HC 6448/2002

ROWLAND ELECTRO ENGINEERING (PRIVATE) LIMITED
t/a SITA SOUND FOREX
versus
ZIMBABWE BANKING CORPORATION LIMITED

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 17 January and 26 February 2003

Opposed Application

Mr *Z. Samushonga,* for the applicant
Adv. *A.P. de Bourbon,* for the respondent

GUVAVA J: The applicant in this matter obtained from this court on 16 August, 2002 a provisional order which provided as follows:

> "1. That the respondent be and is hereby ordered to keep Applicant's Bank Account with all of Respondent's branches operational until 31st March 2003.
>
> 2. That the respondent is ordered to pay the costs of this Application on an Attorney and Client Scale.
>
> INTERIM RELIEF GRANTED
>
> That pending the final determination of this matter, the respondent is to keep all the Applicant's bank accounts with all of Respondent's branches open and Applicant should transact normal banking transactions therefrom."

The facts upon which this order was granted are basically common cause and may be summarised as follows. The applicant is the holder of various accounts with Zimbabwe Banking Corporation Limited (Zimbank) and has been an account holder with Zimbank for over 15 years. On 3 July, 2002 the applicant was served with a letter by the respondent in which the respondent terminated the banking relationship with the applicant with immediate effect. No reasons were given by Zimbank for terminating the accounts. A further letter was sent to the applicant by the respondent giving the applicant until 31 July, 2002 to close its accounts.

The applicant approached this court by way of an urgent chamber application seeking an interdict against the closure of its accounts with Zimbank. The applicant argued that it ran a massive operation as a bureau de change which involved millions of dollars all over the country. It was the applicant's submission that the closure of its accounts would

lead to loss of business profit in an amount of $1,5 million to $2 million per day. As such his accounts could not be closed without adequate notice.

Before dealing with the merits of this matter I note that from the terms of the order the interim relief which was granted and the final order which is sought are, substantially the same. As this has the effect of granting a final order, by way of interim relief, it has been stated in various judgments that the proper approach in such matters is to proceed by way of court application. (*Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342). This approach was however not followed in this matter and it is now before me for confirmation of the order after being set down by the respondent. Failure to follow this approach gives unfair advantage to a litigant who obtains a final order without having to establish the necessary proof required. As in this case the applicant had already obtained the relief which it was seeking when it was granted the provisional order it thereafter did not pursue the confirmation of the order and this application was only set down at the behest of the respondent who had been aggrieved by the interim relief granted. It is for these reasons that legal practitioners should strive to comply with the approach set out in the judgments cited above.

Two legal issues fall for determination by this court in deciding whether to confirm or discharge the provisional order. The first issue is whether the respondent was entitled to terminate the applicant's bank accounts and facilities and the second issue is whether the applicant has established, on a balance of probabilities, that he is entitled to the mandatory interdict which it seeks.

In respect to the first issue, it is clear that a bank has the right to terminate its relationship with a customer and this is confirmed by various authorities. In *Malan On Bills of Exchange, Cheques and Promisory Notes"* 2nd edition at page 372, the learned author states:

> "The bank and customer contract is a consensual agreement that can be terminated in the same way as other consensual contracts. …. It can also be terminated unilaterally by either of the parties. A customer can terminate summarily, but the bank must give reasonable notice of termination. The reasonableness of the notice is determined by the circumstances of each case and by the nature of the account."

(See also *Paget's law of Banking* by Maurice Megrah and F.R. Ryder.)

The only issue in this case therefore, appears to be whether or not the applicant was given reasonable notice by the applicant to terminate its bank accounts.

In this case the applicant was given 28 days notice to enable it to close and transfer its accounts to another bank. The applicant has not, in its papers addressed the question of what is a reasonable time, neither has it explained why it would require 8 months to transfer its accounts to

another bank. The respondent has submitted that 28 days was a reasonable period of notice for the applicant to move his accounts to another bank.

In my view the period of notice given by the respondent was reasonable given the relationship between a banker and a customer. The relationship of banker and customer is one which requires the utmost trust for it to exist. The circumstances of this case indicate that the trust had been broken. The applicant in this case had alleged that the respondent had fraudulently withdrawn $28 445 150 from its accounts. This was being disputed by the respondent. The respondent in the circumstances would understandably not wish to continue doing business with the applicant because of the pending allegations. It is also noteworthy that due to computerization most banks in the country take less than seven days to process an application to open a bank account. With the type of transactions which the applicant was operating any bank would have been happy to conduct business with it and the transition to another bank should have been fairly smooth. The notice period of 28 days would therefore in my view be more than adequate taking into account these factors. From the papers before me, I find no basis in holding that the respondent did not give adequate notice to the applicant to relocate its accounts to another bank and therefore was entitled to close the bank accounts.

With respect to the facilities which were available to the applicant it is clear that in terms of the agreement which was signed between the parties dated 24 May 2001, relating to banking facilities the respondent reserved the right to cancel the facilities at any time. Paragraphs 10 and 11 of the agreement states:

> "10. Facilities may be terminated by the Bank by notice to the effect either forthwith or from any subsequent date stated in that notice its which event the facilities in question are called and any liability to the bank becomes payable.
>
> a) Immediately if the facilities are terminated forthwith.
>
> b) Otherwise, on the date(s) stated in that notice.
>
> 11. The facilities are subject to the Bank's usual terms, condition and the Bank reserves the right to amend, review or cancel the facilities depending on the conduct of the account or if the circumstances in is discretion so warrant. The Bank therefore reserves the right to dishonour drawings in such circumstances without prior reference."

The applicant conceded in his affidavit that the respondent could cancel the applicant's facilities at any time. The concession in my view was properly made as the parties had entered into a contractual relationship which allowed the respondent to terminate the facilities

without giving notice and without giving any reasons for its decision. From the provisions of the agreement the facilities could be cancelled entirely at the discretion of the respondent. Clearly, therefore, the respondent was entitled to terminate both the applicant's accounts and facilities and did so in accordance with the law as adequate notice was given.

The second question which arises in this matter is whether this court has the right to impose on the respondent obligations to undertake banking facilities for a particular person in circumstances where the bank has properly terminated its relationship with the person concerned. In my view no such right exists, as this would be tantamount to the court forcing the parties to continue with a contractual relationship where one of the parties clearly does not wish to do so and has properly terminated the relationship in terms of the contract between the parties. This in my view is contrary to the very basic principles of contract.

Even if I am wrong in this regard and the court could so interfere, it would still be bound by the legal principles which apply to the granting of an interdict.

In order to grant an interim interdict a court must be satisfied that all the requisites have been met. These have been set out in various judgments of this court as follows:

1. whether the applicant has established a *prima facie* right;
2. whether the applicant has an alternative remedy;
3. whether the applicant will suffer irreparable harm; and
4. whether the balance of convinience lies with applicant.

(See *Flame Lily Investment v Zimbabwe Salvage* 1980 ZLR 388 and *Enhanced Communications Network (Pvt) Ltd v Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342.)

However for the granting of a final interdict, as is being sought in this matter, the applicant must show not a *prima facie* right but that it has a clear right of action against the respondent. See *Philips Electrical (Pty) Ltd v Gwanzwa* 1988 (2) ZLR 117.

It is apparent that the principles which have to be established for the granting of an interim interdict and for a final order are essentially the same save for the requirement that in a final order the applicant must establish, not a *prima facie* right, but a clear right of action against the respondent. This onus clearly lies on the applicant and in order to discharge this onus he must, "satisfy the court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for the success in his application"

Neinabt v Stuckey 1946 AD 1049 at 1054. From the facts in this matter the applicant has not established that it has a clear right against the respondent, particularly in view of the clear entitlement of the respondent to terminate any accounts and facilities of the applicant.

The applicant has also failed to establish that it does not have an alternative remedy as it could properly sue for damages against the respondent. The damages can be quantified as the applicant states in his founding affidavit that closure of its accounts would translate to loss of profit of $1,5m to $2m daily. In my view, an action for damages if successful, would provide adequate relief to the applicant. A claim for damages obviously also answers the issue of whether or not the applicant would suffer irreparable harm in the event that the interdict was not confirmed as there is no basis for an assumption that the respondent would not be able to pay in the event that it is sued for damages and a court finds the respondent liable. Having found that the applicant has failed to establish, on a balance of probabilities three of the criteria for the granting of an interdict, there can be no basis for confirming such an order.

Accordingly the provisional order which was granted on 16 August, 2002 be and is hereby discharged. The applicant shall pay the costs of suit.

Wabatagore & Company, applicant's legal practitioners.
Gill, Godlonton Gerrans, respondent's legal practitioners.