TROJAN NICKEL MINE LIMITED
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 and 29 May 2013

Civil Trial

L. Uriri, for the plaintiff
T. Chitapi, for the defendant

MATHONSI J: It is WALLIS JA, with HARMS AJ, VAN HEERDEN and MALAN JJA and PETSE AJA all concurring who waxed lyrical in *Executive Officer of the Financial Services Board* v *Dynamic Wealth Ltd & Ors* 201 2(1) SA 543 when he said:-

> "Ever since the bursting of the South Sea Bubble in 1720 governments have recognised the need, in the interests of the investing public, for regulation of the financial services industry".

The plaintiff, a public company registered in Zimbabwe sued the defendant for payment of US$1 007 541-30 together with interest at the prescribed rate and costs of suit being the plaintiff's money allegedly appropriated by the defendant from the plaintiff's bank in pursuance of a Monetary Policy statement issued in terms of s 46 of the Reserve Bank Act [*Cap 22:15*] ("the Act") and a directive issued to banks in terms of s 35(1) of the Exchange Control Regulations Statutory Instrument 109/96.

The defendant is established in terms of s 4 of the Act and is charged with, *inter alia* the regulation of Zimbabwe's monetary system, the supervision of banking institutions and the smooth operation of the payment system as well as acting as banker and financial advisor to, and fiscal agent of, the State. It is salutary that the defendant performs these functions in order to regulate banking and protect the banking public.

In the discharge of its duties aforesaid, the defendant issued a Monetary Policy statement on 1 October 2007centralising all foreign currency accounts and directing the lodgement, at its doorsteps, of all corporate foreign currency balances held by authorised dealers. One such authorised dealer is Banc ABC where the plaintiff maintained a foreign

currency account. In compliance with the monetary policy and a subsequent directive issued by the defendant, Banc ABC lodged the plaintiff's foreign currency balance with the defendant. That is the last time the plaintiff saw the money as the defendant did not return it to Banc ABC as a result of which the plaintiff was unable to access that money.

The plaintiff then sued the defendant aforesaid seeking to recover the money but the defendant contested the action averring in its plea that there was no causal nexus between the parties given that the plaintiff and the defendant did not enjoy any banking relationship and that the plaintiff should have proceeded against its bank, that is Banc ABC, and not against the defendant.

At the pre-trial conference the parties agreed on the issues for trial as:-

"1.1. whether or not the plaintiff has a cause of action against the defendant.

1.2. whether or not the defendant is obliged to pay the amount claimed or any amount at all".

When the matter initially came before me for trial the parties were of the view that the facts were generally common cause. They then requested the deferment of the hearing to enable them firstly to agree on the facts, prepare and file a statement of agreed facts as well as heads of argument. In due course this was done and the statement of agreed facts signed and filed by the parties reads:-

"1. The plaintiff is Trojan Nickel Mine Limited, a public company registered in accordance with the laws of Zimbabwe.

2. The defendant is the Reserve Bank of Zimbabwe. It is established in terms of the Reserve Bank of Zimbabwe Act [*Cap 22:45*] ("the Act") with the power, amongst other things, to regulate the banking sector.

3. The plaintiff, at all material times, maintained a foreign currency account number ZWTROJ001CALUS0019 domiciled at Banc ABC, formerly the African Banking Corporation.

4. On 1 October 2007, the Governor of the defendant, Dr G. Gono, issued a Monetary Policy Statement in terms of s 46 of the Act. The Monetary Policy Statement provided in pertinent part as follows (the emphasis is in the original statement):

'6.2. In order to achieve the twin objectives of boosting exporter viability and improving the economy's accountability for <u>total export and other foreign currency receipts, as well as ensuring judicious allocation of the scarce foreign currency resources,</u> it has become necessary that the Reserve Bank introduces a new frame-work where we pool our

resources together without disadvantaging the generators of that foreign currency.

6.3. Within this spirit of preserving and promoting the welfare of our generators of foreign currency, who are the geese that lay the golden eggs, it has become necessary that the Central Bank centralises the management of FCAs, along with the creation of an interest earning investment window that boosts exporter viability.

6.4. What this means is that, with immediate effect, all corporate FCA balances at Authorised Dealers are to be lodged at the Reserve Bank, such that each bank maintains mirror accounts for transactions tracing purposes".

5. On 2 October 2007, the defendant's Division Chief, Exchange Control, one M.B. Mpofu, directed a minute to the Head, Exchange Control Department of all Authorised Dealers, which read(s) in pertinent part as follows:-

"Dear Sir/Madam

DIRECTIVE ISSUED IN TERMS OF SECTION 35(1) OF THE EXCHANGE CONTROL REGULATIONS, STATUTORY INSTRUMENT 109 OF 1996

1. INTRODUCTION

1.1. Reference is made to the Mid-Year Monetary Policy Statement announced by the Governor on 1 October 2007. In order to operationalize the measures highlighted therein, Authorised Dealers are accordingly directed as follows:

…….
2. ……
3. CENTRALISED FCA MANAGEMENT

3.1. Authorised Dealers are advised that, with immediate effect, all Corporate and Non-Governmental Organisations (NGOs) FCA balances as at 1 October 2007 shall be lodged with the Reserve Bank

3.2. Authorised Dealers shall transfer all their Corporate FCA (including EPZ Companies) and NGOs balances to the Reserve Bank by close of business on 2 October 2007, as directed by International Banking and Portfolio Management Division, and submit to Exchange Control individual exporter balances on those transfers made.

3.3. Authorised Dealers are required to maintain mirror accounts for their exporting clients indicating individual entitlements for transaction tracking purposes.

3.4. Authorised Dealers shall submit to the Exchange Control Inspectorate monthly foreign currency account statements for their clients for which global balances should be consistent with holdings at the Reserve Bank's Internal Banking and Portfolio Management Division.

3.5. All special FCAs (transitory accounts) and FCAs for International Organisations, Embassies and Individuals shall remain with Authorised Dealers.

3.6. In order to ensure that exporters preserve the real value of the foreign exchange deposits under the pooled framework, all such deposits shall earn an all inclusive (interest) rate of 12% per annum in foreign currency for USD, Pound, Euro, Pula and Rand.

6. The Ban ABC was and remains an Authorised Dealer.

7. The plaintiff alleges that it had a foreign currency balance of USD1 007 541-30 as at 1 October 2007 in its FCA aforesaid.

8. Banc ABC, pursuant to the directive in para 4 above, remitted the sum of USD1 492 516-06 to the defendant.

9. The plaintiff alleges that it has been unable to access its funds from Banc ABC despite demand.

10. The plaintiff has sued the defendant for:-

'Payment of an amount of USD1 007 541-30 which amount is due and payable to the plaintiff by the defendant which amount represents the entire balance of the money which was held by the plaintiff in a foreign currency account in African Banking Corporation Limited which amount was appropriated by the defendant some time in 2008 and which amount despite demand, the defendant fails or refuses to pay'

11. The defendant has pleaded to the summons as follows:-

'The defendant pleads that there is no causal nexus between the plaintiff and the defendant more particularly that:-

(a) The plaintiff and defendant have no banking relationship and the defendant did not manage or keep a banking account of the plaintiff and owed the plaintiff no duties normally associated with a banker and its depositor.

(b) The plaintiff's claim should be against its banker and not the defendant. It is improper and there is no legal basis alleged which would entitle the plaintiff to bring a claim against the defendant.

WHEREFORE the defendant prays for the dismissal of the plaintiff's claim with costs?'

12. The parties have joined issue and agreed on the following issues for disposition:

    12.1 Whether or not the plaintiff has a cause of action against the defendant.

    12.2. Whether or not the defendant is obliged to pay the amount claimed or any amount at all.

13. The parties respectfully pray that this honourable court may dispose of the agreed issues on the basis of the facts agreed herein and Heads of Argument to be filed by both parties.

    DATED AT HARARE this 22nd day of May 2013".

The statement of agreed facts is duly signed by counsel for the parties. Mr *Uriri*, who appeared for the plaintiff submitted that the plaintiff does have a cause of action against the defendant because it is the defendant which wrongfully procured a breach of the contract that exists between the plaintiff and Banc ABC. He maintained that an action exists in our law for the intentional and wrongful interference with contractual rights. In addition, the plaintiff is entitled to recover from the defendant the procured money on the basis of unjust enrichment, it having been enriched at the expense of the plaintiff.

Mr *Uriri* strongly argued that the directives issued to Authorised Dealers by the defendant had the effect, firstly, of inducing Banc ABC to commit a breach of its contract with the plaintiff and secondly, the directives intentionally and wrongfully interfered with contractual rights. Mr *Chitapi* for the defendant did not address himself to that argument. As far as he was concerned, there was no banker and client relationship between the parties and for that reason the defendant does not owe the plaintiff any duty. Mr *Chitapi* insisted that it is the plaintiff's bank which received the money from the plaintiff and for that reason it is the one with the obligation to pay the money to the plaintiff.

Mr *Chitapi* further argued that the plaintiff's pleadings do not allege a legal basis entitling it to bring a claim against the defendant especially as the summons does not specify that the suit is based on either contract or delict.

Relying on the judgment of BERE J in *China Shougang International* v *Standard Chartered Bank Zimbabwe Limited* HH 310/11 where the learned judge stated, *obiter dictum,* at p 5 of the cyclostyled judgment, that there was no privity of contract between the Central Bank and a depositor at a bank.

I do not think the decision in China Shougang International (*supra*) needs to detain us at all because it is clearly distinguishable from the present case. In that case the depositor had sued its own bank and the defendant (*in casu*) was not cited as a party to the proceedings. More importantly, apart from the fact that the claim was based on a banker and depositor relationship and not on the procurement of the deposit by the present defendant, there was also no admission by RBZ that it had indeed appropriated the depositor's money.

I agree with Mr *Uriri* that the question of wrongful procurement was not placed before the court in that matter. Therefore the case is distinguishable.

In our law, it is generally accepted, and I did not hear Mr *Chitapi* argue to the contrary, that an action exists for intentional inducement of a breach of contract. In PQR Boberg, The Law of Delict, Vol 1, Juta & Co. Ltd at p 38 the point made that:-

> "It is well established that the intentional inducement of a breach of contract is an actionable wrong: see *Atlas Organic Fertilisers (Pty) Ltd* v *Pikkewyn Ghwano (Pty) Ltd* 1981(2) SA 173(T) at 202G, and the cases there cited".

In *Dantex Investments Holdings (Pty) Ltd* v *Brenner & Ors NNO* 1989(1) SA 390 (AD) at 395D GROSSKOPF JA also made that point in stating:-

> "It is clear that an interference with contractual rights can in certain circumstances constitute a delict. What is less clear is what precisely the requirements for liability are".

See also *Roux* v *Hattingh* 2012 (6) SA 428 and R.H. Christe, The Law of Contract, 3rd ed, Butterworths at p 551.

In *casu* the defendant acted in terms of s 46 of the Act. That section provides:-

> "In June and December of each year, the Governor shall submit to the Minister a policy statement containing –
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> (a) a description of the monetary policy to be followed by the Bank during the next succeeding six months, and a statement of reasons for those policies; and
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> (b) a statement of the principles that the Bank proposes to follow in the implementation of the monetary policy; and
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> (c) an evaluation of the monetary policy and its implementation for the last preceding six months".

In order to implement the policy statement given in terms of s 46 to the

effect that foreign currency balances were to be lodged with the defendant, a directive was also issued to banks in terms of s 35(1) of the Exchange Control Regulations Statutory Instrument 109/96 instructing them to immediately lodge the foreign currency balances with the defendant.

Section 35(1) of the regulations is of peremptory application. It reads:-

"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".

It was stated in China Shougang International (*supra*) that the directive given by the Governor of the defendant was invalid for want of a ministerial approval. I do not think it is necessary to discuss that issue in this case because it is accepted that the directive was given. To that extent the plaintiff's bank was obliged to comply with the directive in terms of the law. Doing otherwise would have resulted in dire consequence to it, if not the loss of its banking licence.

It is common cause that after appropriating the plaintiff's money, the defendant did not return that money and has not even begun to give any indication as when, if at all, it will repay the money. It has contented itself with hedging behind the non-existence of a contractual relationship between it and the plaintiff. The proverbial hiding behind a finger. Quite how and why the defendant could come to the conclusion that it can just acquire the money and refuse to repay it to the owner is one of the greatest unfathomable mysteries of this world.

There can be no doubt that the right to private property is one of the sacrosanct rights protected by law. There is little doubt that the plaintiff should be protected against the arbitrary deprivation of its equity deposited at Banc ABC, which institution was powerless against the defendant's directive and is now unable to perform its contractual obligations, namely paying the money to the plaintiff on demand.

To my mind, the defendant intentionally induced Banc ABC to breach its contract with the plaintiff. I have already stated that an intentional inducement of a breach of contract is actionable in our law.

As a corollary to that is the submission made on behalf of the plaintiff that the directive which led to the appropriation of the plaintiff's foreign currency balance at Banc ABC constitutes a wrongful interference with contractual rights. I agree. While it is true that the defendant is the monetary authority charged with the management of the banking sector and the formulation of banking rules, I have not been directed to any authorities entitling the defendant to proscribe the release of deposits to depositors or indeed to interfere with bankers' obligations to pay balances to their clients on demand.

As a matter of policy the security of bank deposits should forever be protected by our courts. Indeed it would be an affront to the rights of depositors if ownership of their property stored with banks and the culture of banking money instead of keeping it under a pillow were to be rendered a serious economic hazard and a ruinous activity. Our law, which protects ownership of property is founded on a rock of wisdom. For that reason the courts should be clear, consistent and firm in enforcing principles protecting deposits. Needless to say that the expropriation of export proceeds prior to dollarization which have not been compensated is one of the major factors inducing weak balance sheets of businesses resulting in poor economic performance.

I am persuaded that the plaintiff does have a cause of action against the defendant based on the twin concepts of the intentional inducement of a breach of contract and the wrongful interference with contractual rights, for wrongful it is if the monetary regulatory authority gives a directive for the appropriation of an individual's equity in a bank and then failing to make good that equity.

Even if I am wrong in that conclusion, the defendant cannot escape liability on the basis of unjust enrichment. It is now accepted that the general enrichment action is recognised in our law. See *Industrial Equity* v *Walker* 1996(1) ZLR 269(H) where BARTLETT J stated at 298 B-D:-

> "I am of the respectful view that the principal requisites for a general action on enrichment can be regarded as aptly summarised by Wouter de Vos in *Verry King saanspreeklikheid in die Suid Africkaanse Reg* (1958) as stated by Scholtens in the 1996 Annual Survey of South African Law, 150 at 152 as:
>
> '(a) the defendant must be enriched
>
> (b) the enrichment must be at the expense of another (i.e. the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment);

(c) the enrichment must be unjustified;

(d) the case should not come under the scope of one of the classical enrichment actions;

(e) there should be no positive rule of law which refuses the action to the impoverished person. Obviously these requirements can only be fulfilled if in any given case the action is based on a defined set of circumstances.'"

I am satisfied that all the requirements of unjust enrichment are met in the present case. It is also not a case that would open floodgates because, rarely do we have a situation where a depositor's foreign currency balance is appropriated the way it was in this case.

Mr *Chitapi* submitted that the plaintiff did not plead any case based on delict and that for that reason the claim should fail. I am of the view that the manner in which the plaintiff pleaded its case, predicating it mainly, on the fact that the amount claimed "was appropriated by the defendant" was wide enough to encompass the claim as it has been argued by counsel. I however, agree that it would be inappropriate, bearing in mind the banking relationship between the parties, the defendant being "a banker of banks", to direct that the money, be paid directly to the plaintiff. The correct approach would be for the defendant to return the money to Banc ABC, the plaintiff's banker.

Accordingly it I ordered, that:-

1. Judgment is hereby entered in favour of the plaintiff as against the defendant in the sum of USD 1 007 541-30 together with interest a *tempoe morae* at the prescribed rate from the date of summons to date of payment.
2. The defendant is directed to deposit the said sum of USD1 007 541-30 into the plaintiff's Banc ABC account number ZWTROJ001CALUSD0019 or any other account held by the plaintiff at that bank.
3. The defendant shall bear the costs of suit.

Atherstone & Cook, plaintiff's legal practitioners
T.H. Chitapi & Associates, defendant's legal practitioners