

GILBERT ZVIZHINJI
t/a REDCLIFF EARTHMOVING

versus

STANDARD CHARTERED BANK LIMITED

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 10, 11, 12 JULY 2001 AND 16 MAY 2002

B. Paradza for the plaintiff
R. M. Fitches for the defendant

Civil Trial

KAMOCHA J: The plaintiff in this matter was claiming payment of damages in the sum of \$6 624 750,00, interest thereon and cost of suit. The damages were alleged to have arisen from the cancellation of an ancillary contract between the plaintiff and the Zimbabwe Mining and Smelting Company Limited - "ZIMASCO".

In his declaration the plaintiff stated that ZIMASCO hired from him a D9 bulldozer for the sake of removing slag from a slag dump at its Kwekwe plant. The agreement was that ZIMASCO would pay plaintiff at the rate of \$750,00 per hour. The plaintiff was required to remove the slag for a period of at least eleven hours per day which would earn him \$8 250,00 per eleven hour working day. Plaintiff would work for seven (7) days a week. The contract was for an indefinite period for as long as plaintiff was able to fulfill his obligations in terms thereof.

At the time of the said contract the plaintiff operated a personal account with the defendant. He claimed that there was an agreement between him and the defendant in terms of which the defendant allowed him to deposit into his personal account any cheques issued by ZIMASCO in favour of Redcliff Earthmoving.

Plaintiff claimed that he then furnished defendant with a copy of the contract between

him and ZIMASCO.

The same mandate which authorised him to deposit cheques from ZIMASCO into his personal account also allegedly authorised him to withdraw from any such

deposited cheques without the need to wait for 14 days for their clearance. So he did

not need to wait for 14 days in order for the cheques to be cleared since by agreement

his cheques were cleared immediately to ensure availability of funds when he issued

cheques to his suppliers. The defendant agreed to honour such cheques.

On 16 July 1996, ZIMASCO issued a cheque for \$18 248,00 payable to Redcliff

Earthmoving. The plaintiff deposited it into his personal account and it was immediately cleared as per agreement.

However, when he deposited another cheque from ZIMASCO into his same personal account on 7 August 1996 the defendant - "the bank" rejected and reversed

the deposit on 8 August 1996 resulting in the unavailability of funds to meet any

cheques issued by the plaintiff to his suppliers.

For instance the plaintiff drew a cheque in favour of one Lawrence Whittal of

W.S. Agencies for an amount of \$1 614,70 to purchase materials for the bulldozer but

the bank dishonoured the cheque. The result was that the supplier refused to supply

the required service materials for the bulldozer. It could, therefore, not be serviced

and would not operate.

Consequently on 20 August 1996 ZIMASCO notified the plaintiff of the contract between it and him. He then lost earnings as a result. In conclusion the

plaintiff alleged that the bank was fully aware of the consequences and the prejudice

the dishonouring the ZIMASCO cheque would cause to him. He asserted that the bank

was also fully aware of the contract between him and ZIMASCO and the need to ensure

that the bulldozer was well supplied with service materials and that anything done by

the bank to stop plaintiff's suppliers would be highly prejudicial to his business

interests with ZIMASCO. It was his assertion that the bank acknowledged its mistake

and made various attempts to discourage him from instituting these proceedings.

The damages allegedly suffered by him in the sum of \$6 624 750,00

represented his loss of earnings and damages to his credit worthiness. The issues that

this court was called to adjudicate upon were agreed at the pre-trial conference as

being these:

- "(1) Was there an agreement whereby plaintiff was entitled to draw immediately on cheques issued by ZIMASCO and deposited into its current account with defendant?
- (2) Did defendant breach the agreement?
- (3) Has plaintiff suffered damages in the sum of \$6 624 750,00 or any amount as a result of the breach?
- (4) Were the damages, if any, suffered by plaintiff within the contemplation of the parties?
- (5) Were the damages, if any, suffered by plaintiff too remote?
- (6) Has plaintiff failed to mitigate its damages?; and
- (7) Is plaintiff entitled to interest on its damages, if any, with effect from 15 August 1996?"

The plaintiff had the burden of proof in respect of issues 1, 2, 3, 4 and 7 while

issues 5 and 6 had to be proved by the defendant. The plaintiff had no witnesses to

call in order to discharge the onus that rested on him but he gave viva voce evidence

himself. His evidence was similar to what is contained in his above declaration I

therefore need not recount it in great detail. In brief the plaintiff stated that in June

1996 ZIMASCO hired his bulldozer operated for 11 hours a day.

After securing the contract he alleged that he then approached the bank and advised it about the contract he had secured with ZIMASCO. He said he informed the bank that his trade name was going to be REDCLIFF EARTHMOVING. He had operated a personal account with the bank for four years in his name Gilbert Zvizhinji.

At the bank he spoke to an official known as Stonewell Zemura. He asserted that he discussed with Zemura the question of him depositing into his personal current account cheques from ZIMASCO made in favour of Redcliff Earthmoving. The plaintiff further stated that he told Zemura that he wished to withdraw money immediately after banking the cheques. That, according to him, was acceptable to Zemura who acceded to the proposal. After sealing the agreement Zemura gave the plaintiff agreement forms to fill in which he duly did. The duly completed form was given to the bank but the plaintiff was not given a copy of the agreement. The filling of the agreement form entitled him to make withdrawals as soon as he paid in the cheques.

The plaintiff said he had to go into that agreement because he did not have money and if he waited for 14 days in order for the cheques to be cleared he would lag behind in his job. He needed cash for the maintenance of the bulldozer.

The bank demanded that the plaintiff produce proof of his contract with ZIMASCO and he allegedly furnished it with a letter of acceptance from ZIMASCO and a purchase order. Believing that the bank was going to abide by the terms of the agreement he, on 7 August 1996, deposited a cheque for \$7 957,42 from ZIMASCO made in favour of Redcliff Earthmoving. He then immediately started to pay his suppliers using that money. But the bank dishonoured a cheque he had made in favour of his supplier.

He went to the bank to find out why that had happened. He discussed the matter with an official known as Paul Chinyeure who told him that he could not deposit cheques made in favour of Redcliff Earthmoving into his personal account.

He was advised that the cheque he had deposited had been returned to him by post.

When the cheque arrived it was written "payee signature required". He took it back to

the bank wanting to re-deposit it but Chinyeure told him it was no longer possible to

deposit it into his personal account without giving reasons.

He took the cheque back to ZIMASCO and requested that they issue another cheque in the name of Zvizhinji Earthmoving. He was accordingly given a replacement cheque which he deposited into his personal account.

The plaintiff complained that due to the unavailability of funds he was unable

to service his bulldozer resulting in it not being operational for some time. As a direct

consequence of that his business came to a halt. He wrote to ZIMASCO advising that

the bank had maliciously caused him to have problems with his suppliers. He then

asked ZIMASCO to bear with him. To his surprise ZIMASCO wrote to him in these terms:

"Dear Sir

Subject: Cancellation of Contract

It is not possible for us to wait until you have to repair your machine. We have to maintain certain budgets and we are unable to do this as your machine is out of order.

Therefore could you please remove your machine from our premises as soon as possible.

Yours faithfully

J A Kriek"

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Thereafter considerable correspondence took place between the plaintiff and

the bank. In the correspondence filed of record by the plaintiff it was established that

the bank held one mandate authorising cheques in favour of Zvizhinji Earthmoving to

be deposited into the plaintiff's personal current account. He was informed that

Redcliff Earthmoving was completely a different account and could not be deposited

into Zvizhinji Earthmoving. It was made clear to him that it was against company

policy for him to hold two mandates with different titles on one account.

He was advised that the second mandate in respect of Redcliff Earthmoving which he had handed to Chinyeure had not been accepted by the bank and that the one

cheque for \$18 000 accepted by the teller had been accepted in error.

The basis for claiming \$6 624 750 was that his contract with ZIMASCO was for

a duration of two years. He would have earned that amount during the period had the

contract not been prematurely cancelled.

The plaintiff was cross examined at some length. He was not a convincing witness. He sought to make the court believe that his machine could not operate because it simply had not been serviced when the documents he filed clearly reveal

that the machine had broken down and needed to be repaired. He also avoided questions by not giving direct answers to the questions put to him. For instance when

asked if he had kept copies of the mandate which he claimed had been accepted by

the bank his answer was that he did not anticipate litigation. And when asked why he

did not get a cheque in the name of Zvizhinji Earthmoving instead of Redcliff Earthmoving to avoid that problem, he replied that he did not know.

Four witnesses gave evidence on behalf of the bank. The first witness was one

John Alfred Kriek - "Kriek". He worked for ZIMASCO as a technical assistant. He

said the company hired the plaintiff's bulldozer which was an old machine. The plaintiff's bulldozer was required to work at their slag dam to reclaim Ferro chronic.

The target was to do 100 metric tonnes per day.

The plaintiff managed to achieve the targets for some time but his machine broke down. It was in that state for sometime resulting in ZIMASCO not being able to

meet their budgets of 100 metric tonnes per day.

Kriek alleged that the plaintiff's machine had serious engine problems relating

to pistons and rings. Plaintiff was given a reasonable time within which to repair the

machine. But because he failed to do so Kriek, on behalf of ZIMASCO, wrote the letter

quoted supra on 20 August 1996 cancelling the contract. Kriek was emphatic that the

machine had broken down. It was not merely a question of lack of servicing or maintenance it. He went on to say the plaintiff had not brought to his attention that he

had any cash flow problems. If the plaintiff had done so the company would have assisted him by lending him oil and other consumables which were normally used for

servicing. This was an existing practice at the company. The company would thereafter deduct the money of the consumables from any amount due to the plaintiff.

He said that principle was used to give contractors diesel. He was adamant that the

plaintiff had not informed him that he had problems with his bank. He said it was

clear in his mind that the cancellation was caused by the breakdown of the plaintiff's

machine. Kriek was a good and fair witness who was not shaken under cross examination.

The next witness was Stonewell Zemura - "Zemura". He told the court that he did not authorise the plaintiff to withdraw money immediately the cheques from ZIMASCO were deposited. He in fact had no power to grant such authority.

When the plaintiff approached the bank with a cheque in favour of Redcliff Earthmoving he was given a mandate form to fill in. As he presented the duly filled

in form it was found out that another mandate in the name of Zvizhinji Earthmoving

was still in force. Zemura said the new mandate in respect of Redcliff Earthmoving

did not have a copy of the contract with ZIMASCO attached to it. Since an existing

mandate was still in force the application for a second one was rejected.

Zemura was also a fair witness who gave his evidence well. What comes out clearly from his evidence is that he at no stage sanctioned the plaintiff to withdraw

money from uncleared cheques since he himself would have no authority to do that.

The next witness for the defendant was Paul Chinyeure who was the bank's check clerk at the time. He was responsible for checking the correctness of mandates

and verifying the signatures. Thereafter, he would refer the new mandate to the manager for approval. The manager would approve by stamping the mandate with an approved stamp.

He stated that Zemura brought to him a new application for an account mandate - "In name of Sole Partner" in the name of Redcliff Earthmoving. He made a

check in the files and found that the plaintiff had an existing mandate on file. He

referred the matter to the manageress drawing her attention to an already existing

mandate. The application was then rejected by the bank on that basis.

The witness told the court that he was not aware of any authority entitling the plaintiff to withdraw money immediately after the depositing of cheques. If such authority existed he would have certainly been aware of it. He also denied that mandate form was accompanied by contract documents such as the acceptance letter or purchase order as suggested by the plaintiff. He also denied ever acting with malice.

The witness made it clear that the cheque that was dishonoured was dishonoured because it was deposited into a wrong account. The witness made concessions where they needed to be made. His evidence was clear and fair.

The last witness to give evidence on behalf of the bank was its manageress Mrs Grace Mutasa whose evidence corroborates that given by the previous witnesses.

She said the bank did not authorise the plaintiff to withdraw money immediately after the cheques were deposited. She further confirmed that the plaintiff's application for a second mandate was rejected by the bank. She denied acting maliciously in her dealings with the plaintiff. Mrs Mutasa gave her evidence well and was also a fair witness.

The court makes a finding that all witnesses for the defence gave their evidence well and fair. They are worth to be believed. The plaintiff on the other hand appeared to have some form of arrogance which even manifests itself in the correspondence filed of record. He also avoided answering questions directly.

The court also finds that ZIMASCO canceled its contract with the plaintiff because his bulldozer had broken down and had not been repaired for some time. It is also found that a second mandate in the name of Redcliff Earthmoving was rejected

by the bank. Further, it is found that there was no authority entitling the plaintiff to

immediately withdraw money after cheques from ZIMASCO were deposited. The

plaintiff failed to prove that there was such an agreement. Having found that such

agreement was non-existent there can, therefore, be no talk of a breach of agreement.

If the plaintiff lost earnings and damages to his credit worthiness that can not

be attributed to any breach by the bank because it breached no agreement. In any

event the contract between the plaintiff and ZIMASCO was cancelled because his machine had been broken down for quite sometime.

In the result the order I make is that the plaintiff's claim be and is hereby

dismissed with costs.

Paradza & Partners plaintiff's legal practitioners
Messrs Webb, Low & Barry, defendant's legal practitioners