WYNINA (PRIVATE) LIMITED
versus
MBCA BANK LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 28 September to 1 October 2009 and 11 January 2011

P. Paul, for the plaintiff
E. Morris, for the

PATEL J: The plaintiff herein claims the sum of US$61,944.81 being money which the plaintiff expected to be allocated to it by the Reserve Bank of Zimbabwe (RBZ) in terms of a tobacco growers retention scheme. The plaintiff avers that the defendant negligently failed to submit the plaintiff's application and that, as a result of that negligence, the plaintiff failed to receive its retention money. The defendant disputes any negligence or contractual obligation on its part and denies liability. In the alternative, it is pleaded that any damages proved by the plaintiff should be abated on the ground of its contributory negligence.

Evidence for the Plaintiff

Kevin Graham Cooke is a tobacco farmer and President of the Zimbabwe Tobacco Association (ZTA). He explained the operational modalities of the tobacco retention scheme declared by the Reserve Bank in 2007. In short, applications by tobacco growers for foreign currency retention were to be forwarded through their banks to the RBZ before the end of each year. In 2007 about 70% of the declared 20% retention was paid out, while in 2008 only 5% of the 25% retention was paid. The balances outstanding are the subject of a class action by the ZTA for the recovery of about US$19 million. The claimants under that class action were identified in a list published by the RBZ in April 2009. According to the witness, the RBZ list

constituted an acknowledgement of debt by the RBZ. The plaintiff was not included in that list but, if it had been included, then the RBZ would have acknowledged its debt.

Chantelle Natalie Kriel is employed by the plaintiff, which is a family business operating as a commercial tobacco grower. The plaintiff participated in the 2007 retention scheme and also wanted to participate in the 2008 scheme. She prepared the requisite application to the Reserve Bank on the 16th of September 2008 for the retention of US$62,000 (equating to ZW$ 241,000 at the official exchange rate). She telephoned the defendant before submitting the application, which was then taken by hand to the defendant's Harare Branch by her mother-in-law. The witness arranged for sufficient funds in the plaintiff's current account with the defendant to meet the ZW$ payment, by paying in ZW$ 250,000 on the 9th of October 2008. After the retention application was delivered to the defendant, she assumed that it had been duly forwarded to the RBZ. Subsequently, she saw the RBZ notice in *The Herald* and noticed that the plaintiff was not listed as a creditor or beneficiary. She immediately contacted the defendant and, after several further enquiries, she was told that the plaintiff's account was inadequately funded at that time in order to process the retention application. She was then sent a bank statement for the relevant period. This showed that the sum of ZW$250,000 had been deposited and credited a few days later on the 13th of October 2008. However, several unusually exorbitant bank and interest charges in October and November had reduced the account into debit. The defendant had not informed her about these charges before imposing them nor had it advised her that the account was overdrawn. In the past, whenever the account was overdrawn, the defendant's staff would inform her by cell-phone or e-mail and she would take immediate steps to credit the account.

Jacoba Johanna Catherina Kriel is the wife of the plaintiff's Managing Director. She personally delivered the plaintiff's retention

application to the defendant's Agri-business Branch on the 16th of September 2008, for the attention of the Branch Manager. There was no query about the application from the defendant thereafter.

George Viljoen Kriel is a Director of the plaintiff company. He corroborated the testimony of the last two witnesses. He added that, in the case of a globular or cumulative retention application, the rate of exchange was fixed as at the date of each sale and not at the date of its submission. However, he conceded that after the ZW$ was devalued by 10 zeros on the 22nd of November 2008, the revalued amount would not have sufficed to acquire the sum of US$62,000.

Evidence for the Defendant

Simbarashe Zenza was employed by the defendant in 2008 as an account relationship manager. He confirmed that the exchange rate which obtained at the time of each sale was that which was applied even in respect of a lump sum retention claim at the end of the growing season. However, the ZW$ equivalent was to be forwarded at the same time as the application was submitted by the grower's bank to the RBZ. In the instant case, the defendant was unable to submit the plaintiff's application because its current account balance was always below the requisite amount of ZW$241,000. This was due to the prevailing account maintenance and interest charges levied on the account. Soon after the application was received by the defendant, the witness checked the account balance and on the same day sent an SMS message to Chantelle Kriel stating that there were insufficient funds in the account to process the application. After she deposited ZW$250,000 into the account, he did not advise the plaintiff that this would be insufficient as he assumed that it was aware of the increased maintenance and interest charges. Under cross-examination, he admitted that on previous occasions, whenever the plaintiff was advised of a debit balance, it would take steps to rectify the

problem within a few days. He also conceded that the defendant had an obligation to inform its customers of any increase in maintenance fees.

Price Controls and *In Duplum* Interest

At the conclusion of the trial, the Court questioned the legality of the defendant's account maintenance fees in terms of the laws controlling commodity prices and service charges at the relevant time. After having considered the governing legislation, Adv. *Morris* accepted that the maintenance fees were unlawful and also that the defendant's interest charges were in breach of the *in duplum* rule. Moreover, in terms of paragraph 2.7 of the RBZ's Revised Operational Modalities, the defendant was required to transfer the ZW$ equivalent to the RBZ simultaneously with the plaintiff's retention claim. Consequently, it was admitted that as from the date of the plaintiff's deposit of ZW250,000 into its account, and having discounted the unlawful fees and charges, there were sufficient funds in the account to enable the defendant to submit the plaintiff's retention application to the RBZ in mid-October 2008. Nevertheless, it was still the defendant's defence that the cause of any loss incurred by the plaintiff was the RBZ's failure to pay and not the defendant's conduct.

Damages for Breach of Contract

The plaintiff's claim in the Declaration initially sounded in delict and, alternatively, in contract. Following the defendant's concession that it had a contractual obligation to submit the plaintiff's retention application to the RBZ, which obligation the defendant breached, the plaintiff's claim is now confined to one sounding in contract. As specific performance is no longer feasible, its claim is for damages arising from breach of contract.

In this regard, Mr. *Paul's* submissions are as follows. If the contract had been fulfilled, *i.e.* if the defendant had forwarded the

plaintiff's application timeously, the plaintiff would have been included on the RBZ list published in April 2009. The plaintiff would consequently have had an enforceable contractual right or, at the least, a reasonable expectation to receive payment from the RBZ. However, because of the defendant's breach of contract, the plaintiff does not have this right. If the defendant had performed its contractual obligation to the plaintiff, the latter would have been entitled to receive the payment claimed from the RBZ under the retention scheme. The amount of that payment represents the measure of damages due to the plaintiff.

Adv. *Morris* counters that the plaintiff has not proved any contractual right of any tobacco grower that could be enforced against the RBZ. Therefore, the plaintiff cannot claim the right to be put in any better position than a grower whose application was properly lodged with the RBZ. In any event, even if such right does exist, it is not enforceable as against the RBZ as a State entity with immunity against execution. Alternatively, it is submitted that the plaintiff's claim is premature until such time as the RBZ begins to pay out the growers included on its April 2009 list.

It is trite that the claimant suing on a breach of contract is entitled to be put in the same position as he would have been in had the contract been duly performed. See *Sommer* v *Wilding* 1984 (3) SA 647 (A). In the instant case, had the defendant performed its contractual obligation, the plaintiff would be in the same position as all the other growers whose claims for the retention payment had been properly submitted to the RBZ.

The evidence before this Court is that the ZTA has filed a class action against the RBZ, on behalf of all the growers included on the April 2009 list, for the recovery of their 25% retention payments. However, no detailed evidence was adduced as to the specific terms of the RBZ publication in *The Herald* or as to its contractual implications. Was it an unequivocal acknowledgement of indebtedness on the part of the RBZ or merely an acknowledgement

that the growers listed had submitted their claims? The wording of paragraph 2.8 of the RBZ's Revised Operational Modalities appears, *prima facie*, to be couched as an undertaking to transfer the global US$ amounts claimed to the growers' respective banks. However, whether this constitutes a binding and enforceable contractual undertaking is an issue that cannot presently be adjudicated upon without full evidence and argument on the matter. Additionally and in any event, it would be quite incompetent to decide this point without the RBZ having been joined as a party to these proceedings.

Immunity from Execution

Given the above reservations, I do not deem it necessary or appropriate to determine the specific legal status of the RBZ as a statutory body and its immunity from execution. These are unquestionably very important and interesting points that should be fully ventilated at an opportune juncture. Nevertheless, I am disposed to venture the following cursory observations in that regard.

The allocation and expenditure of public funds is a matter that stands on a different footing from any other form of expenditure or disbursement of moneys. Apart from being preconditioned by the need for Parliamentary approval, public expenditure is also subject to Executive control and restriction in the best interests of the community. See *Murray* v *McLean N.O.* 1969 (2) RLR 541 at 550-551. See also section 24(4) of the Audit and Exchequer Act [*Chapter 22:03*] which explicitly empowers the Treasury to limit or suspend any authorised expenditure "if, in its opinion, such action is in the public interest". Whether these restrictive rules of public administrative law may properly be invoked in the present situation is obviously open to argument.

As regards immunity from execution, section 5(2) of the State Liabilities Act [*Chapter 8:14*] restates the common law restraint upon any "execution or attachment or process in the nature

thereof" being issued against "any property of the State". The RBZ is undoubtedly an instrumentality of the State and, as such, it is entitled to many if not most of the advantages and benefits that enure behind the protective shield of the State. However, whether it also enjoys immunity from suit and execution at common law is a moot point. On the one hand, in terms of section 4 of the Reserve Bank Act [*Chapter 22:15*], the RBZ is constituted as "a body corporate capable of suing and being sued in its own name". On the other hand, by virtue of its distinctive functions and centrality within the State apparatus, it is pre-eminently a body that should enjoy the same immunities as the State. In this context, Statutory Instrument 115 of 2010 (promulgated on the 8th of June 2010) does not really clarify the point at hand. Section 2 of the Regulations amends the Reserve Bank Act by inserting a new section 63B, in terms of which the State Liabilities Act "applies with necessary changes to legal proceedings against the Bank". Section 3 of the Regulations provides that they apply to proceedings against the RBZ "that are pending" on the date of their commencement. The precise scope of these Presidential Powers Regulations is not entirely clear and it is arguable whether they were intended to alter the common law or enacted purely *ex abundante cautela*. In any event, even if the RBZ is held to be immune from execution, whether under the common law or by dint of statute, this would only operate to prevent the enforcement of any judgment debt obtained against the RBZ. It would not preclude the institution of legal proceedings against the RBZ and the recognition of any actionable right at common law or under section 2 of the State Liabilities Act.

Disposition

As I have already stated, the plaintiff's entitlement to an award of damages should place it in the same position as the growers listed in the RBZ notice of April 2009. It would be absurd and entirely anomalous for it to be put in a more favourable position

than those growers whose applications were duly forwarded to the RBZ. At the present time, the rights and entitlements of the listed growers as against the RBZ are the subject of the class action instituted by the ZTA. Until such time as that matter is finally determined or until the RBZ opts to voluntarily pay out the listed growers, whether fully or partially, it is not possible to quantify the measure of damages due to the plaintiff by reason of the defendant's breach of contract. In short, at the present time, the plaintiff holds what is essentially a contingent right to damages as against the defendant, dependent upon the eventual outcome of the claims lodged by the listed growers.

Insofar as concerns the possible prescription of the plaintiff's contingent claim, I take the view that prescription will only begin to run as and when the listed growers' claims are eventually finalised. It is at that stage that the plaintiff's cause of action will crystallise and when the defendant's debt will become due. At this point in time, the plaintiff's claim is clearly premature.

It follows that the plaintiff's action must be dismissed, and it is hereby so dismissed with costs.

Wintertons, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners