plaintiff to sue RMS (Pvt) Ltd in the bank's name, he disputed it on the basis that the letter states that "our client is owed money...." as opposed to "we are owed money...."

In short for those reasons I found that Rakabopa was not being entirely truthful with the court.

Although he authored Annexure 'A' he wanted the Court to believe that there was no authority given to Manase & Manase.

Yet two days latter he got a letter confirming that the legal practitioners will issue summons. In June 2000 he was still addressing correspondence to plaintiff confirming that the bank will pay \$100 000,000 as collection commission Exhibit '8'. Annexure 'A' and subsequent correspondence from Rakabopa to the plaintiff confirm that the instruction was as understood by the plaintiff.

It seems to me that this witness knew more than he was prepared to disclose to his superiors as well as to the Court.

Mr Francis Dzanya the Managing Director of defendant stated that the meeting of 28 August 2000, was attended by four other people in his office. According to Dzanya, he had explained to those present including Mr Manase and Mr Motsi as well as Takawira that Annexure 'A' clearly spelt out at that RMS owed Bruno Takawira (Pvt) Ltd money. Manase & Manase were to recover that money on behalf of Takawira. The bank was not owed money by RMS. As the summons reflected the bank as defendant, Mr Manase was to cause any reference to the bank to be removed from the process and submit his and the Deputy Sheriff's costs for consideration by the bank. Takawira was to pay his legal costs to plaintiff.

These discussions were set out in his letter to Bruno Fungai Takawira (Pvt) Ltd, dated 25 August 2000.

Under cross examination, Mr Dzanya explained that he came to know of the matter after an officer of RMS (Pvt) Ltd had come to plead with him to save their goods, a heavy duty truck from auction. When he questioned Rakabopa the latter denied any knowledge of an instruction to sue RMS by the bank. It latter turned that Rakabopa had written Annexure A to the declaration.

The meeting of 24 August 2000 was called to resolve the problems in which the bank finds itself. It was cited as plaintiff in a case when it ought not to have.

Rakabopa, in my view ought not to be believed when he says he never went to Mr Manase's office together with Takawira. He is demonstrably an unreliable person. He denied any knowledge of an instruction yet he had authored a letter in unambiguous terms that gave plaintiff a basis to act. It is arguable that a close analysis of the contents of the letter will reveal that principal debtor is Bruno Fungai Takawira (Pvt) Ltd rather than the bank. Yet on the other hand the bank is

enlisting the services of legal practitioners to recover money owed to a client. In my view the bank has sufficient interest to be properly cited as the plaintiff. That this is so is confirmed by the bank officials own actions in that Rakabopa and Sibanda did not direct that the name of the bank be removed from court process. They did not resolve to reverse the court process although it was apparent to them at least that the bank's name should not have been cited as plaintiff. As admitted by both Rakabopa and Sibanda and as well as Dzanya the bank advanced money to its client. That money was used to purchase motor vehicle spares which were sold to RMS. RMS agreed through letter of undertaking to pay what it owed to Bruno Fungai Takawira (Pvt) Ltd directly to the bank. That is a sufficient basis to establish a *causa* for the bank to sue in its name.

I am unable to find that the plaintiff in these circumstances negligently failed to follow instructions. In the premises I find that the plaintiff properly cited the bank as plaintiff in case No. HC 2962/00.

As such the plaintiff is entitled to its costs of \$100 000,00 and disbursements to the Deputy Sheriff in the sum of \$260 201,81.

Having come to the above conclusion, I find it unnecessary to make any finding in respect of the other issues except to say that the defendant's counter claim is dismissed with costs.

In the premises it is ordered as follows:

1. Judgment is granted for the plaintiff the sum of \$3 60201,81 together with costs.
2. Interest at the prescribed rate on the sum of \$360 201,81 from 27 September 2000 to date of payment in full.
3. Defendant's counter claim is dismissed with costs.