REPORTABLE **(50)**

(1) BLUE TRACK INVESTMENTS (PRIVATE) LIMITED
(2) STENHOP INVESTMENTS (PRIVATE) LIMITED
(3) ACEFOAM (PRIVATE) LIMITED
(4) SAMZIM (PRIVATE) LIMITED
v
NEDBANK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & MAKONI JA
HARARE: 13 OCTOBER 2020 & 14 MAY, 2021

L. Uriri, for the appellants

T. Mpofu and *T. W. Nyamakura*, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court declining to grant, each of the appellants, declaratory relief that the respondent's unilateral debit of their bank accounts held with it (the respondent) was unlawful.

FACTUAL BACKGROUND

The appellants are companies registered in terms of the laws of Zimbabwe and are subsidiaries to a foreign company known as BST Holdings (Private) Limited. At all material times, each appellant maintained two bank accounts with the respondent; an RTGS account denominated in Zimbabwean Dollars and the Foreign Currency Account 'FCA' denominated in United States Dollars. In 2018, the first to third appellants accessed huge amounts of foreign currency from the respondent to meet their offshore obligations using their RTGS credit balances notwithstanding that their FCA accounts were unfunded or underfunded.

Taesung C & I Co, a Korean company that shares the same shareholding and directorship as the appellants, was one of the major beneficiaries of the transactions.

Two of the respondent's employees one Kundai Dube and Albert Chapatorongo facilitated the transactions without following the procedures put in place by the respondent of accessing such foreign currency. When served with letters of suspension, the employees promptly tendered identical letters of resignation.

To correct the anomalies, the respondent debited the first to third appellant's FCA accounts with the amounts paid in settlement of their foreign obligations. It simultaneously credited their RTGS accounts with the same amounts. Resultant, the first to third appellants' RTGS accounts stood in credit whilst their FCA accounts became overdrawn to the tune of the amounts unlawfully accessed.

The corrective action was extended to the fourth appellant since the respondent treated all four appellants as a single economic entity. All appellants shared the same directorship and shareholding. Further, in previous transactions payments for the discharge of each other's' obligations were made *inter partes*.

Aggrieved by the conduct of the respondent, the appellants filed separate court applications in the court *a quo* seeking *declaraturs* to the effect that the respondent's action of debiting their FCA accounts was invalid. As such, they sought that the respondent restore and reimburse them of the amounts unlawfully debited from their FCA accounts. The first to third appellants averred that the respondent created a fictitious set of facts to justify the action it took. They averred that the transactions were legal and binding on the respondent as they were in line with past practices where the respondent would allocate foreign currency and debit their RTGS accounts with the US dollar equivalent in local currency. This, they submitted, constituted a contract, which the respondent could not unilaterally vary without following due process.

They further averred that the respondent was vicariously liable for the acts of its employees, which were done in the scope of their employment. The first to third appellants also submitted that the respondent erred in its corrective action by wrongly applying the new monetary policy promulgated in the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations ("S.I. 33/19") in retrospect in respect of their vested rights.

The fourth appellant's position was that it had been improperly dragged into the dispute between the respondent and first appellant. It submitted that since it had a separate legal personality from its sister companies, the corporate veil could only be pierced where fraud or other improper conduct had been proven. The fourth appellant submitted that this was not a proper case for lifting the corporate veil as the respondent had only made bald and unsubstantiated allegations of improper conduct.

In its opposing papers, the respondent argued that the appellants were allocated the foreign currency outside the bank's arrangements. It averred that the respondent's employees, who processed the transactions, circumvented clearly laid down procedures for accessing foreign currency by its customers. There was no involvement of the Mini ALCO, a body setup by the respondent in 2016 to facilitate access to foreign currency and the appellants failed to employ any of the provided ways, which could be used to access foreign currency.

The respondent also drew attention to the fact that the appellants failed to approach the responsible accounts relationship managers, assigned to manage their accounts, including issues of accessing foreign currency. It further averred that there was nothing unlawful in effecting the reversals at the exchange rate, which was operational at the time of the reversal.

The court *a quo* consolidated the appellant's matters. It found that the bank accounts, which the appellants asked the respondent to debit for the payment to foreign entities, were RTGS accounts, a fact that they were aware of. It further reasoned that the first to third appellants made use of foreign currency that they did not have and that Dube and Chapatarongo helped them to beat the system. It further held that the clear evidence of fraud perpetrated in acquiring foreign currency could not be ignored.

The court further highlighted that the respondent exercised its contractual powers set out in clause 6 of the parties' contract to combine and consolidate its customers' accounts and to set-off or transfer any sum standing to the credit of any one or more of such accounts against liabilities in any other account. The court *a quo* further indicated that it was bound to respect the parties' freedom of contract and that the exceptions for it to interfere with the principle of freedom of contract did not exist.

Resultant, the court *a quo* held that the respondent was on a sound legal footing, both in terms of contract and banking law and banking usage and custom, to act as it did. To that end, it opined that it was academic to consider the effect of S1 33/19 which was issued when the application was already pending. The court *a quo* held that the appellants maintained their credit balances in RTGS dollars, which was all they were entitled to. It found that the appellants did not have balances standing to the credit of their FCA accounts at the relevant time and that they did not have any legal rights which could warrant a declaration.

Regarding the propriety of the corrective action taken against the fourth appellant, the court *a quo* found that the appellants constituted a single economic unit with the parent company that was not before it. It looked at the substance rather than upholding the corporate fiction argued by the appellants. This was because the shareholding and directorship of the appellants was the same as their parent company and the Korean registered company, which benefited from the transactions. Further, there had been inter-account transfers between the appellants. The case in point is that of the second appellant which owed the respondent large amounts of foreign currency and had made a transfer to the fourth appellant during the relevant period. The court *a quo* indicated that strict adherence to the principle of separate corporate identity would prevent the respondent from correcting the overdraft incurred by the second appellant.

Aggrieved by this decision, the appellants noted an appeal with this Court on the following grounds:

GROUNDS OF APPEAL

1. "The court *a quo* erred in disregarding that the primary issue in dispute between the parties was whether Statutory Instrument 33/19 applied to the dispute between the parties and in failing to make a judicial determination on it.
2. The court *a quo* erred and misdirected itself in not finding that the respondent's act of debiting the appellants' accounts at the then prevailing rate of 1:1 in 2018 constituted a full and final settlement of the parties' obligation
3. The court *a quo* erred in any event in not considering that a completed transaction of this nature could not be unilaterally reversed by dint of the Reserve Bank of Zimbabwe's Consumer Protection Prudential Standards BSD 1/2017 made in terms of section 4C of the Banking Act [*Chapter 24:20*].
4. The court *a quo* grossly misdirected itself and erred in failing to find, as it ought to have done, that the respondent had wrongfully and unlawfully exercised its common law lien/right to combine and set off the accounts of the appellants in circumstances where the factual framework for such an action did not exist.

5. The court *a quo* erred at law and grossly misdirected itself when it held that the appellants, with the assistance of the respondent's employees, had defrauded the respondent by accessing foreign currency without following procedures set out by the respondent at a time when their accounts were underfunded.
6. The court *a quo* erred and grossly misdirected itself in burdening the appellants with an onus they did not have to establish that they did not participate in the alleged fraud.
7. The court *a quo* grossly misdirected itself and erred in upholding the combination of the 4th appellant's bank accounts on the basis of piercing the corporate veil, a remedy which could be granted in the absence of a counter application."

SUBMISSIONS BEFORE THIS COURT

Mr *Uriri* for the appellants argued that the appellants' obligations were discharged when the respondent processed the payments and proceeded to debit their RTGS accounts. To that end, he submitted that setting off the appellant' accounts was improper because the respondent had already taken the money due to it. Mr *Uriri* also argued that the respondent erred by reversing its transactions without giving the appellants an opportunity to be heard in terms of s 4.1.1 (d) of the Reserve Bank of Zimbabwe Consumer Protection Prudential Standards BSD1/2017 (Prudential Standards).

He further argued that the action taken by the respondent was not justified since the parties had transacted in that very same manner several times and at the time of transacting there was no distinction between the accounts as they traded at par. Counsel further attacked the basis of the reversals on the grounds that no audit report was put forth to prove bypassing of the said internal procedures put in place by the respondent. He submitted that the respondent bore the onus to prove fraud but the court *a quo* improperly shifted the same to the appellants.

Mr *Uriri* further contended that the court *a quo* erred by piercing the appellants' corporate veils without an application to that effect. He argued that the fact the appellants were a group of companies did not take away their distinct separate legal statuses.

In justifying the reversals effected by the respondent, Mr *Mpofu* accentuated the distinction between the Nostro and RTGS accounts held by the appellants. He argued that the appellants knew that they could not make foreign payments using RTGS accounts. He further submitted that the appellants used foreign currency they did not have to settle foreign obligations.

He argued that the payments were irregular not having been done in accordance with any of the methods used to procure foreign currency, which the appellants were acutely aware of. They made use of respondent's two employees who resigned upon being confronted with the issue. The appellants representatives communicated with these employees at odd hours, such as 4 am. He further submitted that there was evidence that the employees who processed the transactions were bribed by the appellants. The appellants side lined their dedicated accounts managers. As a result, the appellants accessed foreign currency, a scarce commodity, to the tune of USD$1 257 560 72 within a period of 52 days. As such, Mr *Mpofu* contended, the respondent had a right to correct the irregular transactions in terms of clause 6 of the agreement between the parties without recourse to the appellants.

Mr *Mpofu* further contended that the appellants could not claim alleged violation of the Prudential Regulations as this was not their case in the court *a quo*. Rather, they had always asserted that the respondent's actions were based on a fictitious set of facts. Regarding the propriety of the corrective action taken against the fourth appellant, Mr *Mpofu* submitted that the respondent had a right to combine accounts where there is evidence that the accounts are operated by one individual. He further argued that the respondent's approach was proper in a matter of this nature where the facts show that these companies are a single economic entity.

Although the appellants raised several grounds of appeal, from the parties' submissions in this Court, the following issues arise for determination:

1. Whether or not the court *a quo* erred by not declaring unlawful the respondent's unilateral act of debiting the appellants' FCA bank accounts for foreign currency transactions which had been funded by their RTGS accounts.

2. Whether or not the court *a quo* was correct in combining the appellants' accounts.

3. Whether or not the court *a quo* was correct in not determining whether SI 33/99 was applicable to the dispute between the parties**.**

In *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (H), GUBBAY CJ, in dealing with an appeal against refusal to grant a declaratory order, held that it is not permissible for this Court to interfere with the discretionary power vested in the court *a quo* to decline the issue of a declarator, unless it could be shown that it had committed such an irregularity or misdirection, or exercised its discretion so unreasonably or improperly, as to vitiate its decision. Therefore, the appellants have to demonstrate gross misdirection in the court *a quo*'s exercise of its discretion, which justifies interference by this Court.

In *casu*, the appellants' arguments are hinged on findings of fact by the court *a quo*. It is settled law that the factual findings made by a lower court or tribunal cannot be interfered with unless proven to be grossly irrational. The court in *ZINWA v Mwoyounotsva* SC 28/15, illustrated this as follows:

> "It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it, or that the decision was clearly wrong."

The court a *quo* made the following findings of fact in reaching the conclusion that the respondent's action against the appellants was justified. It found that the appellants knew that the accounts which they asked the respondent to debit were in fact RTGS accounts which could not fund foreign transactions. Also, the foreign currency payments were processed notwithstanding that the appellant's FCA accounts were unfunded or underfunded to meet their foreign obligations. Further, the respondent's employees, Dube and Chaparatongo who helped the appellants to "beat the system" failed to refute the allegations contained in their letters of suspension and promptly resigned. I find nothing illogical in these findings.

In fact, the court *a quo*'s findings lead to the inevitable conclusion that the funding of the appellant's foreign currency payments using the RTGS accounts was irregular. It is an uncontroverted fact that at the time the foreign currency payments were processed, the appellants did not have credit balances in their FCA accounts. The appellants could not issue a mandate to process foreign currency payments on unfunded accounts. There were no corresponding cash deposits made to the FCA accounts against the transfers. The appellants cannot hide behind a bald assertion that they had transacted that way before in the absence of evidence to that effect.

More so, a perusal of the record also shows that the first to third appellants deliberately failed to follow the respondent's procedures for processing payments to foreign entities. The payments were not authorised by the Mini ALCO set up by the respondent for that purpose. They were all processed by the same employees outside of the set procedures. This includes background employees to whom the appellants should, ordinarily, not have had access. There is evidence on record, in the form of emails, between these employees which suggest that there were some payments made to them that could be bribes.

Further, the appelants knowingly evaded the modalities put in place by the respondent for assessing foreign currency. These include allocations from the Reserve Bank of Zimbabwe available to customers on the basis of priority and allocations from the respondent's value chain allocation system. There was also the respondent's bond note deposit promotion system which was run by its count relationship managers. The appellants failed to establish that they had followed any of these three systems.

They accessed foreign currency to the tune of USD$1 257 560.72 in a period of 52 days despite an acute shortage of foreign currency in the country at the time. Therefore, a factual framework justifying the reversals was in existence.

The effect of the irregular transactions was underscored by the court *a quo* as follows:

> "The unlawful transfers meant that the applicants one to three's foreign currency accounts became overdrawn as a matter of fact. When this happens, it is the customer who must make good the overdraft."

In *Zimbank v Chibune & Another 2004 (1) ZLR 301(H)*, the court dealt with a suit for an unauthorised overdraft in the defendant's bank account and held that:

> "In the normal course of banking practice, a bank is entitled to reverse a credit it has entered on a customer's account in respect of a negotiable instrument or cheque deposit when the instrument in question is later dishonoured. The law treats the relationship between banker and customer as a contractual one. The reciprocal rights and duties included in the contract are to a great extent based upon custom and usage. It is now accepted that the basic, *albeit* not the sole, relationship between the banker and customer in respect of a current account is one of debtor and creditor. <u>The fact that the bank might permit the customer to draw cheques against uncleared effects, despite there being no agreement in this regard, would not excuse the customer in law from liability to make payment to the bank. If the effects are not cleared, it is the customer who must bear the loss, not the bank.</u> The bank is entitled to debit the customer's account with the amount drawn, even if there is no agreement for overdraft facilities." (emphasis added)

In *casu*, the appellant's FCA accounts became overdrawn due to the fact that when the transactions for foreign payments were made, the accounts were underfunded. The overdraft could not be cured by any credit balances existing in the RTGS accounts. The respondent, therefore, was justified to correct the anomalies by crediting the first to third appellants' RTGS accounts and debiting their FCA accounts.

The powers exercised by the respondent are found in the parties agreement. Clause 6 of the parties' contract provides that:

> "The bank may exercise its general lien or any similar right it is entitled to including the right to combine and consolidate all or any of the customers' accounts with the Bank and the right to set-off or transfer any sum or sums standing to the credit of anyone or more of such accounts against liabilities in any other account."

The wording of the clause is clear and unambiguous. It must be given effect to. The court *a quo* cannot be faulted for giving effect to what the parties agreed to. Courts of law are bound to honour agreements between parties that are entered into freely and voluntarily. This was put beyond doubt by this Court in *Kundai Magodora & Ors v Care International Zimbabwe* SC 24/14 as follows:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H." (my emphasis)

Further, the appellants' case is watered down by the *caveat subscriptor* rule. In *ZUPCO Ltd v Pakhorse Services* (Pvt) Ltd SC 13/17 at p 18, the court described it in the following manner:

> "The *caveat subscriptor* rule sets out that a party is taken to be bound by the ordinary meaning and effect of the words which appear above its signature, for the other party is entitled to assume that he has signified his assent to the contents of the document. See also Mdlongwa v Thembekile Mdlongwa SC 98/05" (my emphasis)

Therefore, the appellants cannot now seek to dispute the validity of the corrective action taken by the respondent, which stems from the contract the parties voluntarily concluded. By virtue of signing the contract, the appellants bound themselves to the banking practices of the respondent in respect of set-off or transfer of sums standing to the credit of anyone or more of such accounts against liabilities in any other account.

The appellants also argue that the court *a quo* erred, in any event, in not considering that the respondent's conduct was at variance with clause 6.5.2 of the Prudential Standards, which provide that a regulated entity cannot benefit from any amounts. Such amounts will be debited in error which must be returned to the customer without delay.

The appellants cannot rely on clause 6.5.2 of the Prudential Standards for two reasons. First, the provision applies to a bank that has received funds in error. Second, this is not the case that the appellants placed before the court *a quo*. It is trite that a case stands or falls on its founding affidavit. In any event, the appellants cannot import new arguments on appeal. This Court in *Mudyavanhu v Saruchera* SC 75/17 had this to say:

> "An appeal court by nature is one that considers and assesses the correctness or otherwise of the decision of a lower court on any particular issue. Where no such issue is considered by an inferior court, it follows generally, that there is nothing for the appeal court to determine." (emphasis added)

As such, the court *a quo* cannot be said to have erred on an issue that was not before it. More so, clause 6 of the parties' agreement did not require the respondent to consult the appellants in exercising its powers of combination and setoff.

Having established that the respondent's action was justified, a secondary issue arises as to whether the corrective action could be extended to the fourth appellant. The appellants argue that the court *a quo* erred in upholding the combination of the fourth appellant's bank accounts by of piercing the corporate veil, a remedy which could not be granted in the absence of a counter- application. The basis upon which the court *a quo* lifted the corporate veil was the existence of a single economic entity. The court *a quo* looked at the substance rather than the form of the corporate fiction.

In *Deputy Sheriff Harare & Anor v Barnsley* HH 121/11, PATEL J (as he then was), held that the exceptions to the general principle of piercing a corporate veil have been extended beyond the realm of fraudulent or improper conduct to the situation where a single economic entity owns all the shares in its subsidiaries and controls every aspect of their operations. He quoted with approval the following remarks in *DHN Food Distributors Ltd* v *London Borough of Tower Hamlets* [1976] 3 All ER 462 (CA) at 467, where it was stated thus:

> "Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. …This group is virtually the same as a partnership in which all the three companies are partners. …The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one."

The court went on to state that:

> <u>"The rationale for this extension, as I perceive it, is that where the operations of an economic group are so close as to be virtually indivisible, considerations of policy tend</u>

> to militate against any legal separation of its integral units, for to do so would be to perpetuate an essentially corporate fiction. Of course, this may not invariably be the case, but the equities would certainly favour such an approach in dealings at arm's length with innocent outsiders." (emphasis added)

In light of this, the court *a quo* was correct and cannot be faulted as it is common cause that the appellants are part of an economic unit with common directorship and shareholding. Owing to this and the inter-account transfers amongst the appellants, I perceive that this is a case where any legal separation of the appellants would tend to perpetuate an essentially corporate fiction. Therefore, the fact that there was no application is unimportant as all the parties made extensive submissions on the issue in the court *a quo*. The factual framework for the lifting of the corporate veil existed. The court *a quo*'s decision cannot be impugned. In any event the respondent's conduct of combining the accounts is provided for in terms of clause 6 referred to above

The appellants complain that the court *a quo* erred in disregarding that the primary issue in dispute between the parties was whether Statutory Instrument 33/19 applied to the dispute between the parties and in failing to make a judicial determination thereon. Mr *Uriri* submitted that it was not in dispute that the reversals, a domestic transaction between the appellants and the respondents, was governed by the provisions of SI 33/19. He contended that as the transactions were made and completed before the promulgation of the SI 33/19 and any obligations thereunder had been fully discharged, SI 33/19 had no application. Assuming that it applied, its provisions, and more particularly s 4(1)(d) thereof, deems any debt incurred in United States dollars before the effective date to have been incurred in RTGS dollars at the rate one as to one with the United States dollar. The court *a quo* ought to have considered whether the said SI 33/19 applied, and if so, how it applied to the facts. Its failure to do so is a misdirection warranting interference by this Court.

Mr *Mpofu* submitted that the appellants' arguments are a euphemistic way of saying that their fraud should not matter. He further contended that this is not the case that the appellants pressed *a quo*. He concluded by saying that it is not clear what relief appellants claim consequent upon that argument.

I entirely agree with the submissions made by Mr *Mpofu*. It is not correct that the issue of the applicability of SI 33/19 was the primary issue in dispute between the parties *a quo*. A perusal of the appellants' founding affidavits, the orders sought before the court *a quo* and the relief that the appellants seek in this Court belie the appellants' argument. The appellants' concluding paragraph in all the founding affidavits, except in respect of the fourth appellant, are identical and read as follows;

> "Since the Applicant's attempts to reach a settlement have hit a brick wall, the Applicant is left with no option but to approach this Honourable Court for an order declaring the conduct of the Respondent of resorting to self-help illegal and null and void, an order restoring each party to their original positions prior to the illegal deductions made by the Respondent against the Applicant's bank account and for an order compelling the Respondent to unfreeze Applicant's Nostro and any other accounts affected by the illegal freeze in terms of the draft order attached hereto."

In their draft orders *a quo*, the appellants sought declaratory relief that the respondent's unilateral act of garnishing and debiting their accounts was unlawful. Consequently, they sought the restoration and reimbursement of the debited amounts and unfreezing of their respective accounts. This is the same relief that they seek before this Court. The appellants were seeking declaratory and spoliatory relief. That was the primary dispute between the parties, which the court *a quo* dealt with. They did not put in issue the applicability of SI 33/19. As correctly submitted by Mr *Mpofu* it is not clear what relief the appellants claim consequent to that argument. The court *a quo* cannot be faulted for not determining an issue that was not before it.

It is for these reasons that I have concluded that the court *a quo* exercised its discretion judiciously in denying the appellants the declaratory relief sought. The appellants failed to demonstrate that they had an interest in an existing or contingent right or obligation and as a result failed to prove their right to the relief that they sought. The respondent's corrective action against the appellants was justified in the circumstances of this case. The appeal has no merit and must fail.

Regarding costs, I see no justification why these should not follow the cause.

Accordingly, I will make the following order:

"The appeal be and is hereby dismissed with costs."

GWAUNZA DCJ I agree

UCHENA JA I agree

Kamusasa & Musendo, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners