CECIL MADONDO (In his capacity as the duly appointed
Liquidator of Century Discount House Ltd)
versus
ZIMBABWE BANKING CORPORATION

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 4 April 2006, 15 February 2007,
15 November 2007 and 30 January 2008

Opposed Application

GARWE JP: This matter was heard on 4 April 2006 before me. Not long after this I was elevated to the Supreme Court bench. In the ensuing process of moving to the Supreme Court the file in this matter together with other documents were misplaced but these were subsequently found. Thereafter the issue that arose was whether as a Judge of the Supreme Court I had the jurisdiction to determine this matter. The issue was subsequently discussed with both parties as well as the Chief Justice. Those discussions cleared the way for the preparation of this judgment. A further point of law arose on the papers which necessitated calling both parties. The resultant delay in the finalization of the matter is regretted.

The relief sought in this application is for a declaratory order that certain Grain Marketing Board (GMB) bills belonging to Century Discount House (CDH) and delivered to the Zimbabwe Banking Corporation (Zimbank) on 5 December 2003 are assets of CDH and that consequently the liquidator of CDH is entitled to recover from Zimbank the full maturity value of the bills, namely $4 billion ($4 million in the new currency) together with interest thereon from 3 March 2004 being the date of maturity of the bills to date of payment.

There is a dispute as to the nature of the accommodation accorded to CDH by Zimbank which necessitated the delivery of these bills to Zimbank by CDH. Certain aspects of this are however not in dispute. Zimbank had for sometime been granting CDH overnight accommodation. It is not in dispute that this is an arrangement commonly used in the market between individual banks and the Reserve Bank of Zimbabwe in terms of which the bank requesting the facility is credited overnight with the agreed amount of the facility and the amount repaid the following day.

The overnight facilities granted to CDH were not secured. By letter dated 11 Mach 2003, Zimbank, whilst acknowledging that the repayment of overnight loans by CDH had been undertaken smoothly in most instances, advised CDH of the conditions which applied to such loan facilities. The conditions included the need for security and the requirement that such security be deposited with Zimbank by 4.00p.m. on the day of the transaction, except Wednesdays and Saturdays. Zimbank does not appear to have insisted on compliance with these conditions and nothing of importance appears to have happened until 20 November 2003 when CDH wrote to Zimbank confirming that its account had gone into excess and requiring time to liquidate the excess. On 5 December 2003 CDH, who were the holder and owner of GMB bills with a maturity value of $4 billion, executed a security deposit form and delivered this to Zimbank. The CDH account with Zimbank at that stage was overdrawn to the tune of about $12 billion. On 30 December 2003 Zimbank dishonoured all cheques issued by CDH and on 5 January 2004 Zimbank liquidated the GMB bills in its possession for an amount of $3,077,100,273.97.

In the meantime the RBZ had on 2 January 2004 closed the doors of CDH after concluding that it was an ailing institution. On 22 January 2004 at the instance of the Reserve Bank of Zimbabwe, the High Court granted an order placing CDH in liquidation.

At the centre of the dispute in the matter is the nature of the facility which was granted to CDH and whether the act of liquidating the bills by Zimbank amounted to an undue preference in terms of the Insolvency Act [*Cap* 6:04].

The applicant, who is the liquidator of CDH, in his founding papers says the facility was an unsecured overdraft. He further contends that the bills were liquidated at a time when the Reserve Bank had closed CDH and it was therefore improper for Zimbank to have liquidated the bills without the approval of the Reserve Bank. The applicant further contends that Zimbank violated sections 42, 43 and 112 of the Insolvency Act in that it allowed itself to obtain security on a previously unsecured debt and thereafter liquidated the security in circumstances which amounted to undue preference. The applicant further says it is evident that the bills in question were demanded at a time when the insolvency of CDH seemed imminent.

Zimbank, in its papers, denies that CDH was operating an overdraft facility in the normal sense. CDH operated an account with Zimbank through which it paid its debtors. Whenever CDH found that it could not meet its cheques from the funds in its account, it would apply to Zimbank for an overnight facility. If the facility was not repaid the following day, cheques drawn on the account would be liable to be dishonoured. Penalty interest would be charged where the facility was not liquidated

and a further overnight facility had to be applied for if the overnight facility was not liquidated by the end of the day. Zimbank says by letter dated 11 March 2003, it advised CDH of the need for security for its overnight facilities. Because of an improvement in the operation of the CDH account and the fact that no overnight facilities were required for a while, no persistent reminders on the question of security were sent to CDH. In November 2003 CDH started having problems regularizing its overnight position and as consequence the GMB bills were delivered to Zimbank on 5 December 2003. Zimbank denies that the security given on 5 December 2003 was for a facility granted some 25 days later on 30 December 2003. Zimbank says overnight facilities were granted on a frequent basis from the inception of the respondent's relationship with CDH. Had the security not been given on 5 December 2003, no further overnight accommodation would have been allowed.

Whilst stating that CDH was at no time granted an overdraft facility in the normal sense of the word, Zimbank accepts that an overdraft arose from time to time owing to the failure by CDH to liquidate its overnight facility resulting in an overdrawn position on its current account. Zimbank further submits that the bills were in a negotiable state and since CDH was not in liquidation there was nothing to stop the bank from liquidating the security. The security was obtained for overnight accommodations that were continuing and a new debt arose every time an overnight accommodation was granted. The security was given to secure future overnight facilities. On 30 December 2003 Zimbank decided to liquidate the security and honour no further cheques owing to the manner in which CDH was operating its account. The security was not given to secure the overnight accommodation for 30 December 2003 but was to enable Zimbank to continue to grant these facilities. In practice when an overnight facility is liquidated, the current account is credited as

that is the only account which CDH had with the respondent. The security was liquidated on 5 January 2004 although the decision to liquidate the security was made on 30 December 2004.

In his answering affidavit the applicant submits as follows. That if the security was delivered because CDH was having problems with regularizing its overnight position, it follows that CDH had by then accumulated an overdraft. When the security was delivered to Zimbank on 5 December 2004, the CDH current account was overdrawn to the extent of $12 billion. The $4 billion worth of grain bills therefore were delivered not to cover future overnight accommodations but rather to secure a previously unsecured overdrawn position. The applicant further submits that the nature of an overnight accommodation is such that one may not place security to cover future anticipated accommodations. Security is placed equivalent to the value by which the party requesting accommodation is short. Further that even if it were to be a trend that one is invariably short every other day, such shortage cannot be forecast with such exactness as to warrant a certain fixed account of security to be continually in place.

By consent, Zimbank filed further opposing affidavits. These were intended to deal with what Zimbank considered were new assertions made by the applicant in the answering affidavit. The first affidavit is by Gladmore Mutoko, Assistant Head of Zimbank Group Treasury. Gladymore Mutoko emphasizes that Zimbank was the applicant's banker and maintained a current account into and from which deposits and withdrawals would be made respectively in the normal course of banking business. The operation of this account was separate and distinct from the question of overnight accommodation. He makes four points. The first is that it is normal

banking practice to cover future overnight accommodation. Secondly that the applicant's current account was not constantly in debt and that the grain bills were not delivered to secure a previously unsecured position. Thirdly that there is nothing in the nature of overnight accommodation to preclude security being put in place to cover future accommodation and fourthly that as with any security of this nature, security is accepted at a value which is felt would be wholly or partly adequate to protect the bank's position.

The second affidavit is by Andrew Taruwona, General Manager – Banking Operations, African Banking Corporation. He states that it is the invariable practice of an institution, such as CDH when it was operational, to maintain a current account with a commercial bank such as the respondent. The current account would be maintained in the normal way, with receipts coming in and drawings being made from that account. The granting of an overnight facility is an entirely separate issue. He makes the further point that it is perfectly normal banking practice for security to be lodged with a commercial bank to secure future overnight facilities to be granted and that such security would be in an amount which the commercial bank estimates to be adequate or substantially adequate to secure its position notwithstanding the fact that the precise amount of such future facility will be unknown.

On a careful analysis of the facts of this case, I am satisfied that the apparent dispute on the facts can be resolved by adopting a robust approach. A number of facts are common cause whilst others are apparent from the circumstances as a whole. It is clear that CDH operated a current account with Zimbank. By whatever name one may call it, CDH enjoyed an unsecured overdraft facility with Zimbank. No security had been registered against the overdraft and interest would be calculated on the

debit balances. I would agree with the applicant that the arrangement was informal and seemed to suit both parties for a while. The amount of the overdraft fluctuated daily depending on the deposits and withdrawals made. As at 5 December 2003 the CDH account had accumulated a debit balance of about $12 billion.

The suggestion by the respondent that there was no overdraft in the ordinary sense is therefore not borne out by the facts. As stated at page 182, *Pagets Law of Banking*, Tenth Edition:-

> "An overdraft is money lent. A payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money. A banker is obliged to let his customer overdraw only if he had agreed to do so or such agreement can be inferred from a course of business; borrowing and lending are a matter of contract, express or implied."

Whilst there may not have been an express request for an overdraft, it is clear from the respondent's conduct that in continuing to honour CDH's cheques when in fact the account did not have sufficient funds the respondent was agreeable to an overdraft. For how else can one explain the fact that at the time the bills were delivered the account was overdrawn to the extent of almost $12 billion?

There has also been argument on whether the security was intended to cover overnight facilities or CDH's general indebtedness. One may accept that initially the arrangement between the parties was that there should be overnight accommodation and that some security may have been necessary. Indeed one must accept that security can be made available to cover future overnight accommodation. However the circumstances of this case show quite clearly that whilst the respondent had at some stage indicated that there may be need for some security, such security had not been insisted on. It is clear that by the end of November 2003 CDH was having

serious problems in trying to regularize its account and by 5 December 2003 it had overdrawn its account to the tune of almost $12 billion. It was only then that the bills were executed as security for such indebtedness. The security was clearly inadequate taking into account the size of the overdraft. CDH clearly was in financial dire straits and it is also clear that CDH was never able thereafter to clear its indebtedness with the respondent.

The question that now arises is whether what Zimbank did was permissible in terms of the law and in particular, in terms of the Insolvency Act. The Insolvency Act applies in this case pursuant to the provisions of s(s) 269 and 270 of the Companies Act [*Cap* 24:03]. Section 42 of the Insolvency Act provides as follows:

> "42. Voidable Preferences
> 1 …
> 2 Subject to this section every disposition of his property made by a debtor within the period of six months immediately preceding:-
> (a) the sequestration of his estate; or
> (b) …
> which has the effect of preferring one of his creditors above another may be set aside by a court if, immediately after the making of the disposition, the liabilities of the debtor exceeded the value of his assets.
> 3 A disposition shall not be set aside in terms of subsection (2) if the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

Section 184 of the Act goes further and makes it a criminal offence for any person who, before or after the sequestration of an estate, removes, disposes of, deals with any asset belonging to that estate with intent to defeat an attachment by virtue of a sequestration order or with intent to prejudice creditors in that estate. That section further provides that where it is proved that any removal, disposal etc. had

the effect of defeating or was calculated to defeat the attachment, it shall be presumed, unless the contrary is proved, to have been done with such intention.

Century Discount House was placed under liquidation by order of the High Court dated 22 January 2004. The disposition was made on 5 December 2003. This was within the period of six (6) months contemplated in *s* 42 of the Act. The disposition *prima facie* had the effect of preferring Zimbank against the other creditors.

Zimbank appears to accept that the disposition had that effect. However Zimbank argues that the bills were disposed of in the ordinary course of business and that the disposition was not done with an intention to prefer. Zimbank also argues that the transaction whereby CBH furnished the bills was a pledge of the bills which conferred a real right to deal with them as owner or holder on a preference on solvency should it come about before the security had been realized.

On the facts of this case, I am not persuaded that the disposition was made in the ordinary course of business. It must have been evident by the end of November 2003 that CDH was unable to pay its debts. Indeed Zimbank accepts that CDH was having difficulties regularizing its position and it was for this reason that security was insisted on and thereafter delivered on 5 December 2003. At that time, as is common cause, CDH owed Zimbank close to $12 billion. The security that was delivered was not even sufficient to cover CDH's indebtedness to Zimbank at that stage.

On the papers the inference is irresistible that CDH was allowed by Zimbank to operate an unsecured overdraft. Whilst initially the arrangement had been to cater

for CDH overnight accommodation requirements, the position eventually changed and CDH was allowed to operate an unsecured overdraft facility.

At the time the securities were delivered both CDH and Zimbank must have been aware of CDH's precarious financial position. Indeed Zimbank proceeded to unpay cheques presented by CDH on 30 December 2003. Zimbank thereafter proceeded to liquidate the bills for less than their maturity value at a time when the doors of CDH had been closed to the public and liquidation of the institution appeared imminent. It also appears not to be disputed by Zimbank that a run on deposits had occurred, having been triggered by the ENG saga.

I am satisfied that at the time the securities were delivered and subsequently discounted, there was an intention to prefer Zimbank, amongst other creditors. I am also satisfied that the delivery of the securities as well as their liquidation was not done in the ordinary course of business. There was a conscious effort on the part of Zimbank to ensure that it, and it alone, benefited from the liquidation of the bills even though it must have been apparent that CDH had other creditors.

Zimbank has submitted that it had the right to deal with the bills as owner and that it had a preference in the event of insolvency should it come about before the security had been realized. I do not agree with this submission. Where a bill is deposited as security for an advance, a bank is not entitled to negotiate the bill – *Pagets Law of Banking* p 546. The exception of course would be where the pledgor has allowed the pledge to negotiate the bill. That is not the position in this case. Most importantly however once it is accepted that delivery of the securities amounted to an undue preference and that the disposition was not made in the

ordinary course of business but rather at a time when the financial position of CDH was dire, then the disposition cannot be allowed to stand.

In view of the above conclusion it is not necessary to decide whether or not what Zimbank did amounts to a criminal offence in terms of the Insolvency Act.

In the result, it is ordered as follows:-

1. The GMB bills with a face value of $4,000,000 (new currency) delivered to Zimbank at the instance of CDH on 5 December 2003 are the property of the applicant.
2. The applicant is entitled to recover from Zimbank the full maturity value of the GMB bills plus interest from the date of maturity being 3 March 2004 to date of payment in full at the Century Bank Limited minimum lending rate.
3. The respondent is to bear the costs of this application.

Mutangamira & Associates, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners