MBCA BANK LIMITED
and
AFRICAN BANKING CORPORATION
OF ZIMBABWE LIMITED
and
CENTRAL AFRICAN BUILDING SOCIETY
and
NEDBANK LIMITED
versus
ZIMASCO (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 27 January, and 16 February, 2016

Urgent Chamber Application

T. Mpofa, for the applicants
T. Magwaliba, for the respondent

MANGOTA J: The applicants which are financial institutions of repute moved the court to grant them the following order:

> "INTERIM REFLIEF GRANTED
>
> Pending determination of this matter, it is hereby ordered that:
>
> 1. The respondent ceases diminishing the value of the slag dump situate at 1 Birmingham Road, Mbizo Township, Kwekwe being the security provided by it for the applicants or in any way working on the said slag dump.
>
> 2. The respondent provides the applicants with the information requested by the applicants in respect of the valuation of this security (slag dump) described in para 1 above.
>
> 3. The respondent takes all the action necessary to enable the applicants to perfect their security in the slag dump pending the return day of this matter.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The provisional order be and is hereby confirmed.
2. The respondent is interdicted from working on the slag dump or in any way diminishing the slag dump situate (*sic*) 1 Birmingham Road Mbizo Township KweKwe which it presented to the applicants as security.

3. The respondent take all the steps necessary to place the control of the slag dump with the applicants.

4. The respondent takes all the steps necessary to enable each and one of the applicants to perfect their security on the slag dump.

5. The respondent pays the applicants cost (*sic*) of suit at legal practitioner and client scale".

BACKGROUND

The applicants advanced various sums of money to the respondent. They did so as separate entities and on different dates. They, as a group, advanced to the respondent money which was in excess of $ 30 million.

The respondent provided the slag dump which was at number 1 Birmingham Road, Mbizo Township, KweKwe as security for the loans which the applicants advanced to it. It registered a Notarial Special Covering Bond for each loan which was advanced to it.

URGENT APPLICATION

On 21 December 2015, the respondent filed an *ex parte* application with the court. It applied for a provisional order for judicial management. Its application was filed under case number HC 12220/15.

The applicants became aware of the *ex parte* application. They noted that the slag dump was not reflected on the respondent's balance sheet. They opposed the *ex parte* application which this court heard and dismissed on 13 January, 2016.

After the dismissal of the *ex parte* application, the applicants, acting as a group, called the respondent to a meeting. This took place on 15 January, 2016 at 10:25 am and at the third applicant's offices – i.e Northridge Park, Harare. At the meeting the contents of which are reflected in Annexure, the applicants made five (5) demands which they said the respondent had to meet.

On 16 January, 2016 the respondent's legal practitioners addressed a letter to the applicants' legal practitioners. Annexure G which the applicants attached to their application was the letter in question. The contents of the annexure showed that the respondent would not, and did not want to, comply with the applicants' demands. The attitude of the respondent triggered the present application.

The applicants' statement was that the representations which the respondent made to each of them persuaded each to advance to it a certain sum of money. They said the representations were to the effect that the slag dump which the respondent provided as security for the loan(s) advanced was not less than $60 million. They submitted that the exclusion of the slag dump from the respondent's balance sheet was a source of substantial concern to each of them. They said they were not certain as to what the value of the slag dump was. They stated that they feared that each of them might have acted on incorrect information as to the true value of the slag dump when they each advanced a loan to the respondent. They said they feared that the slag dump was or is valueless. They submitted that the respondent's continued work upon the slag dump which it provided to them as security for the loans advanced diminishes the security to a level which would not allow them to recover against the same. They, therefore, moved the court to grant them the order(s) which is or are, stated in the initial portion of this judgment.

The respondent opposed the application. It stated, *inter alia*, that the relief which the applicants were seeking was incompetent. It submitted that the notarial special covering bonds which it provided as security for each loan advanced did not, at law, entitle the applicants to the relief which they were seeking. It said the applicants' security was perfected when the notarial special covering bounds were registered in the applicants' favour with the Registrar of Deeds. It stated that the applicants were seeking a relief which affected the whole of the slag dump when the first and the third applicants were granted rights in respect of specified volumes of ferrochrome in the slag dump and the second and fourth applicants were granted rights in respect of unspecified volumes of ferrochrome in the slag dump. It submitted that the application was not urgent and the applicants did not treat the same with any urgency.

SUBSTANCE OF APPLICATION

One Allan Mutenda was the deponent to the applicants' founding affidavit. He said he was the Chief Risk Officer of the first applicant. He stated that he was authorised to swear to the affidavit. He did not tell the court of the person or entity who or which authorised him to

swear to the affidavit. He produced no authority from the first applicant or from any of the four applicants to show that the first, or second, or third or fourth applicant or all of them conferred authority upon him to depose to the affidavit. It is on that basis alone that the court remains of the view that the application is not properly before it as it stands on nothing.

The applicants stated, in the application, as follows:

> "The applicants could not approach this Honourable Court for the relief now sought prior to this day on account of the outstanding application for Judicial Management brought by the respondent and the applicants have acted without delay following the dismissal of the respondent's application. The applicants have made demands on the respondent and on 15 January, 2016 met with the respondent for over 2 and a half hours in an attempt to obtain the co-operation of the respondent to the applicants' requests".

The applicants' stated position, in a summarised form, was or is that:

(a) the respondent applied for Judicial Management on 21 December, 2015;

(b) they became aware of the application on 23 December, 2015;

(c) they immediately filed their opposing papers to the application;

(d) they did nothing further as they had to await the outcome of the respondent's application for Judicial Management;

(e) the application was dismissed on 13 January, 2016 – and

(f) on 15 January, 2016 they moved swiftly in an effort to bring the respondent to account for the slag dump which it provided as security for the loan(s) they advanced to it.

What the applicants sought to convey was that they respected the respondent's application under case number HC 12220/15 for Judicial Management. They said they waited for that application to take its course to its final conclusion. They, in other words, gave the distinct impression of entities which respected the court and its process.

On 16 January, 2016 the respondent's legal practitioners addressed a letter to the applicants' legal practitioners. The letter, in part, dealt with the issues which the parties had discussed on 15 January, 2016. Paragraph 5 of the letter is relevant. It reads:

> "Another application for a provisional judicial management order has since been filed under case number HC311/16 and same has been set down for hearing on the unopposed motion roll for 20th January, 2016." [emphasis added]

The applicants filed their opposing papers to the respondent's application under case number HC 311/16. They did so on 19 January, 2016. They stated in para 4 of their opposing papers, as follows:

> "The lender banks are aware of the application brought by the applicant for a provisional order placing it under judicial management and for the appointment of a provisional judicial manager."[emphasis added]

That knowledge on their part notwithstanding, the applicants filed the present application on 26 January, 2016. One, therefore, wonders if their inaction in respect of the application under case number HC 12220/15 was out of the respect which they said did hold for the court and its process or it was as a result of inadvertence on their part.

It is evident that the applicants did not, and do not at all, have any respect for the court and its process. The reasons which they advanced for their inaction when the application under case number HC 12220/15 was filed do not hold. They could have acted as they did when the respondent filed its second application for judicial management.

The respondent stated, and in the court's view correctly so, that the present application was not urgent. The applicants' inaction was nothing else other than what is normally referred to as self-created urgency. They did not act from 23 December, 2015 when the cause of action arose and they only did so one full month after the event.

The applicants attached Annexure F to their application. The annexure is a minute of the meeting which they held with the respondent on 15 January, 2016. In the meeting, the applicants, working as a group, sought to place the respondent on certain terms in regard to the slag dump which the latter provided as security for the loan which each applicant advanced to it.

The applicants said they spoke as a group following an inter-creditor arrangement or agreement which they concluded between, or amongst, them. They did not state if the arrangement or agreement was verbal or in written form. They did not state if the respondent was part of the arrangement or not. They did not state the date on which that arrangement or agreement was concluded, if it was. They did not produce any document which showed that such an arrangement or agreement was negotiated and agreed upon as between the parties.

What came near to the arrangement or agreement was the minute, Annexure F. The annexure cannot, however, be elevated to the status of an inter-creditor agreement or arrangement. It is a record of what took place between the parties on 15 January, 2016 and nothing more than that.

The respondent said no inter-creditor arrangement or agreement was concluded between the parties. Its unchallenged statement was that the applicants delayed the

finalisation of the inter-creditor agreement because of numerous changes to the terms of the draft agreements which were circulated.

The respondent's unchallenged statement takes its case to the next stage. The stage is whether or not, in the absence of an inter-creditor arrangement or agreement, the applicants' can sue as a group. They, as the respondent stated, collapsed their various contracts into one composite contract. They now seek to exercise what the respondent termed some rights in terms of the combined contract. Principles of the Law of Contract do not allow the applicants to work as a group against the respondent. They have no leg to stand upon in that regard. Each one of them concluded its contract with the respondent. It did so at a date which was different from the dates of the contracts of the remaining three applicants. It cannot, therefore, join hands with the other applicants to sue the respondent on the basis that the latter provided to it, as it did to the remaining applicants, the slag dump as security for the loan it advanced to the respondent.

The applicants stated in so many words that the respondent was or is in financial distress. They also stated that the slag dump which the respondent provided as security might be valueless. They, however, did not indicate that they wanted to sue the respondent for the recovery of what they are owed. Their conduct in the mentioned regard did not, and does not, resonate with entities which want to protect their interests.

It is on the basis of the foregoing matters and others which have not been stated herein that the court remains of the view that the urgent chamber application was devoid of merit. It cannot succeed. It is, accordingly, dismissed with costs.

Gill, Godlonton and Gerrans, applicants' legal practitioners
Magwaliba and Kwirira, respondent's legal practitioners