

STANDARD CHARTERED BANK ZIMBABWE LIMITED
vs
CHINA SHOUGANG INTERNATIONAL

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & HLATSWAYO JA
HARARE, JULY 15 & October 11, 2013

AP De Bourbon, for the appellant

T C Masawi, for the respondent

ZIYAMBI JA: Standard Chartered Bank Zimbabwe (“the appellant”) or (“the bank”) is a commercial bank registered and operating in Zimbabwe. The respondent is a company duly incorporated in terms of the laws of Zimbabwe and was carrying on business in Redcliff, Zimbabwe. It is a foreign investor whose specific purpose was the refurbishment of the blast furnaces of a Zimbabwean steel manufacturing company popularly known as Zisco Steel. In October 2007, the respondent held two accounts with the Kwekwe branch of the appellant. As at 9 October 2007, there was, in the two accounts, an aggregate credit balance of US\$47 739.86.

In terms of a directive issued by the Reserve Bank of Zimbabwe (sometimes referred to herein as “the RBZ”) sometime in October 2007, the appellant transferred, to the RBZ, the total credit balance of US\$47 739.86 from the two accounts. The directive does not form part of the record but it is common cause that it was purportedly issued in terms of s 35 (1) of the Exchange Control Regulations 1996 SI 109 of 1996 (“the Regulations”). When

the respondent demanded payment to it of the monies deposited in the accounts, the bank refused to repay. It claimed that the intervention of the RBZ had rendered it impossible for it to comply with its contractual obligation to make payment to the respondent.

The respondent applied to the High Court for an order compelling payment. It alleged that the monies were wrongfully and unlawfully debited from its account without its consent and approval. It claimed that in terms of the law of banking, the bank was contractually bound to repay the credit balances on demand.

The bank contended, in its defence, that upon receiving the directive by the RBZ, the funds held in the respondent's accounts ceased to be the property of the bank and became that of the RBZ. It was contended further that the intervention of the RBZ constituted an Act of State and, therefore, a supervening impossibility which discharged the appellant from its obligations to the respondent.

The learned Judge granted the application. It is against his judgment that the bank now appeals.

The main issue which falls for determination in this appeal is whether the bank is liable to pay to the respondent the aggregate amount of US\$47,739,86 transferred by it to the Reserve Bank of Zimbabwe.

THE LAW

The general rule relating to deposits made in a bank account by a customer is that the money becomes the property of the Bank which can use such deposit as it pleases so

long as it pays to the depositor, on demand, the equivalent of the amount deposited in the account. In *Standard Bank of South Africa v Echo Petroleum CC*, Case No. 192/11 (2012) ZASCA 18 (22 March 2012) at para 27 it was said:

“The general rule is that moneys deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit.”

See also *ABC Bank v Mackie Diamonds SC 23/13*; *Foley v Hill* (1848) 2 H.L. Cas 28.

The legal relationship between a bank and its customer whose account is in credit with it is that of debtor and creditor. Although the customer ‘deposits’ money to the credit of his account with the bank, the transaction is not one of *depositum*, but of loan. See *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 (1) SA p 284 G; *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at p 673 C-H. *Absa Bank Ltd v Intensive Air (Pty) Ltd & Ors* 2011 (2) SA 275.

If this legal position is followed to its logical conclusion then the deposits were the property of the bank and what the bank paid to the RBZ was its own money. That the bank parted with the deposits in the account was of no import to the respondent whose right to be paid the equivalent of the deposits, on demand, remained unaffected by the bank’s dealings therewith. The transfer to the RBZ, in terms of its directive, did not, therefore, extinguish the bank’s contractual obligation to make payment to the respondent.

THE DEFENCE

The bank contends that it is discharged from its contractual obligations to the respondent by reason of a supervening impossibility otherwise known as a *vis maior* or *casus fortuitus*, namely the RBZ directive. In support of its stance it relies on the judgments

in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 and *Bob's Shoe Centre v Henneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A). The brief facts of the *Peters, Flamman*, case as summarised in *The Law of Contract in South Africa 3 ed* by RH Christie at pp 524-525, are that the appellant firm was contracted to light the streets of Kokstad for a period of years. During the currency of the contract, in wartime, the partners were interned as enemy aliens and their business wound up under the relevant war legislation. The Municipality's claim for damages for breach of contract and forfeiture of the firm's plant under a clause of the contract was rejected by the Appellate Division. At pp 434-5 of the judgment of the court, SOLOMON ACJ remarked as follows:

“... Nor is it necessary to consider generally what are the circumstances in which it can be said that a contract has become impossible of performance. For the authorities are clear that if a person is prevented from performing his contract by *vis maior* or *casus fortuitus*, under which would be included such an Act of State as we are concerned with in this appeal, he is discharged from liability.”

In the *Bob's Shoe Centre* case (*supra*) the appellants were contracted to clear and deliver a consignment of shoes to the respondents factory in the city. A fire consumed the warehouse where the shoes were warehoused. The shoes were destroyed and it became impossible to complete performance of the contract.

Clearly the facts of both these cases are distinguishable from those in *casu*. The appellant herein has not shown that for some reason beyond its control, it cannot, from its resources, repay the debt. It has not proved impossibility. It goes without saying that in order for its defence to succeed the appellant must do more than merely allege impossibility. The impossibility must be proved, that is, it must be clear from the evidence that performance is impossible, not merely undesirable or uneconomical. See *The Law of Contract in South Africa 3 ed* by RH Christie *supra* at p 525.

In any event, it would appear that where a ministerial directive is given without statutory authority, obedience thereto will not qualify as a *vis major or casus fortuitus*. The appellant has submitted that it was obliged to follow the RBZ's directive and cites s 40 of the Regulations. It alleges that it did not oppose the directive because of its fear of the RBZ which, in terms of s 37 of the Regulation, has the power to revoke its licence. As the respondent submitted, the directive was issued without statutory authority. It was *ultra vires* the provisions of s 35 of the Regulations which grants no authority to the RBZ to confiscate deposits in the accounts of customers of the bank. The correctness of this submission emerges quite clearly from a reading of the section which provides as follows:

“35. Authorised dealers and other persons to comply with directions

- (1) Authorised dealers shall comply with such directions as may be given to them by an exchange control authority relating to -
 - (a) the exercise of any functions conferred on them by or under these regulations;
 - (b) the terms on which they are to exchange foreign currency for Zimbabwean currency;
 - (c) the offer of foreign currency in their possession for sale to the Reserve Bank.

- (2) Persons concerned with—
 - (a) the keeping of any register in Zimbabwe; or
 - (b) the payment of capital moneys, dividends or interest in Zimbabwe;

shall comply with such directions as may be given to them by an exchange control authority in relation to any function conferred or imposed on them by or under these regulations.”

Not only was the directive in violation of s 35 of the Regulations but the bank had the option, if so minded, of resorting to the provisions of s 37 of the Regulations which provide for adequate opportunity to be given to the dealer concerned to make representations before any punitive measures were taken, as well as to the safeguards provided in s 40. Both statutory provisions are set out below.

“37. Penalties for failure by authorised dealers to comply with regulations or directions

- (1) Subject to this section, if an exchange control authority is satisfied that an authorised dealer has –
- (a) contravened any provision of these regulations; or
 - (b) failed to comply with any order or direction with which it is its duty to comply;

The exchange control authority may direct the authorised dealer to cease all dealings in foreign currency, or such dealings as the exchange control authority may specify, for such period not exceeding twelve months as the exchange control authority may specify in the direction.

- (2) Before giving a direction in terms of subsection (1), the exchange control authority shall give the authorised dealer concerned an adequate opportunity to make representations in the matter.”

“40. Orders

- (1) Subject to subsection (3), the Reserve Bank may make orders for all or any of the following purposes—
- (a) to protect or improve the value of Zimbabwean currency;
 - (b) to bring about and preserve stability in the currency market in Zimbabwe;
 - (c) to prescribe any matter which in terms of these regulations is required or permitted to be prescribed or which, in the Reserve Bank’s opinion, is necessary or convenient to be prescribed in order to give effect to these regulations.
- (2) Orders made under subsection (1) may provide for—
- (a) the manner in which authorised dealers shall conduct their business for the purposes of these regulations;
- (3) Orders made under subs (1) shall not have effect until they have been approved by the Minister and published in the Gazette.”

At the hearing of the appeal, Mr *De Bourbon* conceded that the RBZ directive was *ultra vires* of the provisions of s 35(1) of the Regulations. Paragraph (c), it will be seen, deals with the offer of *foreign currency in their possession for sale to the RBZ*. He

submitted, however, that the defence of supervening impossibility was available to the bank even where the directive was unlawful. I disagree.

In *The Law of Contract* by R H Christie, cited above, the following observation is made by the author:

“The limits of *vis maior* and *casus fortuitus* have not been authoritatively defined for the purposes of this branch of the law, but it is clear from *Peters, Flamman*, where the internment and winding-up were carried out under statutory authority, that any similar act of state would qualify. Legislation subsequent to the making of the contract, making performance illegal either absolutely or without a specified consent which has been refused, will also qualify, as will refusal of a statutory consent, **but not obedience to a ministerial directive given without statutory authority**. For the purposes of this branch of the law there is no necessity to distinguish between *vis maior* and *casus fortuitus*, which between them include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and **unavoidable with reasonable care.**” (The emphasis is mine.)

And on p 528

“self created impossibility, that is, impossibility resulting from the act of one of the parties, does not discharge the contract but leaves the party whose act created the impossibility liable for the consequences. This will be so whether the impossibility is complete or partial, and whether or not the act that causes the impossibility is wrongful.”

I respectfully associate myself with those views. The acts complained of by the bank do not qualify as *vis maior* or *casus fortuitus* and do not absolve the bank from compliance with its contractual obligation to the respondent.

CONCLUSION

As has been shown above, the credit balance in the respondent’s account is a debt that the appellant owes to the respondent. The appellant has placed no evidence before

the court which would establish that it has become impossible for it to make payment of its debt. Its contention is that, having made payment to the RBZ in terms of its directive, it no longer has the respondent's money in its possession and is consequently discharged from its obligation to make payment upon demand by the respondent.

The contentions by the appellant run contrary to the established principles of banking law, namely, that the deposits became the bank's property. It seems that what the appellant's defence boils down to is that it ought not to be expected to pay in these circumstances. But as has been demonstrated above, the dealings by the appellant with the deposits in the accounts, namely, the payments to the Reserve Bank of Zimbabwe, were made at its own risk and did not affect its obligation in law to pay its debt to the respondent on demand.

The appeal is accordingly dismissed with costs.

GARWE JA: I agree

HLATSWAYO JA: I agree

Gill Godlonton & Gerrans, appellant's legal practitioners

Masawi & Partners, respondent's legal practitioners