ZIMBABWE BANKING CORPORATION LIMITED
versus
TRUSTFIN FINANCE LIMITED

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 6 and 8 March 2006

Plaintiff's Exception to Defendant's Plea

Mr *Philips*, for plaintiff
Mr *A. Moyo*, assisted by Mr *Sake* for defendant

KAMOCHA J: The plaintiff in this matter excepted to the defendant's plea in which it raised a defence that the promisory notes sued on had not been presented on the date of maturity as had been found to be necessary by UCHENA J. It based its exception on the ground that in terms of section 93(1) of the Bills of Exchange Act [*Chapter 14:02*], the "Act" the promisory notes did not have to be presented in order to render the maker liable.

Plaintiff submitted that it saw no reason why it should not be entitled to except and seek the reconsideration of the validity of the judgment of UCHENA J on the point since the learned judge was alleged not to have referred to section 93(1) of the Act which recites thus:

> "93(1) where a note is in the body of the note payable at a particular place, it must be presented for payment at that place in order to render the maker liable, unless a particular place mentioned is the place of business of the payee and the note remains in his hands. <u>In any other case presentment for payment is not necessary in order to render the maker liable</u>" Emphasis added by plaintiff.

In the light of the above plaintiff concluded that there was no requirement for the notes *in casu* to be presented at any particular place and in the result the provisions of the Act which provide for presentment to be at the date of maturity did not apply. Accordingly plaintiff prayed that paragraph 2 of the defendant's plea be struck out with costs.

In its reply to the plaintiff's exception the defendant had this to say. It stated that this court, in this very same matter had found that the two negotiable certificates

of deposit indicated "Trustfin's logo, address and certificate number. Trustfin's authorised signatories then signed the negotiable certificates of deposit."

It went on to state that the two negotiable certificates of deposit were "payable on maturity upon presentation to Trustfin" and therefore presentation was expressly required by the certificates themselves. In the result, defendant claimed to be entitled to rely on the provisions of section 44(1) of the Act and concluded that the plaintiff exception was devoid of any merit on that basis.

On the second prong and defendant submitted that the same issue taken in the exception was raised in the plaintiff's heads of argument and was disposed by the court's findings referred to *supra* and was *ipso facto res judicata* as between the parties.

Defendant further alleged that plaintiff was estopped from taking the point by exception, moreso in light of the fact that it had voluntarily purported to present the negotiable certificates of Deposit. If no place of presentation was indicated on the certificates, the plaintiff would not have known such place and would not have presented them as alleged, so the defendant's submission went.

Furthermore, it was defendant's contention that as appears *ex facie* the exception, plaintiff had only excepted to the second defence of the defendant, as such the matter had still to proceed to trial in respect of the first defence.

In the defendant's view the relief sought in the exception was the same relief that this court had refused to grant and ordered the case to stand over for trial in terms of rule 34 of the Rules of this court.

Defendant concluded that the exception was not only ill-conceived but was also another frivolous attempt to avoid going to trial whereat all its defences could be explored and ventilated by *viva voce* evidence. In the result, it prayed for the dismissal of the exception with costs on a punitive scale of attorney and client.

The brief facts giving rise to these proceedings are that plaintiff was a bearer of two negotiable certificates of deposit "NCD" issued by the defendant - Trustfin on 11 December 2003 and 20 January 2004. Their maturity dates were 2 January 2004 and 3 February 2004 respectively.

It is common ground that plaintiff did not present the negotiable certificates of deposit on the due dates. Instead, plaintiff alleged that it had presented them on 5 April 2004 but there was no payment to it as the bearer thereof. This was, however,

denied by the defendant which alleged that the first communication it received from plaintiff was a letter of demand of 12 May 2004.

The defendant's denial prompted the plaintiff to issue summons for provisional sentence which was refused by this court and ordered the case to stand over for trial.

The defendant then filed its plea in the following terms:

"Defendant pleads to the plaintiff's claim as follows:-

1. Plaintiff is not a holder in due course and is therefore not entitled to sue on the negotiable certificates of deposit.

2. It being common cause that:
   (i) The maturity and/or due dates of the instruments relied upon by the plaintiff were 2nd January 2004 and 3rd February 2004 respectively;

   (ii) The plaintiff itself alleges (which the defendant denies) that it presented the instruments for payment on 5th April 2004;

   (iii) The 5th April is not the maturity or due date for any of the negotiable certificates of deposit. It is long after the maturity dates for the negotiable certificates of deposit;

Defendant pleads that it is discharged from all and any liability based on the negotiable certificates of deposit in accordance with section 44(1) of the Bills of Exchange Act [*Chapter 14:02*]"

This exception relates to paragraph 2 *supra.* Plaintiff alleged that the defendant's plea was bad in law and discloses no defence in that:

1) A negotiable certificate of deposit was not a Bill of Exchange but a promisory note.
2) In terms of section 93(1) of the Bills of Exchange Act [*Chapter 14:02*] a Promisory note which is not payable at a particular place, as is the case here, does not have to be presented in order to render the maker liable.

The plaintiff appears to be contradicting itself when it states that notes *in casu* do not have to be presented in order to render the maker liable because in its summons it stated that: "The amount claimed by plaintiff had become due and payable to it because on presentation of the bills to defendant on the 5th of April 2004 they were not paid to plaintiff as the bearer thereof."

In its written submissions the plaintiff admitted that the negotiable certificates of deposit were promisory notes, *sui generis* and were governed by the provisions of part IV of the Act. According to the plaintiff the said notes had to be presented within a reasonable time as provided for in section 92 and since they were allegedly presented for payment on 5 April 2004 that was sufficient. It was submitted that, moreover, the place for payment was not specified in the body of the notes as stipulated by section 93(1) *supra*.

In order for the court to establish whether or not it was imperative for notes *in casu* to be presented on their due dates in order to render the defendants liable or they only needed to be presented within a reasonable time the court has to examine the relevant provisions of the Act.

Part II of the Act in which section 44 is to be found deals with Bills of Exchange while promisory notes are found in Part IV which contains sections 92, 93 and 95.

Section 44 lays down the rules of presentment for payment of Bills of Exchange and it provides thus:

> "44(1) Subject to this Act, a bill must be duly presented for payment. If it is not so presented the drawer and any endorser shall be discharged. A bill is duly presented in accordance with the following rules -
>
> (a) where the bill is not payable on demand, presentment must be made on the day it falls due.
> (b) .....
> (c) .....
> (d) ....."

The plaintiff contended that the above provisions do not apply to promisory notes. Instead, it submitted that it was section 92(1) which was applicable which provided that -

> "92(1) When a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it not so presented the endorser is discharged."

The contention by the plaintiff that the provisions of Part II which relate to bills of Exchange are not applicable is without foundation as it purports to ignore what is contained in section 95(1) which provides thus -

> "95 application of Part II to notes

(1) Subject to this part and except as by this section provided, the provisions of this Act relating to bills apply, with the necessary modification, to notes"

In essence section 44 *supra* which relates to presentment of bills for payment also applies to notes *mutatis mutandis*. Presentment of such notes must be made on the days they fall due. There is no controversy *in casu*, that the notes were not presented on their due dates.

The issue that this court must determine is whether or not each note in its body was made payable at a particular place so that it could be presented for payment at that place in order to render the defendant liable in terms of section 93(1) *supra* or could it be said the place of payment was there merely by way of memorandum.

It is important to mention at this stage that the two promisory notes are couched in an identical format which is set out below.

		NEGOTIABLE CERTIFICATE OF DEPOSIT
SETTLEMENT DATE:		11 DECEMBER 2003
MATURITY DATE:		02 JANUARY 2004
AT: 22 (TWENTY TWO) DAYS AFTER SIGHT PAY TO THE ORDER OF BEARER $1 000 000 000.00		
AMOUNT IN WORDS: ONE BILLION DOLLARS ONLY		
FOR VALUE RECEIVED: PAYABLE ON MATURITY DATE UPON PRESENTATION OF THIS CERTIFICATE TO TRUSTFIN		
		_____
		Per Pro
		TRUSTFIN
		_____
logo		
TRUSTFIN	_____	_____
Address	Authorised signatory	Authorised signatory
		TRUSTFIN

In the above diagram the place of payment is the one reflected as "For value Received: Payable on maturity date upon presentation of this certificate to TrustFin"

This in, my view, is specified in the body of the note. It is above both authorised signatories and the TrustFin logo and address. It is also above the per pro TrustFin phrase printed in a box. The place of payment is printed along with the rest of the note. In the case of *Trecothick v Edwin* 1 Starky 468 LORD ELLENBOROUGH held that such a place of payment must be regarded as being in the body of the note.

In the case of *Masters v Baretto*, 19 L.J.C.P 50 where the direction to pay at a certain place appeared below the signature of the maker was held not to be in the body of the note. However in the South African case of *Breitenback b Immelman's Konstruksie* (EDMS) B pk 1970(3) S.A 507 it was held that, because the line specifying the place of payment was carried through above the signature of the maker, presentation was necessary.

The case law was summarised as follows by BURGER J in the case of *Veritas International Promotions v Trustees,* Langad Trust 1985(3) S.A. 945 at 948 A-E.

> "There are a number of cases where it was decided that a place of payment specified in the lower left hand corner of a promisory note is not in the body of the note. In the various cases the place of payment was either on the same line as the signature of the maker, in some cases, it started on the line above and continued on the same line and bracketed together. In none of the cases except one was the line in which the place of payment was specified continued through to the right above the signature. These cases were *Curtis v Rattray* 1913 WLD 181; *Harvey and Co. Ltd v Daugherty* 1914 TPD 665; *Brazil v Henderson and Henderson* 1946 WLD 270; *Botha & Booysens (Pty) Ltd v Duplessis* 1957(4) SA 72(0); *Competent Distributors (Pty) Ltd v Monarch Cabinet Works (Pty) Ltd and Another* 1958(1) SA 161 (D); *Laztex (Pty Ltd v Telementry Equipment (Pty) Ltd* 1 1976(1) SA 71(W) and *New York Shipping Cop (Pty) Ltd v E.M.M.I Equipment (Pty) Ltd* 1968(1) SA 355 (SWA).
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> The exception is the decision in *Breitenback v Immelman's Konstruksie* (Edms) Bpk 1970(3) SA 507(T) where it was held that because the line specifying the place of payment was carried through above the signature of the maker, presentation was necessary. In the present case the part of the note specifying payment is in the left hand corner, starts above the signature and, if one takes the account number as part of the place of payment, it is carried on below. It seems to me that the account number is part of the place of payment as it specifies in greater detail where at the place of payment the money is to be found. Looking at the note as a whole, I am satisfied that it was not intended to incorporate the place of payment into the body of the note." My emphasis.

In casu the line in which the place of payment was specified was carried through well above the authorised signatures in the body of the note from left to right

just like in the *Breitenbach v Immelman's* case. It, therefore, follows that presentment was necessary in order to render the maker liable.

This same conclusion was arrived at by UCHENA J but the plaintiff has brought up this matter again seeking the reconsideration of the validity of the judgment of UCHENA J on that same point. This, in my view is improper since that same point had been adjudicated upon by a judge of this court who concluded that presentment of the negotiable certificates of deposit on their maturity dates was necessary. It is difficult to understand why the plaintiff contended that that point was not *res judicata*.

The defendant had submitted that the plaintiff should be ordered to pay costs on an attorney and client scale on the ground that the plaintiff should not have excepted at all as it felt that the exception was devoid of any merit and in any event the point raised was infact *res judicata.* I cannot accede to that request. Exceptions when well taken can dispose of a case without the need to go through a trial.

In the result I would order as follows:

It is ordered that:

(a) the exception be and is hereby dismissed; and

(b) the plaintiff pays costs on a party and party scale.

Gill, Godlonton & Gerrans, Plaintiff's legal practitioners.

Kantor and Immerman, defendant's legal practitioners.