

AFRICAN BANKING CORPORATION OF ZIMBABWE  
t/a Banc ABC  
versus  
RODOX (PRIVATE) LIMITED  
and  
RODNEY NDANGARIRO CHITEME

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE, 26 June 2013 and 24 August 2016

### **Civil Trial**

*A. Muchandiona*, for the plaintiff  
*T.H Gunge*, for the defendants

BERE J: When this matter was set down for trial, I advised both counsel to prepare a joint statement of agreed facts so that the matter would be dealt with as a stated case. Both counsels agreed and duly complied and I reproduce hereunder the jointly crafted statement of agreed facts which captured the issues that I was called upon to determine.

#### “STATEMENT OF AGREED FACTS

1. By written agreement dated 6<sup>th</sup> April 2011, plaintiff lent and advanced an amount of US\$50 000.00 to second defendant (pages 32-42 of the bundle of documents) hereinafter referred to as “the personal loan”.
2. By written agreement dated 30<sup>th</sup> May 2011, the plaintiff lent and advanced an amount of US\$100 000.00 to 1<sup>st</sup> defendant (pages 3-13 of the bundle of documents) (hereinafter referred to as “the Corporate loan”).
3. The corporate loan was censured by a surety mortgage bond which was passed in favour of the plaintiff by 2<sup>nd</sup> defendant and Ruth Sithokozile Chiteme. (pages 18-22 of the bundle of documents).
4. 2<sup>nd</sup> defendant defaulted on his personal loan resulting in plaintiff instituting recovery proceedings under Case No. HC 7307/2012 through Messrs C. Nhemwa & Associates legal practitioners.
5. 1<sup>st</sup> defendant defaulted on its corporate loan resulting in plaintiff instituting recovery proceedings under case number HC 3487/2012 through Messrs Danziger & Partners.

6. This matter was initially set down for hearing on the 28<sup>th</sup> January 2013 but was postponed to the 30<sup>th</sup> January 2013. On the 30<sup>th</sup> January 2013 the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not attend Court and a default judgment was entered against them.
7. The action is case number HC 7307/2012 was referred to trial at a pre-trial conference held before Mutema J on the 24<sup>th</sup> January 2013.
8. On the 30<sup>th</sup> January 2013 the 2<sup>nd</sup> defendant deposited an amount of US\$80 000.00 into the defendant's corporate loan account. On the 12<sup>th</sup> February 2013 the second defendant deposited US\$100 000.00 with the plaintiff. The deposit slip indicated the account name as that of Rodox but the account number quoted is that of the 2<sup>nd</sup> defendant's personal account namely 2112011367083802017. (Page 43 of the bundle of the documents).
9. On the 20<sup>th</sup> February 2013 the 2<sup>nd</sup> defendant approached the plaintiff with a compromise settlement of US\$180 000.00 to clear his and the 1<sup>st</sup> defendant's indebtedness in full and final settlement of both the personal and the corporate loans. As at that stage, the total balance due under the two loan accounts stood at US\$234 013.85 (page 44 of the bundle of documents).

The plaintiff rejected the compromise settlement proposed by the 2<sup>nd</sup> defendant and went on to do the following:-

- 9.1 to credit the sum of US\$80 000.00 paid on the 30<sup>th</sup> January 2013 towards reducing the 1<sup>st</sup> defendant's corporate loan account;
- 9.2 the sum of US\$100 000.00 paid on the 12<sup>th</sup> February 2013 was appropriated as follows:-
  - (a) US\$60 882.72 went towards extinguishing the 2<sup>nd</sup> defendant's personal loan;
  - (b) US\$10 009.90 went towards payment of Messrs C Nhemwa & Associates' estimated legal costs in case number HC7307/2012; and
  - (c) US\$29 037.09 was transferred to the 1<sup>st</sup> defendant's corporate account (pages 45-46 of the bundle of documents).
10. Messrs C. Nhemwa & Associates went on to withdraw the plaintiff's claim in case number HC7307/2012.
11. The action in this matter was persisted with. On the 6<sup>th</sup> June 2013 the matter was postponed to the 24<sup>th</sup> June 2013. The parties agreed to file a statement of agreed facts and their respective heads of argument.
12. On the 19<sup>th</sup> of June 2013 the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an amended plea. The plaintiff is not opposed to the filing of the amended plea which raised fresh issues.
13. The 2<sup>nd</sup> defendant objected to the estimated costs of Messrs C Nhemwa & Associates and insisted on such costs being taxed before payment thereof can be made, (page 47 of the bundle of documents).
14. The parties are in agreement that it is within the 2<sup>nd</sup> defendant's rights to insist on Messrs C. Nhemwa & Associates' legal costs being taxed before payment can be made. The parties accordingly agree that the sum of US\$10 009.90 which was paid by plaintiff to C. Nhemwa & Associates ought to have been appropriated towards reducing the corporate loan advanced to the 1<sup>st</sup> defendant.

15. The plaintiff's contention is that if the sum of US\$10 000.90 had been rightly appropriated towards reducing the corporate loan, then the balance outstanding on the account should have been US\$61 572.00 as at the 1<sup>st</sup> of June 2013.
16. The defendant's contention is that the entire sum of US\$100 00.00 which was deposited on the 12<sup>th</sup> February 2013 ought to have been appropriated towards extinguishing the corporate loan account which should have been paid up by now. The defendants further contend that the plaintiff should have sought clarification from 2<sup>nd</sup> defendant regarding the confusion created by the deposit slip which he signed on the 12<sup>th</sup> February 2012 which named the account holder to be credited as Rodox but gave the account number to be credited as that of the 2<sup>nd</sup> defendant. (Page 43 of the bundle of documents)."

From the statement of agreed facts, it is clear that the parties' dispute has been triggered by the manner in which the plaintiff handled the deposit of US\$100 000 (One hundred thousand dollars) which was made by one R.N Donga on behalf of the defendants on 12 February 2013. The deposit slip bore the account name as that of the first defendant but the account number quoted reflected that of the second defendant's personal account with the plaintiff.

Faced with this defective deposit slip, the plaintiff decided to appropriate the US\$100 000.00 in accordance with para 9 of the statement of agreed facts.

The plaintiff contends that what it did was perfectly correct because it was in line with clause 4 of the personal loans "Standard Terms and Conditions" Schedule A to the loan agreement between the plaintiff and the second defendant (see pp 32-42 particularly pp 34 and 36 of the plaintiff's bundle of documents).

Furthermore, the plaintiff argued that any reversal of this transaction would result in the second defendant being unjustly enriched by an amount of US\$60 882-72 since the action to recover same had been withdrawn on the understanding that the second defendant had made payment in full. The plaintiff therefore prayed for judgment against the second defendants in the sum of US\$61 572.00 together with interest and costs of suit on the legal practitioners and client scale.

The defendants have totally denied liability. They contend that the US\$100 000-00 was meant to credit the first defendant loan account at the time of deposit and was never meant to be appropriated in the manner done by the plaintiff. They further argue that faced with such a deposit slip as reflected on pa 43 of the plaintiff's bundle of documents the most logical thing the plaintiff could have done was to raise the defendants for guidance.

It was further contended that the situation which the plaintiff finds itself in was self-credited and that it should not be allowed to benefit from its own blundering.

It is clear that the deposit slip which was used as the basis of the appropriation of US\$100 000-00 was defective. On the face of it, it was meaningless. It lacked specific and clear instructions to the bank and it occurs to me that faced with such a deposit slip the best the bank could have done was to seek proper instructions from the depositor as to which account was to be credited by that deposit. The plaintiff took a monumental risk by unilaterally deciding to appropriate the deposit made without a specific and clear mandate from its client.

In my view, it must be the position and accords well with normal banking practice that if a deposit slip or even a withdrawal slip is vague or unclear clarification be sought first from the author of such a slip. I believe, and strongly so that a deposit slip is one of the most important instruments in the banking industry because it tells or instructs the bank to act in a specific manner. If a deposit slip is not properly scrutinized upon presentation serious and unintended consequences will invariably occur. It is important that a bank teller keeps herself or himself totally alert when such a document is presented for processing. If for some reason or another the strict scrutiny of such document escapes the attention of the bank teller, surely the immediate supervisor must be able to pick up the anomaly and immediately take remedial action.

The challenges which stare at the plaintiff given the manner in which it treated this defective deposit slip are too many to ignore. The first one that catches my attention is the plaintiff's inability to discern the distinction between the first and second defendant. As correctly argued by the defendants' counsel, it is elementary knowledge that a company is a legal entity separate and distinct from its members and directors. In this case, the first defendant could not have been treated as the second defendant. It is only in those rare situations when the corporate veil is lifted or pierced that the Directors and other officers of a company can incur personal liability for that company. For this I rely on the authorities referred to me by counsel viz; *Parker v WGB Kingsley Co. (Pvt) Ltd*,<sup>1</sup> *Zimbank Ltd v Pindi Electrical and Hardware (Pvt) Ltd and Ors*<sup>2</sup>.

The second challenge which faces the plaintiff is that by using its discretion to appropriate the money in the manner it did, it overlooked one of the most fundamental pillars that regulates the relationship between the bank and its client, viz the issue of mandate. The plaintiff owed a duty to the defendants. That duty is to perform authorised mandates. If a

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<sup>1</sup> 1987 (1) ZLR 188 (SC)

<sup>2</sup> 1998 (2) ZLR 210 (HC)

bank decides to operate outside the mandate given to it by its client, it assumes a monumental risk and can be called back to order by its client. See the case of *Standard Chartered Bank Zimbabwe Limited v China Shoungang International*<sup>3</sup>.

The plaintiff has sought to rely on clause 4 of the Standard Terms and Conditions as authority to justify its conduct in the handling of the defective deposit slip. A reading of that clause clearly shows that that clause does not allow the plaintiff to treat the account of the first defendant interchangeably with the second defendant's account. The second defendant as a borrower cannot be confused for the first defendant. These are two separate debtors in the eyes of the law.

I do not see how the plaintiff would succeed in this matter. As already stated the plaintiff cannot seek to benefit from its own mistakes.

I have considered the issue of costs in this regard. The circumstances are such that costs on Attorney-Client scale are not justified.

The plaintiff's action is dismissed with costs.

*Danziger and Partners*, plaintiff's legal practitioners  
*Gunje Chakasara & Partners*, defendants' legal practitioners

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<sup>3</sup> Judgement No. SC 49/13