

SINO ZIMBABWE CEMENT COMPANY (PVT) LTD
versus
ZIMBABWE BANKING CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO, 18 October and 16 November 2006

Opposed Application

Mr Mathonsi, for the applicant
Ms P. Dube, for the respondent

KAMOCHA J: The circumstances giving rise to these proceedings are largely common cause. The applicant runs a bank account with the respondent - Zimbank. Some people, most of whom were employees of Zimbank, hatched a plan to steal money from the applicant's account. They went to Typocrafters, a company which manufactures cheque books and ordered a cheque book similar to the one applicant was using in November 2004. Zimbank's tellers who do business on applicant's account would have known the cheque book in use at any moment. In any case it is Zimbank through its employees who order cheque books for and on behalf of its customers and must have ordered a duplicate cheque book. The rogues then forged the signatures of Mr Moyo and Mr Wang on the cheques which they presented to Zimbank and drew large amounts of money totalling to \$538 051 080.00. The signatures on the cheques were forged. Zimbank proceeded to honour the cheques and debited applicant's account in the sum of \$538 051 080.00 and therefore prejudiced applicant by that amount.

Zimbank had no authority or Mandate from applicant to honour the cheques and debit the sum of sum of \$538 051 080.00 from the

applicant's account and the withdrawal of the funds from the applicant's account was wrongful and prejudicial to applicant and in the result applicant suffered loss in the sum of \$538 051 080.00.

In order to facilitate the encashment of the cheques, the rogues printed applicant's letter heads and each time they presented the forged cheques for payment they also wrote instructions to the bank and appended forged signatures of Mr Moyo and Mr Wang on those instructions for the bank to encash the cheques.

Zimbank accepted that the signatures on all the cheques which were used to defraud applicant's accounts were forged and that the cheques themselves did not originate from the cheque book held by applicant. They originated from the illegitimate cheque book held by Zimbank's employees who in fact have been arrested and are facing criminal charges.

The law on forged cheques is very clear. In *casu*, there is no controversy that both the signatures on the cheques and the letters upon which the purported mandates to encash the cheques were forged. Section 23 of the Bills of Exchange Act [*Chapter 14:02*] provides as follows:

"Subject to this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative and no right to retain the bill or to give a discharge therefore, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to forgery."

A banker and its customer enter into a contract which is classified as a contract of mandate in terms of which the bank

undertakes to execute all orders to pay, given to it by the client by means of cheques, provided there are sufficient funds at the disposal of the client. See Business Law 2nd edition by authors C.J. Nagel *et al* at page 298.

In the book Business Transactions Law by Robert Sharrock 6th edition at page 486 it is stated thus:-

"A cheque is not the drawer's mandate if his signature has been forged or appended without his authority. It follows that if the bank pays out on such a cheque it is not entitled to debit the drawer's account." Emphasis added.

The rule relating to forged cheques does even apply where general carelessness by the customer in the conduct of his affairs facilitated the deception.

NICHOLAS J in Holzman vs Standard Bank of South Africa Ltd 1985(1)(SA 360 W at 363 observed that:-

"Merely being careless in controlling access to a cheque book does not render the customer liable to bear the loss ... nor does a failure to verify bank statements or general carelessness by the customer in the conduct of his affairs."

In *casu* not only did Zimbank pay on forged cheques but that the perpetrators were its employees. Despite this fact Zimbank pleaded contributory negligence which, in my view would, in any event, be irrelevant. Negligence or carelessness would not render the client to bear the loss.

More importantly, in this case there is no evidence to suggest that the applicant was negligent or careless. Instead, the simple sequence of events is that the bank's employees went on to have a parallel cheque book to that of the applicant printed by Typocrafters. All the forged cheques came from that particular cheque book. The cheques were forged by its employees. The suggestion that there could have been employees of the applicant who may have been

involved is speculative and will remain so as long as no evidence to that effect is available.

The respondent also alleged that the applicant contributed by not reporting timeously after discovering the fraud. That argument is equally speculative as there is no evidence to indicate that there was a delay in reporting by the applicant. Instead, when applicant discovered some discrepancies on 10 December 2004 it sent out a letter querying the anomalies. Zimbank took sometime to investigate and only responded on 16 December 2004. The response was dismissive and clearly revealed that the investigation was facile as the letter seemed to defend the anomalies that were taking place.

The respondent argued that there was a triable issue in that there must have been some of the applicant's employees who were involved in the fraud. This, as stated *supra* is speculative as the respondent cannot say which applicant's employee is involved. The suggestion remains speculative and can therefore not constitute a triable issue.

In the result I would grant summary judgment in terms of the draft order.

Dzimba, Jaravaza & Associates, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

