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

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 10 January 2007

Civil Trial

Advocate *R Fitches* with him Advocate *P Machaya*, for the plaintiff
Advocate *H Zhou*, for the defendant

GOWORA J: In terms of an amended summons and declaration filed with the Registrar of this Honourable Court on 17 December 2004, the plaintiff claimed the following amounts from the defendant:

a) payment of the sum of $28 445 150.00
b) payment of the sum of $123 647 760 068.00 as on (*sic*) the 31st October 2004, and further sums of money reckoned from 1st November 2004, computed on the basis of a return on investment on the said sum of $123 647 760 068 on financial instruments with the Zimbabwe Development Bank maturing every (7) days, until payment in full.
c) Costs of suit.

At the commencement of the trial Mr Fitches moved for an amendment to the summons and the declaration. There being no opposition to the application, the amendment was duly granted. The sum of $123 647 760 068 in paragraph 10(b) of the declaration was therefore deleted and substituted with $8 009 993 144.00. The plaintiff also claimed further damages in the sum of $249 156 977 706.

The background to this claim is that the plaintiff and its directors had a number of operational accounts with defendant's various branches. During the period 12th September to 8th November 2001 some money was withdrawn from the plaintiff's account at the defendant's Angwa Street branch. The withdrawals were effected through bank cheques payable to one George Nyandoro. Whilst the plaintiff maintains that such withdrawals were unauthorized, the contention by the defendant is that the withdrawals were effected on the verbal instructions of the plaintiff's representative. As a result of the withdrawals, it is the plaintiff's contention that it would have utilized the monies thus withdrawn in its foreign currency business and generated profits which it would have ultimately invested on the

money market and gained a profit. It alleges further that the unauthorized withdrawals have made it impossible for it to utilize the money as alleged at a profit and thus it has suffered loss which it is then claiming from the defendant.

Each of the parties called one witness. Thomas Mutano who gave evidence on behalf of the plaintiff was a controlling shareholder and Managing Director for the plaintiff. The witness for the defendant was one Cynthia Marowa who was employed as a transaction controller at the time of the trial. During the period that the payment to Nyandoro was effected she was employed in the same position at the branch where the plaintiff's accounts were located. I will examine the evidence adduced on behalf of both parties according to the issues agreed upon at the pre-trial conference.

The plaintiff's claim is premised on an alleged agreement between itself and the defendant for the defendant to pay out money only upon receipt of written instructions from the plaintiff. It is common cause that at the time that the account in question was opened the plaintiff had in accordance with the requirements of the defendant provided specimen signatures for those of its officers authorized to execute documents on behalf of the plaintiff. This document has not been exhibited for my perusal and scrutiny and I am hence not in a position to state whether or not its purpose was to regulate the dealings of the parties apart from providing specimen signatures of those authorized to execute documents on behalf of the plaintiff in its dealings with the defendant.

In the declaration filed on behalf of the plaintiff, a specific averment was made that it was a condition of the banking arrangement between the parties that the defendant would pay out monies on the plaintiff's written instructions signed by any of the authorized signatories, or that alternatively, it was a rule of banking practice that no withdrawals could be made without signed authorization from the account holder. Given the fact that both parties to this dispute are corporate entities, one assumes that if there is an arrangement between a bank and its customers, who are account holders, such arrangement would be in writing. I have not been furnished by either party with a document spelling out the terms and conditions under which the instructions from the customer were to be executed. Indeed it is the case by the plaintiff that there was a document which spelt out the terms upon which the parties had to deal with each other. It was therefore for the plaintiff to prove the terms allegedly contained in the document. If the defendant had the document it chose not to produce it. Nor can it be suggested by the plaintiff with conviction that the document in question, referred to as the 'mandate of signature form' by the plaintiff's representative, would be the one to contain such conditions. Can a document whose main purpose is to

confirm the signatures of the signatories to an account be the operative document detailing the manner of dealing between the parties and containing important details such as how instructions from the account holder should be communicated to the paying bank? According to the evidence of Thomas Mutano this form, would show who was entitled to sign on behalf of the plaintiff, or give instructions on the account. He gave no further details on its contents. The witness was referred to a document in the bundle which is at p 271 thereof, entitled 'customer information questionnaire' which requests for details on signatories for a company account holder. The significance of the document in proving the plaintiff's case escapes me. If it is meant to prove that the plaintiff and defendant had agreed that no transactions could be executed against the account without written instructions from the authorized signatories, it, the questionnaire, does not do so. Instead it merely advises the bank of the company's details and the names, the official positions and signatures of authorized personnel.

The plaintiff's witness also referred me to letters on pages 32 up to 36 of the bundle of documents as proof of the fact that all withdrawals and transfers were to be effected only on written instructions. On closer scrutiny of the documents, they all related to transfers from the plaintiff's account in Harare to the accounts held by the plaintiff in various branches country wide. The instructions were to deal with electronic transfers inter accounts. The written instructions were confirmed by the bank raising documents which are reflected on pages 40, 41 and 42. I note that although they should have been completed and signed by the customer, they were in fact not signed. None of the documents I have been referred to specifically addressed the issue as to whether or not the plaintiff had been requesting the issuance of bank cheques in writing. On pages 80, 81 and 82 the plaintiff has exhibited written requests for the defendant to issue bank cheques in favour of G. T. Nyandoro. The first two letters were written during the period when money was allegedly withdrawn from the plaintiff's account without authorization. The last request was made in December 2001 which was subsequent to the period in question. According to the plaintiff's witness this was the valid manner in which requests for bank cheques were done between the parties.

In the plea filed on its behalf, the defendant denied that the arrangement between the parties was that it, the defendant, would only pay out money on plaintiff's written instructions. The defendant averred that as a longstanding customer of the defendant, the plaintiff had routinely given verbal instructions for the transfer of monies to various persons. The defendant further averred that the payments to Nyandoro were authorized by the plaintiff. On 18 December 2001 the defendant through its Angwa Street branch manager, addressed a letter to the plaintiff's directors requesting that all requests for transfers,

telegraphic transfers and bank cheques be in writing with effect from that date as it had been noted that the plaintiff had been making verbal requests for such transactions and in some cases in respect of large sums of money. The suggestion is made by the plaintiff that this letter was only written after the dispute over the unauthorized bank cheques had arisen and does not reflect the correct position between the parties.

In the absence of documentary proof as to the arrangement between the parties on the conduct of the accounts belonging to the plaintiff it means therefore that I can only decide this issue on the evidence of the parties regarding the course of dealing that was between them. On at least three occasions the plaintiff gave written instructions for bank cheques to be issued. The letter from the defendant's Angwa Street branch manager is clear that these requests should be in writing. Whether or not there was an arrangement between the parties and whatever its terms, it appears not to be in dispute that it was standard procedure within the defendant that requests for bank cheques had to be in writing. The bank accepts this and in the letter to the plaintiff states in categoric terms that these requests should always be in writing. The witness called by the defendant stated that the standard procedure for having bank cheques issued was that a client would either complete a form to have the cheque issued or bring in a signed cheque with details of the payee and request that a bank cheque be issued. She indicated however that based on the relationship between the personal banker and the client, the bank could accept instructions either through the telephone or by e-mail. Although the plaintiff failed to prove that there was an arrangement between itself and the defendant that the bank could only issue bank cheques upon written instructions, it is my conclusion on the evidence before me that there was a requirement in terms of the defendant's own banking procedures that bank cheques should be issued through written instructions. This requirement could however be dispensed with based on the relationship between the defendant and its client in which case, verbal or other forms of instructions could be employed by the parties.

As far as the banking practice that the plaintiff alleged existed in the manner of having bank cheques issued, the plaintiff led no evidence. Mr Mutano who sought to address the issue of prevailing bank practice has no experience or expertise in banking. There was no evidence placed before as to what such banking practice was. It was incumbent upon the plaintiff to establish the exact nature of the banking practice that it sought to rely on and as well as the extent of its application. It would also in my view have been appropriate in the circumstances to advise the court whether or not such practice was known within the general public who deal with banks and the effect that non-compliance of such practice would have

on both the bank and its clients. As I have stated above I have no evidence before me of any banking practice and the plaintiff therefore cannot rely on such to prove that the bank cheques were not authorized. Even though I have found that the defendant had a standard procedure for the issuing of bank cheques, I am not convinced that this standard procedure within the defendant's modus operandi proves the existence of a banking practice requiring that bank cheques and money transfers be effected only on the basis of written instructions. Not only has the plaintiff failed to prove that an arrangement existed between itself and the defendant, it has also not established that there was a banking practice requiring the defendant to only issue bank cheques on written instructions from the plaintiff's authorized signatories.

In their written submissions *Messrs Fitches* and *Machaya* submitted that the defendant owed the plaintiff a duty of care to ensure that safeguards against abuses by personal bankers were put in place. The declaration filed on behalf of the plaintiff does not allege the existence of a duty of care on the part of the defendant, nor is there an averment that the defendant was guilty of the breach of such a duty in the manner that the bank cheques were issued. The defendant was not asked to plead to the breach of a duty of care as paying banker against an account of the plaintiff's. It is correct that the defendant's witness was cross-examined at length on what safeguards existed where verbal instructions were being relied on in transactions, but my view is that these questions could not have been sufficient for the plaintiff to base its claim on the breach of a duty which the defendant had not been asked to answer to. Nor was it ever alleged to the defendant what it was that it had failed, omitted or neglected to do in respect of the cheques which form the subject matter of the dispute between the parties. Since the pleadings did not refer or mention negligence or duty of care, this was not one of the issues agreed for determination at the trial. Nor was any evidence led on the part of the plaintiff regarding the question as to whether or not there was a duty of care on the part of the defendant. Whether or not the defendant would have owed a duty of care to the plaintiff is therefore not an issue for my consideration in this matter.

The first bank cheque drawn against the plaintiff's account in the sum of $6 038 000.00 was dated 11 September 2001. It was deposited into the account of one George Nyandoro on 12 September 2001. There is no indication on the papers before me as to how it found its way from the defendant to Nyandoro. A cheque for $$5 376 000.00 again drawn in favour of Nyandoro was issued on 17 October 2001. According to the defendant's cheque delivery book, it was collected by K Hofisi on the same day. This same cheque was deposited into Nyandoro's account with Standard Chartered Bank on the same day. On 6

November 2001 yet another bank cheque in the sum of $15 467 400.00 was drawn in favour of Nyandoro against the plaintiff's account. It was collected on the same day by K Hofisi and was deposited into Nyandoro's account on the same day. The last cheque for $1 563 750.00 was drawn on 8 November 2001 and was collected by K Hofisi. It was deposited in Nyandoro's account on the same day.

As part of its documentary evidence, the defendant has produced a handwritten note from one Rusike, a manager at the defendant's Angwa Street branch who was the plaintiff's account manager at the branch. The note is an instruction to 'ledgers' to do a bank cheque for $5 376 000.00 in favour of Nyandoro against the plaintiff's account as per client's instructions. The note is dated 17 October 2001, and also bears the defendant's official date stamp of that day. A copy of the cheque in that amount and for that date is also produced. The cheque is in favour of G. T. Nyandoro. The defendant has also produced debit waste entries for the two cheques issued on 6 and 8 November 2001. The information on the debit waste entries tallies with what appears on the bank statements.

It is common cause that plaintiff employed K Hofisi at the time as an accountant. I did not hear the plaintiff's witness state that Hofisi had no mandate to collect cheques on its behalf or that the cheques in question were not collected by Hofisi. Although the plaintiff's witness insisted that the defendant was obliged to issue cheques only on the basis of written instructions, it was obvious that the defendant had issued bank cheques against the plaintiff's account where no written instructions had been given. The plaintiff's witness was referred to cheques issued to Muzvidziwa for $3 500 550 and Modern Furnishers in the sum of $98 550 for which no written instructions for their issuance was exhibited to the court. The letter to the plaintiff dated 18 December 2001 clearly spelt out that the plaintiff's directors had, at times, given verbal instructions for transfers, telegraphic transfers or bank cheques and in most cases for huge amounts. The plaintiff was requested to make written requests thereafter. The letter was not responded to by the plaintiff's directors. The plaintiff's witness was unable to give a cogent reason for not responding to the letter if it did not state the correct position. The plaintiff is aware that the money ended up with George Nyandoro, yet there has been no attempt to sue Nyandoro for its recovery nor was there any effort made to join him to these proceedings. K Hofisi, who allegedly collected the cheques, was not called by the plaintiff to confirm the plaintiff's position that the withdrawals had not been authorized. Hofisi was the plaintiff's accountant and the plaintiff should have placed before the court evidence to explain his dealings with cheques, their collection and movement to Nyandoro in the absence of instructions to the bank to have them issued. The plaintiff

suggests that there was fraud on the part of the defendant in issuing the cheques but it has not explained the part Hofisi played in the scheme.

The claim by the plaintiff's witness that written instructions were necessary in respect of cheques with a large face value were negated by the cheques issued under written instructions for the following amounts; $775 000, $2 000 000, $2 296 000, $13 297 284. I have also considered that for the major part of the period in question the plaintiff's account was overdrawn. I accept the submission by Mr Zhou that it is more likely to pick up a fraud perpetrated against an overdrawn account than one with a healthy balance. The other factor is that all the cheques were drawn in favour of Nyandoro with whom the plaintiff had a business relationship, not to mention the personal relation between plaintiff's Thomas Mutano and the said Nyandoro. Taking all the circumstances of this case into consideration, it is my view that the probabilities favour the defendant. It is not inconceivable in the circumstances that verbal instructions were given to the defendant's Mr Rusike to have the cheques issued without written authorization from the plaintiff. I find that the payments to G. T. Nyandoro were authorized by the plaintiff.

In the event that I am not correct on the issues I dealt with above, I turn now to consider the question of the damages being sought by the plaintiff. According to the evidence of Thomas Mutano the plaintiff is a different entity to Sita Sound Forex Services Private Limited, hereinafter referred to as Sita Sound. The plaintiff has furnished to the court bank statements which show that the two companies maintained separate accounts with the defendant. I note further that the forensic report from Ernst & Young which was the basis upon which the plaintiff sought to sue the defendant was addressed to Sita Sound.

The defendant in its written submissions has taken issue with the plaintiff suing for amounts which should have been sued for by Sita Sounds Forex Services Private Limited. However the plea filed on behalf of the defendant does not take issue with the *locus standi* of the plaintiff in bringing the suit. From the bank statements that were admitted into evidence and the evidence of Mutano it is very clear that the two are entirely different entities. Counsel for the plaintiff has contended that having admitted the identity of the parties in its plea the defendant was precluded from raising it in its submissions. In my view Mr *Fitches* is correct that the defendant admitted the identity of the parties and could not now take issue at this stage. The plaintiff however still bore the onus to establish that it had suffered the losses that it claims from the defendant. The amount of $28 445 150.00 was certainly deducted from the plaintiff's account, and therefore it has *locus standi* to sue for the amount allegedly debited against its account without authorization.

The evidence of Thomas Mutano was to the effect that the foreign currency transactions were being effected by Sita Sound. The account against which the withdrawals were made was that of the plaintiff but the entity engaged in foreign currency business, according to the plaintiff's witness, is Sita Sound. No explanation has been proffered as to how it is Rowland Electric sues for damages arising out of an inability to trade in foreign currency due to the alleged unauthorized withdrawal when the plaintiff was not engaged in such business. Sita Sound which was the entity running the business of foreign currency trade did not have any of its money withdrawn from its account by the defendant. It is the evidence of the plaintiff's witness Mutano, that the company which operated the bureaux was Sita Sounds. The bank cheques in issue were debited against the current account of the plaintiff and not Sita Sound.

As far as the damages claim is concerned the plaintiff has not established a locus standi to sue on behalf of Sita Sounds given the status of both companies. There is also no evidence placed before me to show that the plaintiff was in the business of trading in foreign currency and further that the account from which the funds were withdrawn was the account used for trading in foreign currency given that the plaintiff was itself in the business of motor rewinding. It is my view that the plaintiff is non-suited and on the basis stated above the claim should be dismissed with costs. Although I have found that the plaintiff has no *locus standi* to sue for damages, it is nevertheless necessary that I undertake the assessment of the damages being claimed.

It is common cause that about a year after the events which the plaintiff complains about, the Minister of Finance revoked the licences of all bureaux de change. It therefore became necessary, according to the plaintiff that it find some other business in which to invest. It chose to place its money in the fast growing and phenomenal asset management companies that were offering interest rates that were hithertofore unimagined. The case for the plaintiff is therefore to the effect that if it had not lost the $28 445 150 that was debited against its account it would have generated much more profit with it in the foreign currency business and hence had a greater base to invest in the money market. I have been referred by Mr *Zhou* to a passage in Law of Damages by the learned authors *P J Visser and J M Potgieter*. They state at page 238 to 239 of book:

> "No legal system holds a defendant liable without limitation for all the harmful consequences suffered by the plaintiff. There is general agreement that some means must be found for limiting the defendant's liability. The question of legal causation arises whenever one must determine for which of the damaging consequences actually caused by the wrongdoer's wrongful, culpable act, or breach of contract, or any other legal fact creating a duty to pay damages, he should be held liable; In other

words which harmful consequences should be imputed(attributed) to him. Because this subject is fully dealt with in standard textbooks on the law of delict and the law of contract, only the most important principles will be discussed here.

A delictual and contractual duty to pay damages can arise only if the wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. Consequently conduct can be described as a damage causing event only with reference to the damage actually flowing from such an event. Without factual causation, no duty to pay damages can arise. Factual causation on its own however, is not sufficient as it is undesirable to hold a person liable for all the damage which he has caused. In *International Shipping Co (Pty) Ltd v Bentley*[1] the court stated as follows:

> 'Demonstration that the wrongful act was a *causa sine qua* non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play apart. This is sometimes called legal causation.'

Stated differently, legal causation is determined by evaluating the nature and quality of factual causation on the basis of relevant criteria."

Referring now to the claim by the plaintiff, apart from the claim for $28 150 000.00 (old currency) the claim by the plaintiff is in two parts viz-

1. i) general damages for loss of profits between September 2001 and November 2002 in the sum of $6 992 095 306.00 (old currency) plus interest thereon at the prescribed rate of interest from the date of summons;

   ii) Alternatively special damages for loss of profits between September 2001 and November 2002 the sum of $6 992 095 306.00 (old currency) plus interest a *tempore morae* from the date of summons

2. i) special damages for loss of investment income, (after closure of the bureaux de change), in the sum of $139 694 923 251 926.00 from December 2002 up to 31 October 2004, (being the date claimed in the amended summons), plus interest a *tempore morae* from the date of summons;

   ii) Alternatively special damages for loss of income, (after the closure of the bureaux), in the sum of $217 494 845 071.00 from December 2002 up to 31

[1] 1990 (1)SA 680 (A) at 700

October 2005, (being the date immediately before trial), plus interest a *tempore morae* from the date of summons.

I turn now to deal with the issue of damages under each of the specific headings. The amount of $6 992 095 306.00 has been claimed as general damages or in the alternative special damages. In written submissions, *Messrs Fitches* and *Machaya* contended that the loss of profits from the alleged unauthorized withdrawal of $28 445 150.00 flowed generally from the breach by the defendant and as a result such loss constitutes general damages. They sought reliance on *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman*.[2] At p 393E-394A NESTADT J stated as follows:

> "…. A claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and in particular the type of loss of profits being claimed. In the *locus classicus* on the subject, namely *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD1 INNES CJ at 22 said:
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> > 'Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom ….. Moreover, it is the duty of the complainant to take all legal steps to mitigate the loss consequent on the breach …. It follows that damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance.'."

General damages are the loss which a plaintiff suffers as a direct result of the breach of the contract, or is the intrinsic loss suffered by the plaintiff and is due to the diminution of the value of the subject matter of the contract or the impairment of its use. On the other hand special or extrinsic damages constitute loss flowing indirectly from the breach of the contract and extend to all the property. However in order to hold a debtor liable for special damage, a plaintiff needs to show that the damage was within the contemplation of the parties when the contract was concluded.

The claim by the plaintiff for the sum of $6 012 015 209.00 is in respect of the period extending from the second week in September 2001 to November 2002. The schedule prepared on behalf of the plaintiff under the head of general damages starts off with a base amount of $6 058 000.00. Using a purchasing rate of Z$ 60.00 to the USD the plaintiff assumes a profit margin of Z$5.00 per every USD purchased. The plaintiff assumes that an amount of $121 160 is earned as income on the transaction. The amount thus raised is added to the base amount thereby achieving a trading capital of Z$ 6 683 993 for the next transaction the following week. Again purchases of the USD are claimed at the same rate as

[2] 1983 (3) SA 309 (T)

the previous week with the same profit margin being indicated and at the end of the week a trading capital of Z$7 374 673 is achieved. By the first week of October 2001, the plaintiff on its schedules has achieved a trading capital of Z$8 977 517. Week two in October starts with a trading capital of Z$14 353 517 which has taken into account the sum of Z$5 076 000.00. By week two in November 2001 the plaintiff has accounted for the entire sum allegedly removed without its authority and has calculated a trading capital of Z$ 44 023 353.00. This amount is thereafter the basis for the calculation of a total sum of Z$6 012 015 209.

The rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not occurred by the payment of money and without causing undue hardship to the defaulting party. A comparison is made between the patrimonial position that the plaintiff would have occupied had the breach not occurred and the position that exists as a result of the breach. The plaintiff would therefore be entitled to the difference where the former exceeds the latter. An assessment of damages whether *ex contractu* or *ex delicto* is fraught with difficulty. In this matter it is rendered even more difficult by the manner in which the plaintiff approached the claim. There is no suggestion from the plaintiff that once the account was debited with the sum of $28 445 150.00 the plaintiff stopped operations and shut down. If one goes by the claim for additional damages subsequent to the shutting down of the *bureaux de change*, the plaintiff continued in business.

The claim for damages is premised on the loss of profit suffered by the defendant as a result of the unauthorized withdrawals in favour of Nyandoro. It is common cause that the plaintiff has produced no books of account in proof of the profits that it was allegedly making from the business of the *bureaux de change*. Even extracts from its books of account would have sufficed. Instead what has been produced are schedules which detail the returns the plaintiff would have made in purchasing foreign currency with the amounts that were withdrawn by way of the bank cheques made out in favour of Nyandoro.

Although the plaintiff sought to state that the running expenses had been catered for in his figures, no proper explanation was advanced as to how the said expenses had been factored. It is not evident even from the bank statements produced before the court that the business conducted by the plaintiff at the time the cheques were issued was generating returns on the investments that would justify this court to conclude that the plaintiff was generating profit. Such proof would have formed the basis of its claim that the profit thus generated used as seed money then was responsible for creating the massive profits that

plaintiff later on obtained by investing in the money market. Put differently, what the plaintiff should have shown as the first rung to its claim was that the business of running a *bureaux de change* generated so much by way of profit. That in my view can only have been done through the admission into evidence of books showing a profit and loss account for a period, which would have been properly audited and produced before the court. The schedules produced on its behalf are mere schedules and are not sufficient for me to conclude that the plaintiff was actually making the profits reflected thereon.

It is trite that a plaintiff seeking to claim damages based on breach of contract has a duty to mitigate his loss. The plaintiff has claimed damages from September 2001 to November 2002. Somewhere in between those dates it, the plaintiff, acquired knowledge that money withdrawn from its account had somehow been paid to Nyandoro by the defendant. There was no demand from the plaintiff to Nyandoro for the reimbursement of the money. The plaintiff could have recovered its money in the event that he was not entitled to it. In this way it would have drastically reduced its claim against the defendant. The plaintiff made no such effort and even up to the date of trial its claim was still being computed.

Counsel for the plaintiff have made specific references to the bank statements furnished to the court in evidence. Pages 4 to 15 of the bundle of exhibits comprises of bank statement from a number of current account in the name of the plaintiff or T Mutano. They all appear to be ordinary current accounts. From page 16 to 22 the statements are Rand denominated accounts in the name of Sita Sounds or T Mutano. There are none bearing the plaintiff's name. Pages 23 and 24 are statement for USD dollar accounts in the name of T Mutano. There are no foreign denominated accounts in the name of the plaintiff. The statements thus referred to reflect transactions in foreign currency. Thus they confirm that the owners of the statements were engaged in foreign currency trade. There is no proof before me that the plaintiff was similarly engaged. The plaintiff also had to adduce evidence to establish that the money withdrawn from its account by the defendant would have been used in the running of the bureaux de change and as a result would have generated the profits being spoken of. The plaintiff would have also to show that as a result of the cheques being deducted it actually sustained a loss in the amounts being reflected on the schedules. That has not been proved. The plaintiff did not draw my attention to any deposits in the bank statements, which could be said to have been profits earned from the bureaux. I agree with the submission by counsel for the defendant that an examination of the bank statements does not lead one to conclude that the plaintiff was conducting a brisk business as is implied. In my view, in the absence of proof that the plaintiff actually suffered a loss, I cannot see how

the plaintiff can claim that it then went on to suffer damages as a result of the cheques withdrawn from its account by the defendant. The event that would have given rise to the damages would be the loss of profits sustained as a result of the illegal and unauthorized withdrawal from its account.

Even assuming in favour of the plaintiff that it did suffer a loss of profit in the sum of $6 992 095 306 from its inability to utilize the $28 445 150.00, can it establish that the consequence of that was the special damages being claimed as a result of the closure of the *bureaux de change* by the Government. It is common cause that the plaintiff states that it only embarked on investing money in the money market a year after the alleged wrongful withdrawal. The reason for it embarking on the investments was because of the closure of and withdrawal of licences for the *bureaux de change* by the government in line with a new fiscal policy by Government. At the time that the bureaux were stopped from operating the plaintiff and defendant had long since stopped doing business together. It was in itself an event that would have been completely unexpected given that the decision was made following a change in fiscal policy. The plaintiff's witness in answer to a question during cross-examination admitted that this would never have been contemplated by the parties, that any profit earned by the plaintiff would be placed in very profitable interest earning investments. To succeed in the claim for extrinsic damages the plaintiff had to show that it was the kind of damage that the parties to the contract contemplated as being a natural consequence in the event of a breach. *Wessels the Law of Contract* has the following statement[3];

> "Although we allow the injured party to claim profits, we do not allow it in every case. In some cases, as pointed out by INNES, C.J,; in *Victoria Falls Power Co v Consolidated Langlaate Mines Ltd, supra* at p 22, the whole motive for the contract is to obtain profits, as where a person undertakes to thresh corn with his thrashing machine, or to do some work or sell a quantity of maize, etc. in these cases the profits which must necessarily or naturally result from the fulfillment of the contract, and which are the direct and immediate fruits of it, are considered to have been in the contemplation of the parties when the contract was made, and therefore the Court ought to award to the injured party the loss of these profits as damages (see *Masterton v Mayor of Brooklyn*, 42 Am. Dec. 38 at p 42; *Bhayla v Cassim*, 1945 N.P.D. 208).
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> In other cases, however, where the profits are necessarily speculative, contingent or conjectural, our law, like the law of England, refuses to take them into consideration (Voet, 45.1.9). If however, it can be proved to the Court that the profits were reasonably to be expected, and would certainly have been realized, but for the breach of contract, they form as much a part of the damages as any other loss (*Victoria Falls Power Co. v Consol. Langlaagte Mines, supra* at p 22; *Dold v Gilson*, 1914 E. D. L.

[3] A. A. Roberts 'Wessels' Law of Contract paras 3223 and 3224

> 44). Where profits do not depend upon the chances of trade, the fluctuating value of good or freights, or matters of an uncertain character they should be allowed; but where they are entirely dependant upon the fluctuations of markets or the chances of business, they ought to be rejected as of too uncertain a character to have been in the contemplation of parties or expected by them when the contract was entered into (*Griffin v Glover*, Am Dec. 718)."

'Special' or extrinsic damages would only be recoverable if in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would result from its breach. According to Christie the question of special damages presents two difficulties. The first is that at the time that the parties conclude the contract it is unlikely that they would contemplate breach on either side which would result in one party suffering damages from the breach. Thus any inquiry into their contemplation is artificial. The second difficulty postulated by *Christie* is whether it suffices to show that the damages were in the contemplation of the parties or whether it must be shown that the payment of such damages in the event of breach was a tacit term of the contract. The inquiry into whether or not special damages were in the contemplation of the parties was formulated in these terms by BECK J in B.A.T Rhodesia Ltd v Fawcett Security Organisation (Salisbury) Ltd[4] :

> "It seems to me …… that it is the type, kind or order of harm that must have been in the contemplation of the parties ……. and not the exact concatenation of circumstances which might, in an individual case, immediately bring into being the harm of the type, kind or order that was contemplated."

The question then is whether or not the damages that the plaintiff claims as special damages were within the contemplation of the parties when the contract was concluded. The submission is made on behalf of the plaintiff that the defendant was aware of nature of the business that the plaintiff conducted and further that the defendant even traded with the plaintiff at times. As such, the loss of profits by the plaintiff was contemplated by the parties. The account operated by the plaintiff would generate a profit for the defendant. Equally, as the plaintiff was a business entity, it stands to reason that it could only have opened the account in order to run a profitable business. However was the kind of loss allegedly suffered by the plaintiff within the contemplation of the parties when the account was opened? It is contended on behalf of the defendant that the money was in an account which was held with the defendant, and that therefore any loss in relation to that account would have been the interest that would have accrued to the account. I am not persuaded by this

[4] 1972 (2) R.L. R. 22

argument, as the account was a current account which at the time did not appear to attract any interest for credit balances.

As these damages are special (extrinsic) the plaintiff had an onus to establish that such damages were in the contemplation of the parties when the contract was concluded. In normal course special or extrinsic damages are regarded as being too remote to be recovered unless in the special circumstances attendant upon the conclusion of the contract, it can be deduced that the parties actually or presumably foresaw that they would probably flow In a claim for special damages it must be alleged in the pleadings and established by evidence that the loss being claimed was within the contemplation of the parties. (See *Collective Self Finance Scheme v Asharia*).[5] No such averment was made by the plaintiff. It was also not established by evidence that it was within the contemplation of the parties that the government would close down all *bureaux de change* and that when that happened the plaintiff would put its money on the money market at phenomenal and unbelievably high interest rates and that in the event that defendant unlawfully paid out some of the plaintiff's funds the plaintiff would incur huge losses as a result of not having earned money on those investments.

In simple terms, what the plaintiff would have to show is that the harm that befell it is the type, kind or order of harm that must have been within the contemplation of the parties when the contract was concluded. In my view, the defendant might have contemplated that the plaintiff's business might suffer a loss from its purchase and sale of foreign currency if, by a breach on its part, it caused moneys to be withdrawn from the plaintiff's account. It cannot have been within the contemplation of the parties that the plaintiff would have placed its money on the money market and achieved the profits that it says it did. However an examination of the investment certificates produced before the court reveals that they are either in the name of Sita Sound or T Mutano. None bear plaintiff's name. It seems to have escaped the attention of the plaintiff's directors and its legal practitioners that Rowland Electro Engineering Private Limited and Sita Sound Forex Services Private Limited are two different legal entities and are not interchangeable. There is no evidence before me that plaintiff ever invested in the money market. This part of the plaintiff's claim also fails.

In my view the plaintiff's entire claim is not well-founded and the claim is therefore dismissed with costs.

[5] 2000 (1) ZLR 472 (S)

Musunga & Associates, legal practitioners for the plaintiff
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