

ZIMBABWE SILICATE (PRIVATE) LIMITED
(In liquidation herein represented by Cecil Madondo the appointed liquidator)
versus
INFRASTRUCTURAL DEVELOPMENT BANK OF ZIMBABWE
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 March 2015 and 13 May 2015

Opposed application

T Mpofu, for the applicant
O Mutero, for the 1st respondent

MUREMBA J: The applicant is a company which is now under liquidation, the liquidator being Cecil Madondo. The first respondent is a bank.

Sometime in 2009 before the applicant went into liquidation it was given a revolving credit facility of up to US\$30 000.00 by the first respondent. The facility was guaranteed by Zimbabwe Glass Industry (Pvt) Ltd (hereafter referred to as the guarantor.)

The applicant is a subsidiary company of the guarantor.

The applicant failed to repay part of the loan resulting in the first respondent obtaining a court order under case number HC 6593/11 against both the applicant and the guarantor on 24 April 2013. However, by the time that court order came out, the applicant had been placed under liquidation on 21 March 2012. Consequently the first respondent decided to enforce the court order against the guarantor. It went on to have the guarantor's motor vehicles attached for the purposes of having them sold in order to satisfy the debt. The Sheriff of the High Court attached the motor vehicles on 5 June 2013.

The guarantor's legal practitioners negotiated for the suspension of execution promising to settle the debt on terms but the terms were breached thereby causing the first respondent to resume execution. The motor vehicles that had been attached were removed for sale.

However, before the motor vehicles were sold the applicant's liquidator Cecil Madondo entered into negotiations with the first respondent for the suspension of the sale and the release of the motor vehicles to the guarantor. Cecil Madondo and the first respondent agreed that an investment account whereby the applicant would deposit an amount which was equivalent to the outstanding debt would be opened. The following e-mail correspondence between Tsitsi Majoko of Sawyer Mkushi, the legal practitioners of the first respondent and Cecil Madondo the applicant's liquidator is relevant. On 8 October 2013 Tsitsi Majoko sent an e-mail to Cecil Madondo which said,

“you had been requested to deposit an amount equivalent to Zim Silicates Loan balance in Treasury Department, and this has not been the case. Zimglass are therefore supposed to meet the deadline given or else lose the vehicles which will be disposed of if you fail to honour the agreement in terms of our discussion, last week.”

On 9 October 2013 Cecil Madondo wrote back to Tsitsi Majoko saying,

“We write to confirm that a total investment of US\$32 310.42 has since been completed today as per the resolution dated 02 October 2013 by Zimglass Industries Limited. We kindly request you to facilitate the release of assets (vehicles) to Zimbabwe Glass Company Limited top management at the earliest possible time, please.”

The Zimbabwe Glass Industries Limited resolution of 2 October 2013 which the applicant's liquidator was referring to in the e-mail had a history to it and the history was as follows:- The court order under case number HC 6593/2011 against the applicant and the guarantor had a total sum of \$41 533.92. The guarantor made some payments leaving a balance of US\$32 310.42. The first respondent had the guarantor's motor vehicles attached for the purpose of satisfying that outstanding amount. The guarantor being one of the creditors of the applicant and having already lodged a claim of \$365.682.00 against the applicant through the second respondent, the Master of the High Court and which claim had been provisionally accepted at the second meeting of creditors held on 27 February 2013 resolved at a board meeting held on 1 October 2013 that the applicant's liquidator be authorised to pay liquidation proceeds due to the guarantor from the applicant directly to the first respondent to facilitate the release of the attached motor vehicles. This board resolution was signed on 2 October 2013 and was brought to the attention of the applicant's liquidator.

It was on the basis of this board resolution that the applicant's liquidator negotiated with the first respondent for the release of the guarantor's attached motor vehicles. The opening of the investment account was then agreed upon as a condition precedent to the release of the guarantor's motor vehicles. The investment account was duly opened in the

applicant's name and the sum of US\$312 310.42 which was an amount equivalent to the outstanding debt by the guarantor to the first respondent was deposited into that account.

When the applicant's liquidator entered into these negotiations for the release of the guarantor's motor vehicles he was hoping that he was going to pay the guarantor's outstanding debt using the liquidation proceeds due to the guarantor. Upon such payment of the debt the first respondent was going to release the funds of the applicant from the investment account.

Unfortunately on 18 September 2013 the guarantor's claim of \$365 682.00 as a creditor against the applicant was challenged by 2 former employees and creditors of the applicant on the basis that the guarantor as the holding company of the applicant had not declared all assets of the applicant. The objection was upheld by the second respondent who is the Master of the High Court. No appeal was made against it. As a result the guarantor was removed from the applicant's list of creditors. Pursuant to that the first respondent's debt could no longer be paid by the applicant's liquidator.

Following the dismissal of the guarantor's claim against the applicant by the second respondent, the applicant's liquidator wrote to the first respondent on 30 September 2014 asking it to release the invested funds. The first respondent refused to release the funds. This is what has led the applicant to approach this court. The applicant is seeking an order against the first respondent for the release of these funds.

It is the applicant's contention that the first respondent has no right to withhold the funds because

- a) they belong to the applicant
- b) the amended final and distribution account for the applicant's creditors was finalised by the second respondent and the creditors are due to receive their share of proceeds in liquidation in terms of s 283 of the Companies Act [*Chapter 24:03*]. The applicant's money that was invested by the liquidator is legally due to be distributed to the applicant's creditors.
- c) the refusal by the first respondent to release the funds is prejudicing the applicant's creditors
- d) the first respondent has no legal basis or right to refuse with the money.

The first respondent is opposed to the applicant's claim citing the following reasons.

- a) The investment was made as a form of security pending settlement of the debt that was still outstanding from the guarantor. Settlement of the debt was to be made

either from that investment or from other sources. The debt has not been settled and therefore the investment cannot be redeemed.

- b) In entering into the agreement which led to the opening of the investment account the applicant's liquidator had misrepresented to the first respondent that the liquidation and distribution account's inspection period had expired and that there were no challenges thereto. In support of this contention the first respondent attached Annexure 1 to its opposing affidavit. Annexure 1 is an e-mail that the applicant's liquidator wrote to the first respondent on 30 September 2013 saying that the First Interim Liquidation and Distribution Account period of inspection had been completed on 5 September 2013 and that the second respondent was attending to the confirmation of the said liquidation account. He indicated that he anticipated that the process would take four weeks. He made an undertaking to pay the guarantor's outstanding amount of US\$ 32 310.42 upon confirmation of the liquidation and distribution account.
- c) As a result of the said misrepresentation by the applicant's liquidator it suspended execution against the guarantor and released the guarantor's motor vehicles it had attached. This was to its prejudice because the guarantor has since been placed under judicial management now. The first respondent laments that it could have recovered its money from the sale of the motor vehicles it released back to the guarantor.
- d) Because of the misrepresentation made by the applicant's liquidator that the inspection period had expired and that there were no objections to the liquidation and distribution account resulting in the release of the motor vehicles, the applicant is estopped from claiming the release of the funds.

After the first respondent filed its notice of opposition and opposing affidavit the applicant filed an answering affidavit. It started by raising a preliminary point that the deponent to the first respondent's opposing affidavit Gregory Mapfuma Mapfumira who is employed as the first respondent's Head of Credit Control had no authority to depose to that affidavit. It argued that there is neither a resolution by the first respondent nor any explanation which justifies his authority to depose to the affidavit on behalf of the first respondent. It was submitted that on that basis alone the opposing affidavit was fatally defective warranting the matter to be treated as an unopposed matter.

I will dismiss this point *in limine* for the following reasons. While it might have been prudent and wiser for the deponent to the opposing affidavit to attach proof of authority by the first respondent to depose to the affidavit, the omission thereof is not fatally defective to the extent of having this matter treated as an unopposed application. As has been held in a plethora of cases the need for a deponent to attach proof of authority that he has been authorised to represent the company is largely necessitated by the need to protect the other party from being prejudiced as a result of litigation. Prejudice may arise in situations where the company being represented by a deponent turns around and says it never authorised the deponent to act on its behalf and as such it was never a party to the proceedings. In *Total Zimbabwe (Pvt) Ltd v The Power Coach Express (Pvt) Ltd* 2010 (2) ZLR (7) GOWORA J said that if such a scenario was to happen the other party would find itself unable to recover its costs or give effect to the judgement if it has succeeded. GOWORA J went on to say;

“My reading of the authorities doesn’t therefore lead to me conclude that in every case where a company litigates, it is necessary to produce a resolution to prove such. Where a minimum of evidence has been adduced, as is the case here, establishing that the company has set litigation in process, in the absence of some evidence from the respondent pointing to a lack of authority for the litigation then in those circumstances, the court should not require the production of a resolution”.

In *casu* Gregory Mapfuma Mapfumira is employed by the first respondent as Head of Credit Control. He indicated in the affidavit that as such he is authorised to depose to the affidavit for and on behalf of the first respondent. He further said that the facts contained therein are within his personal knowledge. The e-mail correspondence which happened between the applicant’s liquidator and Tsitsi Majoko and Majaya Katoma representatives of the first respondent was all copied to Gregory Mapfuma Mupfumira. This is apparent from Annexure 1 which is attached to the first respondent’s opposing affidavit. On 8 October 2013 Gregory Mapfuma Mupfumira personally wrote an e-mail to the applicant’s liquidator, reiterating the first respondent’s position in respect of the condition upon which the guarantor’s motor vehicles would be released.

In terms of r 227(4) (a) of the rules of this court an affidavit should be deposed to by a person who has personal knowledge of the averments he makes. It need not be based on hearsay. See also *Bubye Minerals (Pvt) Ltd and Anor v Rani International Ltd* 2007 (1) ZLR 22(S).

The e-mail correspondence shows that the averments which were made by Gregory Mapfuma Mupfumira are within his personal knowledge. It also shows that he had always

been involved in the negotiations which resulted in the opening of the investment account and the release of the attached motor vehicles from the beginning to the end. In the circumstances and as was said by ADAM J in *Direct Response Marketing (Pvt) Ltd v Shepard* 1993 (2) ZLR 298 (H) to uphold the point *in limine* in relation to lack of authority on the part of the deponent would be carrying formality too far. See also *Thorne v Retail Traders Inquiry, Bureau and Anor* 1936 TPD 310 wherein it was held that it is sufficient for the deponent to say that he is authorised to depose to the affidavit and that all facts contained therein are within his or her personal knowledge.

For the above reasons I hereby dismiss the applicant's point *in limine*.

Merits of the case

Basically two issues determine the outcome of this case and they are as follows:

- (a) Whether or not the investment account was opened as a form of security for the debt owed by the guarantor.
- (b) Whether or not the first respondent has a right to refuse to release the funds to the applicant.

I will now turn to deal with the issues.

(a) Whether or not the investment account was opened as a form of security for the debt owed by the guarantor

Firstly, it was argued for the applicant that money or cash cannot be used as a form of security. However, Advocate *Mpofu* did not refer to any authority for that averment.

In *Paget's Law of Banking* 9th ed p 460 it is stated that money can be used as security. Though this is in relation to money that is advanced by a bank to a barrower, I find it relevant and applicable in the present case.

It is said:

“Cash, such as moneys on deposit, may be used as a security for advances quite apart from its availability for set off arising by operation of law. By agreement cash may be made available to cover the indebtedness or other liability of the depositor or a lending to a third party. the banker may be given a specific right of set off.... The banker may exercise a set off in circumstances which should be made clear when the lending is agreed to, by indicating, preferably in writing, when the right should arise”.

The above is a clear illustration that money can be used as security. In *casu* what remains to be seen is whether or not the investment account was opened as a form of security for the guarantor's indebtedness.

It is clear from the e-mail correspondence that happened between the applicant's

liquidator and the first respondent's employees namely Tsitsi Majoko, Majaya Katoma and Gregory Mpfuma Mupfumira that had the investment account not been opened by the applicant's liquidator, the first respondent would not have released the guarantor's motor vehicles that had been attached. It was also agreed that the investment account have an amount equivalent to the amount owed by the guarantor. See Gregory Mupfumira's e-mail of 8 October 2013 addressed to the applicant's liquidator. It is annexure J of the first respondent's opposing affidavit.

The major problem that surrounds this issue is that nowhere in the papers that are before me is it stated in black and white that the invested funds were to act as a form of security for the debt. The agreement to have the investment account opened was never reduced into writing. As a result the conditions attached to that investment account were not written down. That the opening of the investment account was a condition precedent to the release of the guarantor's motor vehicles can only be deduced from the e-mail correspondence that happened between the parties. That e-mail correspondence is found on Annexures I, J and K to the first respondent's opposing affidavits. However, none of these e-mails state that the investment account was a form of security.

Now the problem that I am faced with is that the parties are not in agreement on what the purpose of the funds was. On one hand the applicant's liquidator says that the funds were meant to show that the applicant as a company in liquidation had sufficient funds to pay the first respondent upon the approval of the guarantor's claim. The applicant's liquidator stated that it had always intended to use the guarantor's dividends to pay off the debt that was owing to the first respondent. He further submitted that the opening of the investment account was also a way of safe keeping the applicant's funds. He said that if the money/funds had been meant to be security then the first respondent would have forfeited the investment when the second respondent disapproved the guarantor's claim. He argued that the fact that this did not happen means that the money was not invested as a form of security.

On the other hand the first respondent argued that the investment account was opened as a form of security for the debt by the guarantor. It stated that as such the funds were only redeemable upon settlement of the debt. The first respondent argued that had it not been for the investment account which was opened as a form of security it would not have released the motor vehicles it had attached.

In the absence of an agreement which clearly stipulates that the funds were invested as security I will find in favour of the applicant that the money was not invested as a form of

security. I believe that if it was a form of security then an agreement would have been made by the parties to the effect that if the debt was not paid or if the guarantor's claim against the applicant was disallowed the invested funds would immediately be forfeited to pay the debt. From the submissions made it appears that no such agreement was made. The first respondent was notified on 30 September 2014 by the applicant's liquidator that the guarantor's claim was rejected by the second respondent and that the guarantor was not receiving any dividend from the liquidation of the applicant. Surely if this money was held as security, by now the first respondent would have forfeited it or transferred it from the investment account to pay the debt.

It is a fact that the first respondent is still keeping that money in the investment account. It is busy churning out statements to the applicant monthly saying that if no instructions to withdraw the funds on maturity date are given the investment will be rolled over for the same period at the prevailing money market rates.

It is also a fact that nowhere in the opposing papers does the first respondent say for how long it is going to keep this money in the applicant's investment account. It does not explain why it is continuing to keep the money without using it to set off the debt that is owing if indeed the funds were deposited as a form of security. The first respondent does not state the conditions that are attached to the investment account.

In the absence of an agreement that the money was invested as a form of security and in the absence of a clear explanation of the terms and conditions attached to the security and in the absence of a good explanation as to why the first respondent has failed to use that money from September 2014 to date to set off the debt I cannot make a finding that the money was invested as a form of security.

It appears to me that the bank's intention was to have the investment account opened as security for the debt. However, It took things for granted that the guarantor's claim would sail through since the liquidator had made an undertaking to pay the debt and had given an assurance that all was in order since no challenge had been made to the interim liquidation and distribution account. It also appears that the applicant's liquidator was also of the same mind that the guarantor's claim would sail through. Because of this, the parties did not go into the finer details of what would happen to the investment account should the guarantor's claim fail. The bank was not careful in its dealings with the applicant's liquidator.

(b) Whether or not the first respondent has a right to refuse to release the funds to the applicant

As already stated above, the parties did not put it in black and white what would happen if for some reason the guarantor's claim did not sail through. They did not make it clear that the invested funds would be used to set off the debt. This explains why the first respondent continues to keep the applicant's account running without being able to forfeit the money to set off the debt.

In any case even if the parties had expressly agreed that the invested funds would be used as security for the purposes of setting off the debt in the event of default of payment, that agreement would have been null and void for it had been done without the leave of the court. The invested funds belong to a company which is under liquidation and this transaction was entered into when the applicant was already under liquidation. Section 213 of the Companies Act [*Chapter 20:03*] reads:

“In a winding up by the court—

(a)

(b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;

(c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”

For a company which is under liquidation any attachment or execution against its assets is void and the leave of the court is required for the disposal of its property. No such leave was obtained. The first respondent was even aware that the applicant was under liquidation. For these reasons the first respondent has no basis for refusing with the applicant's money even if the debt by the guarantor has not been settled. The first respondent is not an approved creditor of the applicant. It did not lodge its claim through the Master of the High Court and the applicant's liquidator.

In the result the applicant's application for the release of the invested funds is granted as prayed for in the draft order.