DEPUTY SHERIFF HARARE
versus
METBANK ZIMBABWE
and
ECOBANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 2 April 2013 & 24 July 2013

F. Girach, for the Judgment Creditor
T Mpofu, for the respondent

Opposed Application

CHIGUMBA J: These are interpleader proceedings brought by the applicant, the Deputy Sheriff of Harare, in terms of Order 30 r 205 of the High Court Rules, 1971.

The relief that the applicant seeks is for the claimant and or alternatively the judgment creditor's claim to be dismissed, with costs following the cause.

The background giving rise to this matter is as follows:

During the course and scope of carrying out his duties as Deputy Sheriff of Harare, namely the execution of a writ in the case between Ecobank Zimbabwe Limited, Borlscade Investments (Pvt) Ltd and 3 Ors, case number HC 10435/11B, the applicant attached certain funds being held in trust by Metbank Zimbabwe (hereinafter referred to as Metbank.

The writ of execution had been issued on 8 June 2012, and, according to the notice of seizure and attachment Borlscade Investments (Private) Limited (hereinafter referred to as Borlscade) was indebted to Ecobank Zimbabwe Limited (hereinafter referred to as Ecobank) in the sum of US$3 862 360, 00 in respect of capital and costs, and a total sum of US$5 431 321, 42 when interest and commission were added.

The claimant, Metbank, admitted that judgment in default was obtained by the respondent Ecobank against Borlscade, Cecil Rhanniel Chengetai Muderede and Michelle Fadzai Muderede (the debtors) under case number HC 7640/11, on 2 May 2012. Metbank averred that it entered

into an escrow agreement with Far Eastern Zimbabwe Holdings Limited, Borlscade Investments Private Limited, Metcash Trading Africa (Proprietary) Limited, and Cecil Rhanniel Muderede, in terms of which it is holding a sum of US$2 500 000, 00 in trust, for part payment of the purchase price of US$7 000 000, 00 in respect of shares in Jaggers Wholesalers Private Limited (herein after referred to as Jaggers). Metbank contended that the debtors in case number HC 10435/11B are not entitled to the US$2 500 000, 00 that it holds in the escrow account. It averred that although Borlscade and Cecil Rhanniel Muderede are party to the escrow agreement, the funds it holds are held in a joint account and do not belong to any of the joint account holders. Metbank contended that it cannot release the funds at the instance of only one of the joint account holders, and consequently instructed the Deputy Sheriff to institute interpleader proceedings in order to protect itself against a lawsuit by one of the joint account holders, in the event that it releases the funds without a determination of whether it may lawfully do so.

The respondent Ecobank, vigorously opposed the averments in Metbank's affidavit, and stated that, in May 2010, it gave Borlscade a loan in the sum of US$2 500 000,00, for the specific purpose of making a down payment for the purchase of shareS in Jaggers. The shares in Jaggers required exchange control approval to be bought or sold, as they were owned by a non resident. The respondent averred further, that the judgment that was sought to be executed by it against Borlscade arose from the loan it made to Borlscade, as aforestated, and in terms of which the parties had agreed that the US$2 500 000, 00 be held in trust by Messrs Gill Godlonton and Gerrans Legal Practitioners, pending exchange control approval of the sale of shares in Jaggers.

Ecobank contended that Borlscade and Cecil Rhanniel Muderede wrongfully caused the US$2 500 000, 00 to be removed from Messrs Gill Godlonton & Gerrans, and to be deposited with Metbank, to Ecobank's prejudice, which is why the applicant has now been instructed by Ecobank, to attach those funds in execution. Ecobank averred further that Metbank is and has always been aware that the funds it holds in an escrow account emanated from a loan given by it to Borlscade in that exact same amount. Ecobank submitted that exchange control approval of the sale of shares has not been obtained to date, that Jaggers has gone into final liquidation, and that there is no way the sums loaned to Borlscade can or ever will be utilized for their intended purpose. It is Ecobank's contention that the US$2 500 000, 00 ought to be returned to Borlscade in terms of the escrow agreement. Ecobank denies that the escrow account is a joint account, and

disputes that there are any competing claims to the funds which it claims to have validly attached.

The issues that fall for determination are:

1. What are the terms of the escrow agreement which govern the rights and obligations of the parties in the event that the agreement for the sale of shares in Jaggers fails to be concluded?
2. Which party is entitled to the monies in the escrow account?
3. Whether money which is in a bank account can be attached in execution.

Ecobank raised a point *in limine* that Metbank was barred from the proceedings because it had filed its notice of opposition out of time. It was contended that consequently Metbank was not properly before the court, unless an application for condonation and upliftment of the bar in terms of Rule 233 sub-rule (3), as read with Rule 83 and Rule 84 of the rules of this court was filed and determined in its favor. Metbank did not dispute this, it advised the court that such an application had been made by it after reading Ecobank's heads of argument where this point was made. At the hearing of the matter, it was agreed that the chamber application for condonation of late filing of opposing papers and extension of time within which to file opposing papers under case number HC 11039/13, Ref case number HC7831/12, would be heard first, and determined, before a consideration of the merits of the matter.

The matter was postponed to enable the court to locate the record in which the application for condonation had been filed. The parties subsequently reconvened before me, and I proceeded to hear argument in respect of that application.

Metbank applied for condonation of late filing of opposing papers and extension of time within which to file opposing papers, and relied on the case of *GMB* v *Muchero 2008(1) ZLR 216(S),* where GARWE JA found, at 220 E-G that, in an application such as this one, the applicant must explain the delay and thereafter convince the court that it has a *bona fide* defence on the merits. It was held further, that the court must postpone the decision on the merits pending the determination of the application to uplift the bar.

Metbank averred that it was served with interpleader notice sometime in July 2012, on a date unknown to it, because the copy which was left at its offices after service had been effected was not date stamped, resulting in it only becoming aware of the date of service through Ecobank's

heads of argument filed in the main matter. Metbank admits the time for filing its opposing papers lapsed on 3 August 2012, and that it subsequently filed the papers on 6 August 2012, one day out of time. Metbank contended that the delay was not deliberate, or willful, but was based on a genuine error arising from internal system failure. It was submitted that no prejudice would be suffered by Ecobank because of a delay of one day. Metbank expressed regret for any inconvenience caused.

Ecobank opposed the application for condonation on the basis that it was improbable that Metbank was not aware of the date when the interpleader notice was served upon it due to internal system failure. It contended that if the court accepted that such errors were reasonably capable of occurring, it ought to find that the error was nevertheless grossly negligent. Ecobank submitted that Metbank was not entitled to retain the funds that it was holding and that, it could not participate in the interpleader proceedings since it was holding the funds on behalf of others, not for itself.

According to *Herstein & Van Winsen The Civil Practise of the Supreme Court Of South Africa 4th ed at p 897-898,* the considerations that the court takes into account in considering an application for condonation include:

1. The degree of non-compliance.
2. The explanation for the non compliance.
3. The importance of the case.
4. The prospects of success
5. The respondent's interest in the finality of judgment.
6. The convenience of the court.
7. The avoidance of unnecessary delay in the administration of justice. See *Maheya* v *Independent African Church 2007 (2) ZLR 319(S).*

In Bishi v *Secretary of Education 1989 (2) ZLR 240 HC at 242G*, it was held that no one factor is inherently more important than the other. Each factor is weighed against the other and an overall assessment made.

I am unable to agree with Ecobank, that Metbank has no prospects of success in the main matter, because much turns on the court's interpretation of the escrow agreement. I am persuaded by the submission that Metbank needs to protect itself against possible litigation against it, by

any of the parties to the escrow agreement, should it wrongfully release the funds that it holds. I find that a delay of one day, while significant because of the non-compliance with the rules, in this case has not been shown to have caused serious prejudice to Ecobank. I find the explanation for the delay reasonable, the reception area of such a large institution as Metbank will occasionally experience an internal system failure such as the one described here. In my view the delay was not deliberate or wanton, the issue in the main matter is important to all the parties concerned and to members of the public in general. The sum of money involved is substantial and there should be finality in the administration of justice by determining the merits of the main matter once and for all. Having carefully weighed all the relevant factors, I hereby grant the application for condonation of late filing of opposing papers and extension of time within which to file opposing papers.

Having granted condonation, I now turn to the merits of the main matter.

The Rights and Obligations of the parties to the Escrow Agreement

The escrow agreement was entered into between 20-24 June 2011. The parties to the agreement are:

1. Far Eastern Zimbabwe Holdings Limited.
2. Borlscade Investments Private Limited.
3. Metcash Trading Africa Proprietary Limited.
4. Cecil Rhanniel Muderede.
5. Metropolitan Bank of Zimbabwe Limited.

Clause 2.2.10: defines an escrow account (in the name of the seller and Metcash), in the form of an interest bearing US denominated account to be opened by the Escrow Agent and governed by the terms and conditions of the escrow agreement.

Clause 2.2.11: states that the escrow agent is Metropolitan Bank of Zimbabwe Limited (Metbank).

Clause 1.1.12 defines the escrow monies as:

> "..an amount of USD 2 500 000,00 paid by the purchaser (in reduction of the purchase price of US$7 500 000,00) payable by it in terms of the Sale Agreement and at present retained in escrow by Gill Godlonton & Gerrans pending the grant of approvals together with all interest accrued thereon during the period of retention in escrow…"

Clause 6.4: of the escrow agreement states that:

> "The Escrow Agent shall be obliged to release the escrow monies together with interest to the Seller and to Metcash (in such proportions as they may in writing direct) immediately upon receipt by it of the necessary documentation evidencing the grant of the approvals. Save as foresaid, the Escrow Agent shall not be entitled to release the Escrow monies or any portion thereof without the joint written instructions of the Seller, or Metcash (duly represented by the seller's Attorney), the purchaser and Muderede, or an order of a competent court".

It is common cause that the escrow monies were being held as part payment for the purchase of shares in Jaggers, pending the grant of exchange control approvals, whereafter the parties were expected to authorize the escrow agent (Metbank), jointly and in writing, whether to release the monies, in what sum, and whom to release the monies to. It also common cause that this has not transpired, to date. My reading of clause 6.4 of the escrow agreement is that, unless the monies are released by way of joint written instructions, Metbank is obliged to release the money in any of three ways:

(a) In accordance with the joint written instructions of the seller and Metcash
(b) In accordance with the joint written instructions of the purchaser and Muderede
(c) Or on an order of a competent court.

Nothing in the papers before me or in the submissions made by both counsel suggests that either Metcash and the seller, or Muderede and the purchaser have instructed Metbank in writing to release any of the escrow monies, to date. That leaves one option open, that of an order of a competent court. The averment made by Ecobank that Jaggers has been placed under final liquidation, has not been challenged by Metbank. In my view the definition of escrow money in clause 1.1.12 is affected if there are no longer any shares to be purchased in Jaggers because Jaggers has been liquidated. My interpretation of the escrow agreement is that the escrow monies can be released at any time, by way of any of the stipulated methods. The release of the monies is not contingent upon the cancellation of the escrow agreement, or the agreement of sale of shares in Jaggers.

Entitlement to the funds in the Escrow Account

At the hearing of the matter counsel for Metbank argued that, when the applicant purported to attach the funds in the escrow account, he did not state that he had attached the right, title and interest in the account, belonging to any of the defendants named on the writ,

Borlscade Investments Private limited, Cecil Rhanniel Muderede, and Fadzisai Muderede (who is not a party to the escrow agreement).

It was submitted that the applicant merely stated that he had attached the judgment debtor's funds, which is incompetent at law, and renders the attachment invalid. It was submitted further, that funds in a bank account belong to the bank not to the account holder, who merely has a credit balance. It was argued on behalf of Metbank, that, a bank and its customer have a debtor-creditor relationship in terms of which the bank is loaned money for its consumption, subject to availability on demand. Money deposited in an account therefore belongs to the bank. See *Zimra & Anor* v *Murowa Diamonds Private Limited 2009 (2) ZLR 213 at 220 B-D* where it was stated that:

> "As stated by MCNALLY JA in *Meman & Anor* v *Controller of Customs & Excise 1987 (1) ZLR 170(S) at 173F* "strictly speaking a person does not own the money in his bank account".

And at 174A where the same court stated that:

> "…money in your bank account is not strictly your money but it is money at your disposal, and that is so whether you have earned it or been given it, or borrowed it…"

Metbank's submissions are also supported by the case of *Kircos* v *Standard Bank of South Africa Limited 1958 SA58 SR at 60A,* where the court states that:

> "The relationship between banker and customer is that of debtor and creditor Foley v Hill 1848(9) E.R 1002. The bank undertakes to receive money and collect bills for its customers account. The bank borrows the proceeds so obtained and undertakes to repay them to the customer on demand."

The court is being asked to declare the purported attachment of the escrow monies invalid because money in an account held by a bank is incapable of attachment, being fungible. It was submitted that the judgment debtors do not have an account with Metbank, but that if they did, only their right, title or interest in that account was capable of attachment in execution, at law, not the actual funds. I accept that these submissions are correct. The purported attachment of funds in an account held at Metbank is incompetent at law and therefore invalid. Applicant ought to have attached the right title and interest in the account, on behalf of the judgment creditor. Further the account was not in the name of any of the judgment debtors, so it was incompetent to purport to attach that account to satisfy the judgment debt.

However, I am inclined to agree with the submission made by Ecobank that the matter ought to turn simply on the interpretation of the escrow agreement. An escrow account, being a trust account, is different from normal and ordinary bank accounts. Metbank, as the escrow agent, is bound by the stipulated terms of the escrow agreement, and cannot invoke normal banking laws or practices to override or nullify the escrow agreement. According to the escrow agreement, there is a sum of US$2 500 000, 00 being held in trust by Metbank, which sum may be released in accordance with strict procedures agreed by the parties. The funds were deposited with Metbank for the purpose of part payment for shares in Jaggers. This court has accepted that Jaggers went into final liquidation and can no longer sell its shares as agreed by the parties. Once the possibility that the sale will go through falls away, in my view only the Purchaser (Borlscade) and Muderede can validly instruct Metbank what to do with the escrow monies. The money reverts back to Borlscade and Muderede, two of the judgment debtors, who borrowed it from Ecobank.

In the absence of written instructions to Metbank on how or when to release the money from Borlscade, the purchaser and Muderede, then, the escrow monies can validly be released in accordance with an order of a competent court such as this one. According to clause 6 of the escrow agreement the parties agreed that a court of competent jurisdiction could instruct Metbank, as the escrow agent, to release the escrow monies. Metbank did not deny that the escrow monies came from the loan given to two of the judgment debtors by Ecobank. Metbank did not deny that the escrow monies ought to have been held by Messrs Gill Godlonton & Gerrans. No explanation was given as to how or why the funds were deposited with Metbank, contrary to the agreement between the parties. Neither Bolscade nor Cecil Rhanniel Muderede saw fit to explain what had transpired. The court is left with unchallenged submissions by Ecobank that the motive for depositing the funds with Metbank was to cause prejudice to Ecobank.

In my view the balance of equities demands that this court makes an order that the escrow monies US2 500 000,00, together with interest which has accrued thereon from the date of deposit to date, be transmitted to Ecobank by Metbank, in terms of clause 6 of the escrow agreement. It is just and equitable that Ecobank recovers the money which it loaned and

advanced to Borlscade and Muderede, and which all the parties accept is currently deposited in an escrow account with Metbank. It is hereby ordered as follows:

Order

1. The application for condonation and extension of time within which to file opposing papers in case number HC11039/12, Ref case number 7831/12 be and is hereby granted, with costs.
2. The claimant's claim in case number HC7831/12, Ref case number10435/11B be and is hereby dismissed.
3. The costs of suit, on an ordinary scale, shall be paid by the respondent.

Kantor & Immerman, claimant's legal practitioners
Atherstone & Cook, Judgment Debtor's legal practitioners