

RM MINING AND INDUSTRIAL ZIMBABWE (PRIVATE) LIMITED
versus
STANBIC BANK ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 6 & 8 January 2015

Urgent chamber application

A. Masango, for the applicant
R.F. Mushoriwa, for the first respondent

MAFUSIRE J: Following certain concerns that I had raised on the form and content of the urgent chamber application herein, the applicant decided to withdraw it. However, it insisted that each party should bear their own costs. On the other hand, the respondent insisted not only on its costs, but also that they be paid on the higher scale. After full argument on costs I awarded them at the higher scale. Below are my reasons, most of which I had given *ex tempore*.

The urgent chamber application had been for an order that the respondent (“*the bank*”) should uplift or remove the embargo that it had unilaterally placed on the applicant’s account with it. The applicant’s deponent, one Richard Mayiya (hereafter referred to as “*Richard*”), was a director of the applicant. He claimed that two other directors, a husband and wife team based in South Africa, had resigned. He said that such a development had been communicated to the bank with instructions to alter the signing mandate originally given to it. The mandate had included those directors. The bank had initially complied. Richard said he had made some four withdrawals single handedly. However, the one ex-director, the husband, one Reuben Munsamy (hereafter referred to as “*Reuben*”), had subsequently written to the bank on applicant’s forged letter-head, denying that he had resigned from the applicant and that he was still a signatory to the account. The letter had warned the bank of grave consequences if it should honour requests for withdrawals on the basis of Richard’s single signature.

The bank had filed a notice of opposition objecting to the urgent chamber application on both technical and substantive grounds. But since the application was withdrawn it became unnecessary to argue it on the merits, except in so far as they had a bearing on the question of costs.

At the hearing the applicant had wanted a postponement. It transpired that as they had been waiting to be called into chambers the parties had had an opportunity to discuss the matter. It seems the issue had finally crystallised into whether or not Reuben had indeed resigned as a director of the applicant and was no longer concerned with the manner the applicant's account with the bank would be run. The applicant wanted a postponement to present its second resolution that allegedly would prove that Reuben had indeed resigned. The first resolution was the one on which the application had largely been predicated upon. It had been challenged.

The bank was opposed to a postponement. Among other things, it said the applicant had had ample opportunity to produce proof of Reuben's resignation and that the purpose for which the applicant wanted the postponement, namely to produce another resolution, would not change the complexion of the case. It seemed the bank wanted Reuben himself to provide the proof of his resignation and to confirm the alteration of the signing arrangements. There was a stalemate.

Mr *Masango*, for the applicant, formally moved the application for a postponement. Mr *Mushoriwa*, for the bank, responded. It was before Mr *Masango* could reply that I raised my concerns in order that he could take them into account in his reply. It had seemed to me, even before I had read the notice of opposition, that the urgent chamber application was defective in a number of ways. So I felt if the application was to be postponed I had to be satisfied that it was regular in the first place. It was at that point that the applicant decided to withdraw it. I felt it was a decision well-taken and I commended Mr *Masango* for it.

The applicant's grounds for insisting that each party should bear their own costs was that the bank's action in "*freezing*" its account had been taken unilaterally; that it had not afforded the applicant a chance to make representation and that there had been no justification for such action given that proof of Reuben's resignation, in the form of a Form CR14, had been furnished to the bank. Furthermore, the bank must have initially accepted the applicant's position because Richard had made four withdrawals soon thereafter before the embargo had been placed.

In spite of applicant's submissions I not only awarded the costs against the applicant but also on the higher scale. My reasons were these.

The urgent chamber application was defective from the outset. It had not been in Form No. 29 of the Rules of this court as required by the proviso to r 241(2): see *Zimbabwe Open University v Mazombwe*¹; *Minister of Higher & Tertiary Education v BMA Fasteners (Private) Limited & Ors*² and *Base Minerals Zimbabwe (Private) Limited & Anor v Chirosva Minerals (Private) Limited*³. Among other things, the grounds for the application had not been set out on the face of the application.

The certificate of urgency was also defective. It did not comply with r 244. Among other things, it omitted the most basic of information on which the legal practitioner who had certified the matter to be one of urgency had based her conclusions on. Incidentally, she happened to be the same legal practitioner of record for the applicant – an aspect that I did not take issue with despite the respondent's protestation. Virtually all the averments in the purported certificate of urgency had been arguments on the merits of the case, essentially why the bank had to be ordered to uplift the embargo.

In *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd*⁴ it was held that the reason behind the certificate of urgency is that the court is only prepared to act urgently, in a matter where a legal practitioner is involved and has given his or her assurance that such treatment is warranted. The legal practitioner must apply his or her mind and judgment to the circumstances of the case and reach a personal view that the matter is urgent. He or she must support his or her judgment with reasons.

Apart from the form, the urgent chamber application was also defective in substance. Among other things, Richard's main proof that Reuben had stepped down was some resolution allegedly reached on 24 October 2014. However, this document clearly referred to Reuben's removal from a different entity altogether, an entity that was based in a different country altogether, South Africa. Richard had alleged that the applicant, known as RM Mining and Industrial Zimbabwe (Private) Limited, and that the other entity, known as RM Mining and Industrial South Africa CC, had a "*common shareholding*", whatever that meant. However, the two being completely different entities despite their names sharing the same

¹ 2009 (1) ZLR 101 (H)

² HB 42-14

³ HH 559-14

⁴ 1998 (2) ZLR 301 (HC)

root, it was not explained why Reuben's alleged resignation from the South African entity would automatically be a resignation from the applicant. Mr *Masango* argued that the applicant had subsequently updated its Form CR 14 to align with the new development and that it was such proof as had been submitted to the bank. However, Reuben, in a communication to the bank which was part of the applicant's papers, had denied that he had resigned. Under such circumstances it should have been obvious to the applicant that the only sensible thing for the bank to have done would be to embargo the account.

Another document submitted by the applicant as proof that Reuben had resigned and that the bank had seemed to accept that fact, was an extract of a bank statement of the applicant's account. It showed some debit and credit entries between 13 November 2014 and 16 December 2014. The applicant alleged that communication to the bank of Reuben's alleged resignation had been on 10 November 2014. However, nowhere on the bank statement did it show that the transactions had been on Richard's single signature. Furthermore, given that Reuben's warning to the bank had been on 16 December 2014, it made sense that the bank immediately placed the embargo. The applicant could not rationally expect the bank to continue honouring Richard's unilateral withdrawal instructions in the face of Reuben's warning. For the applicant to have mounted an urgent application under such circumstances was rather irresponsible. That was not all.

It was manifestly untrue for the applicant to allege in its application that the bank had embargoed its account without warning. Its legal practitioners had written to the bank on 18 December 2014 demanding the removal of the embargo. The bank had responded on 23 December 2014. It advised of Reuben's communication and of the fact that it had informed Richard about it. It had asked Richard to provide resolutions and other documents to confirm Reuben's alleged resignation. The bank had also expressly advised Richard that the two entities had been separate and that the document that it had initially been furnished with had been in respect of the South African entity and that it was irrelevant. Instead of dealing with the banks' concerns, the applicant had rushed headlong with its urgent chamber application.

The draft provisional order sought the same relief in both the interim and final orders. In both instances it was in essence a final order being sought. As I asked Mr *Masango*, was it not obvious that the blocking of the account by the bank was but a symptom of the underlying festering dispute between the parties? There had been no indication anywhere in the application that the applicant had brought, or was planning to bring, substantive

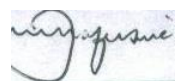
proceedings to end the dispute so as to pave way for the opening of the account. Instead, the applicant had precipitously filed the urgent chamber application which avoided the main dispute. It should have been obvious to the applicant that there had been a serious misjoinder of parties and that the enormous dispute of fact, namely whether or not Reuben had stepped down, could not possibly be resolved on the papers, let alone in summary fashion as is inevitable in an urgent chamber application.

Finally, when I had got seized of the matter on New Year's eve, literally some few hours before the demise of 2014, I had agonised over whether or not to set it down on account of the numerous defects apparent on the face of the application. Eventually, I decided I would give the applicant its day in court. But seeing that the application was against the bank only, and that this was a party that would not help bring out the full story, I expressly directed that the application and notice of set down be served, not only on the bank, but also on the other directors, and that proof of such service should be filed or produced at the hearing. Furthermore, realising that the other directors may well have been out of the country and in their home country, South Africa, I further directed that if proper service was not going to be possible, given the short time available, at least the applicant had to inform the other directors of the application and of the date and time of the hearing.

Surprisingly, at the hearing, no proof of service of the application and or of the notice of set down was available. Mr *Masango* advised that in response to my directive, another meeting of the applicant had been convened at which Reuben had resigned again. He said he had a copy of the resolution to that effect and would produce it if it was necessary. That was hardly satisfactory. We were going round in circles.

In the end I considered that there was no reason why the bank had to be put out of pocket in respect of such a vexatious application. I felt costs on the higher scale were justified.

8 January 2015



Musunga & Associates, applicant's legal practitioners
Mawere & Sibanda, respondents' legal practitioners