

NATIONAL SOCIAL SECURITY AUTHORITY  
versus  
METBANK LIMITED

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 27 June 2019 and 3 July 2019

**Civil Trial**

*T Zhuwarara*, for the plaintiff  
*Ms F Mahere*, for the defendant

MATHONSI J: This matter has proceeded as a special case in terms of r 199 (1) of the High Court of Zimbabwe Rules, 1971 it being the desire of the parties that it be determined on a statement of agreed facts they have crafted and without the hearing of any evidence. The plaintiff which is established in terms of s 4 of the National Social Security Authority Act [*Chapter 17:04*] instituted proceedings against the defendant, a registered commercial bank, for an order directing the bank to return to it 3 Treasury Bills with a total face value of US\$20 million together with the attendant garnishment of a 5% per annum penalty fee on the sum of US\$20 million, collection commission and costs of suit on the adverse scale.

Alternatively the plaintiff sought an order for payment of the sum of US\$20 million, the value of the Treasury Bills in question, together with a penalty fee of 5% per annum on that sum from 18 June 2018, collection commission and costs of suit on the same adverse scale. It made the averments that the Treasury Bills were lent to the defendant for use by it as security for its third party borrowings by virtue of a security lending agreement entered into on 18 December 2017 in terms of which the lending agreement would subsist for 6 months from the date of signing, the defendant would settle the Treasury Bills upon expiry of the agreement and the failure to return

them on expiry would attract a penalty fee of 5% per annum on the face value of the Bills compounded daily.

The plaintiff pleaded further that the defendant breached the agreement by failing to return the Treasury Bills when the agreement expired on 18 June 2018. Although the defendant was given notice on 7 August, 2018 to remedy the breach, it failed to do so. After entering appearance to defend the defendant filed a plea denying entering into any security lending agreement with the plaintiff. According to the defendant the parties signed a term sheet in terms of which they would agree on the terms of the security lending agreement which would incorporate the terms of the term sheet. For that reason “there is no agreement between the parties.”

Alternatively, the defendant pleaded that in terms of the term sheet signed by the parties, the plaintiff was required to co-operate with the defendant but failed to do so resulting in the defendant’s failure to return the Treasury Bills. Such failure was occasioned by the plaintiff’s behaviour which was “illegal and irrational” in that the plaintiff failed to deliver the “formal agreement” to the defendant thereby hindering the defendant’s performance. In addition, the plaintiff not only “violated the terms of the term sheet” but also made demand before performance was due. The defendant averred further that it was an implied provision of the term sheet that it would be renewed. As such, having been renewed by implication, the Treasury Bills are not yet due and the plaintiff’s claim is immature.

I have said that the parties crafted and signed a statement of agreed facts and issues for determination in terms of which they would want the matter to be resolved. I reproduce that statement hereunder:

“BE PLEASED TO TAKE NOTICE THAT the parties agree on the following factual positions.

1. On or about the 18<sup>th</sup> of December 2017 the plaintiff and the defendant signed a document titled: Term Sheet – Security Lending Agreement to Metbank.
2. In cognisance of the aforementioned document the plaintiff extended and gave the defendant Treasury Bills worth US\$20 000 000.00 for the purpose of use as security for the said defendant’s third-party borrowings.
3. In particular the defendant took into its possession the following treasury bills belonging to the plaintiff:
  - 3.1 Ztb 1095 20160729A: Face value of US\$1 264 203.05 maturing 29/07/19
  - 3.2 Ztb 1095 20160908A: Face value of US\$6 699 060.38 maturing 08/09/2019
  - 3.3 Ztb 3652 201705 03A with face value of US\$12 036 736.57 maturing 03/05/27.

4. The defendant proceeded to pay over to the plaintiff an upfront arrangement fee of 0.75% of the security lending value of the treasury bills which amounted to US\$150 000.00.
5. On the 18<sup>th</sup> of June 2018 the plaintiff, in contemplation of the document signed *inter partes* proceeded to demand the return of the treasury bills after the lapse of the stipulated 6 months period.
6. The parties never signed any other document or amendment. The document of 18<sup>th</sup> of December 2017 is the only memorial of the terms and conditions prevailing *inter partes*.
7. On previous occasion the parties had arranged and actuated other lending and securitisation agreements involving other treasury bills.

#### Dispute

8. The plaintiff contends that the document the parties signed on the 18<sup>th</sup> of December 2017 constitutes a binding and enforceable Security Lending Agreement in terms of which the defendant is obliged to return the said plaintiff's treasury bills valued at US\$20 000 000.00.
9. The defendant disputes the plaintiff's claim and contends that the document signed on the 18<sup>th</sup> of December 2017 constitutes negotiations whose terms were to be incorporated into a subsequent formal Security Lending Agreement.
10. In spite of the pre-trial conference issues the real questions for determination arising out of these facts are as follows:
  - (i) Whether the document the parties signed on the 18<sup>th</sup> of December 2017 constitutes a binding and enforceable security lending agreement in terms of which the defendant is obliged to return the said plaintiff's treasury bills valued at US\$20 000 000.00 (alternatively payment of US\$20 000 000.00 with interest as claimed).
  - (ii) Whether the defendant has any lawful basis to retain possession (of) the said plaintiff's treasury bills valued at US\$20 000 000.00.

#### Documents

In deliberating the aforementioned matter the court may take consistence (*sic*) of the Record of Proceedings filed of record and the documentation as discovered and furnished by the parties."

Even though the parties had narrowed the issues for determination by the court to only 2, Ms *Mahere* for the defendant still took a point *in limine* outside the agreed issues. She submitted that the plaintiff has pleaded a wrong cause of action which is incompetent. To the extent that the plaintiff prays for the return to it of the specified treasury bills, its claim falls under the *actio rei vindicatio*, namely that as owner of the bills it reclaims possession thereof from the defendant

which retains their possession without the owner's will. She submitted that a litigant who seeks the return of its property must proceed by way of vindication proceedings. It is incompetent for such litigant to plead its claim in contract.

In Ms *Mahere*'s view, when a claim is pleaded in contract and a breach is alleged, the competent relief is to seek specific performance or damages. As none of those claims are made in the present matter, coupled with the fact that the term sheet on which the plaintiff's suit is based has no provision for the return of the treasury bills, the claim should be dismissed. Regarding the alternative claim for the payment of US\$20 million, Ms *Mahere* submitted that the plaintiff should have sued under unjust enrichment.

Mr *Zhuwarara* for the plaintiff contested the point *in limine* as being the fruit of an idle mind fixated on buying time in the most callous manner. He submitted that the plaintiff's claim is based entirely on contract and says so. There is no basis for introducing the *rei vindicatio* in a claim based on breach of contract where the other party to the contract merely seeks an enforcement of the terms of the agreement between the parties.

I must say that I find it extremely difficult, if not well-nigh impossible, to follow the logic of the point taken *in limine*. Apart from the fact that it was pursued outside the four corners of the stated case, it is significant that Ms *Mahere* did not suggest that the plaintiff's summons and particulars of claim are exceptionable either as disclosing no cause of action or any other ground upon which a pleading can be excepted to. It is not without reason that it is so. The reason is that there is no basis for an exception to the claim as pleaded. The plaintiff's summons could only be excepted to if it disclosed no cause of action, not on the basis that the defendant's preference is that the plaintiff should have pleaded in a particular way or should have pleaded a cause of action preferred by the defendant. It does not happen like that.

It is trite that a cause of action is the entire set of facts which give rise to an enforceable claim. It includes every fact which is material to be proved in order to entitle the plaintiff to succeed in the claim and incorporates all that the plaintiff must set out in the declaration in order to disclose a cause of action. See *Dube v Banana* 1998 (2) ZLR 92 (H) at 95 D-E; *Abrahamse & Sons v SA Railways and Harbours* 1933 CPP 626 at 637. The purpose of pleading is to inform the opposing party in advance of the basis of the other party's claim. This is to enable that other party to prepare

for the case which it has to meet at the trial. The choice of what cause of action to plead or rely on is entirely that of the plaintiff. It is not for the defendant to select that for the plaintiff.

In my view, there can be no valid objection to a suit based on the defendant's preference of how it wants to be sued. If the plaintiff's claim is pleaded with sufficient clarity and the summons sets out a cause of action, it cannot be resisted on the basis that the cause of action is wrong. It is either there is a cause of action or there is none. If there is none, then the remedy available to the defendant is to except to the summons. If a cause of action is pleaded then whatever the defendant has to say about it constitutes a defence which can succeed or fail in the normal run of events. While it is true that the owner of property which is in the possession of another who holds it without the owner's permission, may have a vindication right against the possessor, that does not mean that vindication is the only remedy possessed by the owner. The owner may have a claim steeped in contract as happened in the case. I therefore dismiss the point *in limine*.

On the merits of the matter the plaintiff's position is simply that the term sheet signed by the parties on 18 December 2017 is a fully-fledged contract with all the characteristics of a binding contract which the parties gracefully acted upon only for the defendant to violate it by refusing to return the bills as provided for in the agreement. All the crucial provisions of the agreement were complied with except the return of the bills at termination. Mr *Zhuwarara* submitted that the conduct of the parties is consistent with their acceptance of the binding nature of the term sheet. In pursuance of the terms, the defendant paid the arrangement fee of US\$150 000.00 provided for in the agreement. The plaintiff on its part also surrendered the treasury bills to the defendant again as provided for in the agreement.

That view was resisted by Ms *Mahere* who drew attention to the part of that document under "repayment term" where at item 4 thereof the parties recorded:

- "4. The full settlement shall become due and payable in the event of:
- i) the termination of the security lending agreement entered into incorporating the provisions of this security lending term sheet,
  - ii) the occurrence of an event of default or breach of the agreement conditions which is not remedied within the time period required to remedy such a default after notice to that effect from the NSSA."

In Ms *Mahere*'s interpretation, the foregoing provision illustrates the point that the term sheet was a preliminary agreement by the parties to negotiate and sign a further agreement of a security lending. She pressed further that considering that the document also contains provisions

suggesting that it may have been the only agreement evinced by the parties, it must follow therefore that it is an agreement which is void for vagueness. It is vague in the sense that its terms were to be incorporated in a secondary agreement which is not there and clause 4 (ii) under the repayment terms anticipated a breach of that secondary agreement and not the term sheet. By the same token the document may be said to be an incomplete and therefore unenforceable contract. The plaintiff cannot get anything out of such incomplete negotiations not amounting to a valid contract.

The question to be answered is a simple one. Is there a contract between the parties which can be enforced by a court of law? R H Christie, that iconic professor of law, was philosophical when he dealt with the definition of a contract in his book, *Business Law in Zimbabwe*, 2 ed, Juta & Co Ltd, 1998 at p 31:

“A working definition of a contract is an agreement which is or is intended to be enforceable at law. As the first step in deciding whether a contract has come into existence in a given case it is therefore logical to inquire whether agreement was reached ..... Agreement by consent, true agreement, a meeting of the minds, a coincidence of the wills, consensus *ad idem* all mean the same thing, and there is ample authority, from Inst 3.15.1 to *Salisbury Municipal Employees Association v Salisbury City Council* 1957 R & N 127 131 H, 1957 (2) SA 554 557E, for first looking for such true agreement. This having been said, it must immediately be added that the courts are not equipped with any magical instrument that can provide a true reading of the state of each party’s mind when they made or did not make their contract. The judge or the magistrate must listen to the evidence, read the exhibits and arrive at a human judgment which, if it is to be sufficiently predictable to meet the business community’s need for fixed criteria on which to plan its activities, must be objectively based on the evidence and exhibits and not on a subjective assessment of what the parties say was hidden in their minds at the time.”

The point made by Professor Christie is that the court is least interested in the state of mind of the parties considered in abstract but that it decides the issue as exhibited by word or deed. As stated by TREDGOLD CJ in *Levy v Banket Holdings (Pvt) Ltd* 1956 R & N 98 (FS) at 105.

“It is idle for a party to avow mental reservations or unspoken qualifications if these are inconsistent with what is said and done.”

Clearly one must employ the objective test when attempting to find whether there was an agreement or not. KORSAH J (as he then was) was making almost the same point in *National Railways of Zimbabwe Contributory Pension Fund v National Railways of Zimbabwe* 1984 (1) ZLR 322 (H) when he spoke of the need to consider the conduct of the parties where there is an ambiguity in the language of the written document . The learned judge quoted with approval the

remarks of FAGAN CJ in *Consolidated Diamond Mines of South West Africa v Administrator of South West Africa & Anor* 1958 (4) SA 575 (AD) at 632 where the Chief Justice said;

“The subsequent conduct of the parties to an agreement may afford evidence of a common interpretation of an ambiguous document by both parties to it ... and the Court would, on satisfactory evidence of such common interpretation by the parties concerned, hold them to it.”

See also *Cone Textiles v TTL Development Corporation* 1979 RLR 114 (RAD) at 120.

It occurs to me that in situations of ambiguity the conduct of the parties is the best barometer with which to measure how they themselves interpreted their contract. If, by their conduct, it is apparent they gave the ambiguous provision a certain meaning, all the court is required to do is to give the provision of the contract that meaning. The court does not make a contract for the parties and in my view the moment there is certainty arising from the conduct of the contracting parties, the court would have found the existence of an agreement. It would be remiss in the extreme to strike the contract down on the ground of vagueness as urged by Ms *Mahere*.

Apart from the legal principle on how the court relates to the conduct of the parties when interpreting the contract there is also the hallowed approach of the courts on the parol evidence rule. As stated by WATER MEYER JA in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at p 47:

“Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, added to or varied by parol evidence.”

See also *Nhuda v Chiota & Anor* S 28 -07 (unreported). The parol evidence rule rhymes with what has come to be known as the integration rule expressed by CORBETT JA in *Johnston v Leal* 1980 (3) SA 927 (A) at 943 in the following:

“Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict it, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence,”

That rule comes to the same conclusion as the parol evidence rule that a party to a written contract is prevented from altering the recorded terms of an integrated contract by production of extrinsic evidence. Not that the defendant produced any.

Applying these principles to the facts of the present case one should not lose sight, as much as the document signed by the parties may have an ambiguity to the extent that it refers to a security lending agreement incorporating the provisions of the terms sheet, that there are other features pointing to that document being the only agreement envisaged by the parties. I will give examples.

The heading of the document: “Term Sheet – Security lending agreement to Metbank” as well as the opening line: “This security lending term sheet is made on 18<sup>th</sup> December 2017...”, would seem to suggest that it was meant to be a stand-alone agreement. That is not all. The document gives a background that it sets out the commercial terms and conditions proposed by the plaintiff for the extension of treasury bills to be used by the defendant as security for its third party borrowing. Thereafter it proceeds to set out “agreed terms.” The said agreed terms are listed and include provisions that “the facility shall be for a period of 6 months”, for an “upfront arrangement fee of 0.75% of the security lending value of US\$20 million” which was to be paid by the defendant and that the bills shall remain the property of the plaintiff as well as all the other trappings relied upon by the plaintiff.

What I find even more telling is what is contained in the provision under the heading: “Repayment Term” because it tends to suggest that indeed the document constituted a complete agreement. It states;

“1. The tenure of the security lending transaction shall be for 180 days (that is, 6 months) from date of signing of the term sheet.

2. Metbank shall settle the Treasury Bills on expiration of the lending agreement as defined above.

3. Failure to return the Treasury Bills on expiry of the loan agreements as proposed shall attract a penalty fee of 5% per annum of the face value of the treasury bills, compounded daily.

4.....”

The duration of the arrangement between the parties was defined. The settlement or return of the bills was to be in terms of that defined duration. The time period would be reckoned from the date of signing the term sheet and not any future agreement. It would appear that the rest of the

terms in that provision tending to create the ambiguity were inserted not to create a new contract outside the one signed but perhaps for neatness and nothing more.

I say so because the conduct of the parties following the signing lends credence to the view that they did not anticipate the making of a further agreement. The defendant proceeded to pay over to the plaintiff the arrangement fee provided for in the term sheet. The plaintiff proceeded to give the defendant the 3 treasury bills amounting to US\$20 million for use as security as provided for in the term sheet. When the period of 6 months stated in that document lapsed, the plaintiff immediately claimed the bills by letter of 13 June 2018. The defendant's response was not to demand a secondary agreement but, as appears from its letter of 20 June 2018, to insist on the renewal of the "agreement" for a further period of 6 months. Surely one could not renew something which did not come into effect in the first place.

It occurs to me in light of the manner in which the parties treated the document signed on 18 December 2017 that there was an agreement between them, the terms of which were also very clear. They agreed to lend each other specified treasury bills listed in the document regulating their relationship, for a specific purpose namely for the defendant to use as security for its third party borrowing. Consideration in the form of \$150 000.00 also exchanged hands. That is how the parties treated the term sheet. If it was meant to be John the Baptist, a forerunner for another agreement to come, the parties would not have acted on its terms as they did.

To the first stated case, whether the document of 18 December 2017 constitutes a binding and enforceable security lending agreement obliging the defendant to return the treasury bills or their face value, I answer the question in the affirmative. In fact that finding naturally resolves the second stated case, whether the defendant has a lawful basis to retain possession of the treasury bills.

The defendant does not own those treasury bills. They were lent to it for a specific purpose for a fixed period of time. The period expired 6 months after the signing of the agreement. Thereafter the defendant would have no lawful basis for holding onto the bills. Other than chasing a mirage, that there is no agreement between the parties, the defendant did not advert to any lawful basis for the retention of the bills. Quite to the contrary the argument that there exists no agreement is a self-destruct button the defendant was fervently pressing. It brought the entire edifice of the defendants' case tumbling down in humpty-dumpty fashion. Without some semblance of an

agreement the defendant would not have a right to keep that which it does not own. It should simply return it.

No argument was advanced as to why the agreed face value of the treasury bills being US20 million and the penalty stipulation for breach, being 5 % per annum on the face value should not be ordered in the event of the defendant's failure or inability to return the bills. In fact that is what the parties signed for and is ancillary to the main claim. By equal measure, no argument at all was advanced as to the plaintiff's claim for collection commission which was not even included as a stated case. There is no basis for awarding it.

Mr *Zhuwarara* made a case for costs on the adverse scale. He submitted that these costs should be awarded as a sign of the court's disapproval of the defendant's conduct of pursuing a hopeless defence. I agree. A litigant having the benefit of valuable treasury bills belonging to another has refused to hand them back when called upon to do so. It has set about contesting the action with no recognisable defence, while in the process the reasons for resistance continued to vex the mind. Such behaviour can only be explained as an abuse of the process of the court, typical of engaging in a Sunday morning kick around, except that this is a court of law transacting serious business. To discourage similar activity in the future, there must be pain in the form of costs on the punitive scale.

In the result, it is ordered that:

1. The defendant is hereby directed to return to the plaintiff treasury bills number Ztb 109520160729A with face value of US\$1264 203.05 and maturity date of 29 July 2019; number Ztb 109520160908A with face value of US\$6 699 060.38 and maturity date of 8 September 2019 as well as number Ztb 36522017503A with face value of US\$12 036 736.57 and maturity date of 3 May 2027, whose total value is US\$20 000 000.00.
2. The defendant shall pay to the plaintiff a penalty fee of 5% *per annum* of US\$20 000 000.00 compounded daily from 18 June 2018 to date of return of the treasury bills listed in paragraph one (1) above or the date of payment of the alternative sum of US\$20 000 000.00 in terms of paragraph 3 below.
3. In the event of the defendant's failure to return the treasury bills in terms of paragraph 1 above, the defendant shall pay in the alternative, the sum of US\$20 000 000.00

together with the coupon thereon at the rate of 5% *per annum* from 18 June 2018 to date of full payment.

4. The defendant shall bear the costs of suit on a legal practitioner and client scale.

*MawereSibanda*, plaintiff's legal practitioners  
*PTG Attorneys*, defendant's legal practitioners