ENGEN PETROLEUM ZIMBABWE [PVT] LTD
versus
WEDZERA PETROLEUM [PVT] LTD
and
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 27 & 29 January 2016; 16 March 2016 & 15 April 2016

Civil trial

Adv. *R. Fitches*, for the plaintiff
A. Moyo, for the second defendant
The first defendant in default

MAFUSIRE J: This was a civil trial. The first defendant ["***Wedzera***"] was in default. On application by the plaintiff ["***Engen***"] in respect to which the second defendant ["***the Bank***" or "***IDBZ***"] had nothing to say, I entered a default judgment against Wedzera, in favour of the plaintiff, in the sum of $847 847-65, together with costs of suit and interest at the prescribed rate.

Most of the material facts were common cause. Engen was an oil company. It sold bulk fuels. Wedzera operated filling stations at which it retailed fuels. IDBZ was a statutory corporation set up in terms of its enabling Act, the Infrastructure Development Bank of Zimbabwe Act, [*Chapter 24: 14*] ["***IDBZ Act***"]. Engen's claim arose out of petroleum fuels sold and delivered to Wedzera in terms of an agreement between them. Wedzera had failed or neglected to pay. Engen claimed IDBZ had guaranteed the due payment by Wedzera, up to an amount in the sum of $950 000. That amount was made up of two guarantees, one for $500 000 and the other for $450 000. But IDBZ disowned them. It argued that one of its ex-employees had issued them fraudulently or without authorisation.

Engen called two witnesses. The first, Johannes Mudzengerere ["***Mudzengerere***"] had been Engen's Managing Director at the relevant time. He had been in charge of Engen's entire operations, including the procurement and disposal of fuel stocks.

Engen's second witness, Francis Mugwara ["***Mugwara***"], was the man at the centre of the guarantees. He had been subpoenaed just before the trial commenced. He was the one who had signed and issued the impeached guarantees. Figuratively, and perhaps not unexpectedly, the Bank sought to lynch him.

For the Bank, there were also two witnesses. At the relevant time Norbert Munengwa ["***Munengwa***"] had been an Assistant Director in charge of a unit or division called Private Sector Projects. He reported to the Chief Executive Officer. His portfolio covered the crafting of strategies, policy formulation and business development. Within that sector Mugwara had at all relevant times been the Head of the unit called Corporate Banking. It was formerly called the Short Term Loans Unit. He had joined it as Assistant Head, and had subsequently been promoted. He reported to Munengwa.

The Bank's second witness was Desmond Matete ["***Matete***"]. He was a qualified lawyer. At the relevant time he was the Director for Legal and Corporate Services. Amongst other duties, he was the custodian of the Bank's legal documents.

There was much convergence, or little controversy, on such key aspects of the evidence as would, in my view, decide the matter. Differences were mainly on peripheral issues and on the parties' application of the law to the facts.

Wedzera used to buy bulk fuels from Engen for cash. As its sales increased, it wanted more fuels, but on credit. Engen obliged. Wedzera signed Engen's standard credit facility application form. Mudzengerere ran it past Engen's agent for credit rating. He also sought and obtained clearance from Engen's head office in South Africa. Everything seemed in order.

Wedzera had to provide a bank guarantee to guarantee the due payment for the fuels. These came from IDBZ.

During this period, 2010, the country's economy had just "dollarized". A multi-currency system had been introduced following the demise of the local currency. Most companies' balance sheets had almost reduced to zero. As a recapitalisation strategy, the Bank had decided to offer non-traditional or non-generic products that either avoided or minimised direct cash outlays, or that brought in quick income. The witnesses said the Bank was trading off balance sheet.

The Bank's new strategy concentrated on non-direct cash products such as short to medium term loans, bankers' acceptances, bills discounting and bank guarantees. This

strategy also involved the bulk importation of petroleum products and the procurement of fertilisers for disposal on the local market.

The Bank had set up a body known as the Private Sector Projects Committee ["***the PSPC***"]. This committee would grant global approvals and cap the upper monetary limits for any new projects. The members of this committee were the Bank's senior officials, including Munengwa and Matete. But heads of divisions such as Mugwara were also members. Mugwara was a member.

It was common cause that Mugwara had the Bank's authority to market this new strategic innovation. He had the authority to procure new business, to manage and grow it. The point of departure between Mugwara, on the one side, and Munengwa and Matete on the other, was the extent of Mugwara's authority.

Specifically with regards to the issuing of guarantees, Mugwara claimed he had the authority to issue guarantees in favour of third parties and binding on the Bank, for as long as the amounts on them did not exceed the limits set by the PSPC. He claimed he could issue such guarantees on his single signature. He had access to the Bank's stationery, including sample guarantee forms. He managed Harare, Bulawayo and other towns. He was in charge of all staff falling under his unit. He insisted he had complied with all the standard operating procedures, not least opening an account for Wedzera and issuing it with a facility letter; raising bank charges and completing all other relevant documents. He claimed all the paper work had been placed in the relevant bank records which Matete kept. He challenged Matete to produce those records.

Of some guarantees that were produced in evidence bearing two signatures and which the Bank gave as an example of what a valid guarantee was like, Mugwara said these had been initiated by his subordinates who also had the authority to issue guarantees. However, guarantees by subordinates had to be countersigned by himself, as head of the unit, or else they would be invalid.

Munengwa and Matete vehemently disputed that Mugwara could issue guarantees on his single signature and bind the Bank. They said all the Bank's guarantees had to be countersigned. They said there were elaborate internal standard operating procedures. These had to be followed at all times that the Bank would offer any credit facility to anyone. Of the two guarantees in question, and some two others that Mugwara had also issued on his single

signature in favour of other third parties, Munengwa and Matete said they were invalid for lack of authority. They had never been brought up to the PSPC for specific approval.

Munengwa and Matete also accused Mugwara of fraud. They said when they had confronted him after Mudzengerere had called up the guarantees and was pressing for payment, Mugwara had broken down and confessed to having been paid by Wedzera's Managing Director, one Eric Nhodza ["***Nhodza***"], an amount in the sum of $10 000 in return for the guarantees. The Bank had raised misconduct charges against him. However, he had ducked out of the disciplinary process by resigning.

Mugwara denied the fraud. He denied the confession. He maintained he had issued the guarantees within the scope of his mandate. It was common cause that the Bank had reported Mugwara to the police. However, it was also common cause that the State had declined to prosecute for lack evidence.

For Engen, Mudzengerere said his first encounter with Mugwara was when, a few days before the guarantees, Mugwara had arrived at his office offering Engen two million litres of fuel. Mugwara had introduced himself as the Bank's Head of Corporate Unit. He had produced his business card. However, the fuel deal had subsequently fallen through.

When Wedzera was increasing its fuel purchases and was asking for supplies on credit, Mudzengerere had required the provision of security in the form of assets or guarantees from a reputable bank.

A few days later a Wedzera representative and Mugwara had returned to Mudzengerere's office with a sample guarantee from IDBZ. Mudzengerere had been satisfied with the wording. He had been comfortable with IDBZ as a "government bank". The first guarantee had been issued. It was for $300 000. Engen never had to call it up. Wedzera had paid in accordance with the agreement.

Wedzera had further increased its fuel purchases. It had provided further guarantees from IDBZ for $500 000 and $450 000-00. It was on these last two guarantees that the case before me was all about. Wedzera had failed to pay. Its debt at the time of the default stood at $847 847-65. That was the amount claimed in the summons.

There was no issue about the wording of the guarantees.

When Mudzengerere called up the guarantees, Mugwara got in touch with Wedzera. Wedzera wrote something to assuage Engen. Mudzengerere was unimpressed. He pressed for payment. Eventually he got through to Munengwa. Munengwa disowned the guarantees. The

Bank's position was that Wedzera was not, and had never been, a customer of the Bank. Among other things, and contrary to standard operating procedures, there was no record of any account having been opened for Wedzera before or after the guarantees had been incepted. No bank charges had been raised as fees for the guarantees. There was simply no paper trail relating to them. As far as the Bank was concerned, the purported guarantees had been an abuse of the Bank's stationery by Mugwara. They were invalid.

Having faced a brick wall, Engen sued.

That was essentially the case before me.

Mr *Fitches*, for the plaintiff, argued that the Bank's defence was misconceived. From the facts, Mugwara had the actual authority to issue the guarantees in question. He was the Head of the Bank's unit that had the requisite mandate to issue such type of bank products. Mugwara's contract of employment empowered him to issue such guarantees.

Mr *Fitches* further argued that if it should be said that Mugwara had no actual authority to issue the guarantees, then he undoubtedly had ostensible authority. The Bank had held him up as one with such authority. He had started off as Assistant Head in the Short Term Loans Unit. He had interacted with the public in that capacity. This unit had subsequently changed its name to Corporate Banking. Mugwara had subsequently been promoted to head it. All this had been in the eyes of the public.

Mr *Fitches* highlighted that Mugwara had access to the Bank's stationery. It had provided him with business cards, obviously to assist in the marketing of its products. One such product had been the non-generic, off-balance sheet facility that involved minimal cash outlay. There were also other innovations, such as the non-traditional trade in fuels and fertilizers. Mugwara had been mandated to market and manage them. Third parties like Engen could hardly be faulted for accepting Mugwara's authority and his guarantees. Nothing warned them that he might be unauthorised. That he might have breached the Bank's in-house standard operating procedures, or that he might have exceeded the bounds of his authority, could not disentitle Engen from holding the Bank to the guarantees.

For the Bank, Mr *Moyo* explored Mugwara's contract of employment in some detail and argued that nothing said therein could be said to amount to authority for Mugwara to issue such guarantees on his single signature. Mr *Moyo* further explored the Bank's standard operating procedures and concluded that Mr Mugwara had manifestly breached all the important check-lists. Among other things, Wedzera had never been a customer of the Bank.

There was nothing on record to show that any of the account opening and account operating procedures had been put in place. No fees had been raised. No facility letter had been issued. No customer vetting had been done. The guarantees had never been brought up to the PSPC for approval. There was not a single meeting convened for this business, let alone any minutes taken in respect of it.

To the Bank, Mugwara was just a rogue. He had taken a bribe for $10 000 in return for the guarantees. When confronted by Messrs Munengwa and Matete, he had confessed. To avoid disciplinary action he had simply resigned. He had an axe to grind with the Bank. He had been blacklisted and was no longer employable in the finance industry.

According to Mr *Moyo*, Mugwara had neither the actual nor the ostensible authority to issue those guarantees. Engen had been negligent in accepting them without verification. It should have checked with the Bank for their authenticity. On this particular point, Matete claimed in his evidence that it was the practice and custom in the capital markets that a third party who is given a guarantee such as the type Mugwara had issued, would run them past its own bankers. The bankers would know how to go about verifying them for authenticity.

Mr *Moyo* discredited Engen's credit rating process of Wedzera. He pointed out that on the credit facility application form, the Standard Chartered Bank, not IDBZ, had been listed as Wedzera's bankers. If Engen had been diligent or prudent enough, it should have been suspicious to be receiving from Wedzera guarantees from IDBZ, instead of the Standard Chartered Bank.

In his closing submissions Mr *Moyo* sprang a new argument. It had not been pleaded. It had never been referred to before. It was that the Bank was a statutory corporation the powers of which were set out in its enabling Act. In summary, Mr *Moyo's* new argument was that anyone could check what the Bank could or could not do. Among other things, only the Bank's Board and its Chief Executive Officer had the sole mandate to represent the Bank. Mugwara's conduct had been in contravention of the law.

Mr *Moyo* quoted s 21 of the IDBZ Act *in extenso*. It sets out the procedures and requirements for financing by the Bank. Among other things, there can be no financing for any project without the Bank's Board having first considered it. An elaborate procedure is then set out on how the Board may go about considering a proposal for funding; what sort of things it must look for, and what conditions it may prescribe if the proposal is approved. It was argued that Mugwara, not having followed, or caused to be followed, the statutory

procedures, his guarantees were *ultra vires* the Act, manifestly void and therefore unenforceable. Inevitably, reference was made to LORD DENNING'S seminal statement in *McFoy v United Africa Co. Ltd*[1] . If an act is void, then it is a legal nullity. Such an act is not only bad, but also incurably so. There is no need for an order of court to set it aside. Every proceeding founded on it is also incurably bad:

"You cannot put something on nothing and expect it to stay there. It will collapse."

Mr *Moyo* also referred to s 30 of the IDBZ Act. By this provision, the Bank is made immune from the provisions of the Companies Act, [*CHapter 24: 04*], or of any other law relating to companies. This has huge significance. Section 12 of the Companies Act codifies the common law rule of company law, also known as the ***Turquand*** rule, after the 19th century English case of *Royal British Bank* v *Turquand*[2] in which the rule was first succinctly expounded. This rule says that any person dealing with a company is entitled to make certain assumptions, such as that the company's internal regulations have been duly complied with. The company is estopped from denying the truth of such assumptions. Anyone is entitled to assume that every person whom the company represents to be its officer or agent has been duly appointed and has authority to exercise the functions customarily exercised by him: see *Mills* v *Tanganda Tea Company Ltd*[3].

In terms of s 13 of the Companies Act, a company shall be bound in terms of s 12 notwithstanding that the person held out to be the officer or agent for it might have acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company.

Plainly, but for s 30 of the IDBZ Act, the Bank could never have mounted the kind of defence that it did herein, for Mugwara's actions fell squarely within the scope of the presumptions of regularity prescribed by s 12 of the Companies Act.

However, in spite of the ousting by s 30 of the IDBZ Act of the provisions of the Companies Act, and any other law relating to companies; in spite of such further provisions of the IDBZ Act as may repose in the Bank's Board the sole power to represent it and to consider all funding proposals, and furthermore, notwithstanding the Bank's argument that Mugwara's powers might have been limited, I find that as between himself and the Bank

[1] [1961] 3 All ER 1169 [PC] at 1172
[2] (1856) 6 E & B 327; (1843-60) 119 ER 886
[3] 2013 [1] ZLR 38 [H], at 42 -43

Mugwara had ***actual*** or ***implied*** authority to issue those guarantees. I find that as between Engen and the Bank, Mugwara had ***ostensible*** authority to issue the guarantees and to bind the Bank to third party recipients.

LORD DENNING MR, in *Hely-Hutchinson* v *Brayhead Ltd & Another*[4] [quoted with approval by MPATI P in *Northern Metropolitan Coal Council* v *Company Unique Finance [Pty] Ltd & Ors*[5]] explained ***actual*** or ***implied*** authority as follows:

> "[Actual authority] is *express* when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office."

BEADLE CJ in *Reed No* v *Sager's Motors*[6], [quoted with approval in *Seniors Service [Pvt]* v *Nyoni*[7]] explained ***apparent*** or ***ostensible*** authority as follows:

> "The word 'ostensible' in the *Rhodes Motor Company* case (1965 (4) SA 40) is used in the sense of 'apparent' and in the language of the law of agency these two terms are synonymous. If a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his 'apparent' authority. The principal is bound even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act [other than the act of appointing him in this capacity] held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed, normally have authority to do what he did."

The principles that emerge from case authority in relation to the ostensible authority of employees in general, and bank managers in particular, are that the principal [the employer] must have created an impression in the mind of the third party, even though that impression might be wrong, that his agent [the employee] had the requisite authority to transact on behalf of the principal. The third party must show a representation by words or conduct by the principal, not merely by the agent. The representation must have been in such form as would reasonably lead outsiders to act on the strength of it to their prejudice.

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[4] [1968] 1 QB 549; [1967] 3 All ER 98 [CA]
[5] 2012 [3] All SA 498 [SCA], at p 507a - c
[6] [Pvt] Ltd [1969] [2] RLR 519 [AD], at p 523; 1970 [1] SA 521 [RAD]
[7] 1986 [2] ZLR 293 [SC]

The court considers the ***façade of regularity*** of the employee's actions purporting to act on behalf of the employer, given ***all the trappings*** of his appointment as set in a context. The branch manager of a bank is a senior employee. He is the face of the bank to the world. He is its local spokesman The outside world is normally entitled to assume or believe that he has the authority to issue out letters of credit binding on the bank: see *Northern Metropolitan Coal Council* above; *NBS Bank Ltd* v *Cape Produce Co [Pty] Ltd & Ors*[8]; *Africa Life Assurance Company Limited* v *NBS Bank Limited*[9] and *Glofinco* v *ABSA Bank Ltd t/a United Bank & Ors*[10].

In *NBS Bank Ltd* v *Cape Produce Co [Pty] Ltd & Ors* above, SCHULTZ JA, holding the bank liable for deposits stolen by a rogue manager at one of its branches, said:

> "[The branch manager] was appointed the local head of this business at Kempton Park. He commanded the staff, including his secretary, who typed the letters and then deleted them from her computer on his instructions, keeping qualms to herself, whether out of fear, or loyalty, or both.
>
> The letterhead on which the letters were typed was provided by the NBS. The facility was created, and it functioned, for the NBS to take Cape Produce's cheques into its bank account, and for its cheques to be issued in repayment. The state of affairs continued for some 18 months with numerous repayments, without the NBS's own system of control detecting the abuse."

One of the cases on which Mr *Moyo* relied was the judgment of the court of first instance in *Glofinco*[11] above. In that case, the trial court held the bank not liable where a manager at one of its branches was in the habit of endorsing certain post-dated cheques from one of its customers in favour of a factoring agent, in effect making the bank a surety and co-principal debtor in *solidum* with the customer. The manager's actions were inimical to the interests of the bank. She had no authority to commit the bank in that manner. The trial court held that the powers of a bank manager are not limitless.

The decision was upheld on appeal. It was found that the transactions were not ordinary transactions of a kind a branch manager would do as a matter of course. Other than the fact of her appointment, the bank had made no other representation that the manger might have been authorised to carry out such peculiar transactions. Furthermore, in spite of its own

[8] 2002 [1] SA 396 [SCA]; [2002] 2 All SA 262 [SCA]
[9] 2001 [1] SA 432 [W] 432
[10] [2002] ZASCA 91
[11] Reported in 2001 [2] SA 1048

serious misgivings about the authority of the manager to bind the bank in the manner she was doing, the factoring agent had purposefully chosen to rely on her word and had refrained from verifying with her employer.

The appeal judgment was a split decision: three for and two against. Even then, the majority judgment made it clear from the outset that the case would turn on its own peculiar set of facts, it being analogous to two other cases that the court had recently dealt with and in which the banks had been found liable[12].

In my view, *Glofinco* is distinguishable from the instant case on the facts.

In *Northern Metropolitan Coal Council* above, the court freed the Metropolitan Council from liability for the contracts signed by some security personnel, one Du Plessis. He was a mere superintendent. He was no. 2 from the bottom in the order of administrative authority. His immediate boss, one Van Wyk [senior superintendent], had purported to approve the contracts. Du Plessis and Van Wyk both operated from a side structure outside of the main offices. It was not clear how they had got hold of Council's stationary and equipment like letterheads and stamps. There was no evidence of what the trappings of their positions were, or what would normally go with those positions.

The court found that the third party had dealt very casually and superficially with Du Plessis. Among other things, it had relied on a clumsily worded and open-ended resolution, signed by Van Wyk, and which purported to give Du Plessis limitless powers to contract on behalf of the Council. The conduct of the third party had not been reasonable, especially given the experience that its witnesses said they had in dealing with local authorities.

Northern Metropolitan Coal Council is also distinguishable from the instant case. Du Plessis and Van Wyk were respectively the last and second last from the bottom. *In casu*, Munengwa and Mugwara were respectively no 1 and no 2 from the top in the Corporate Banking Unit. The Unit, among other things, had the requisite mandate to issue guarantees. Mugwara was the Head. He had layers of staff below him. He managed other regions, not just Harare. He had the authority to use the Bank's stationery. He was expressly entitled and empowered to market the Bank's new innovative trade in non-traditional products in the new multi-currency dispensation. In the overall administrative structure of the Bank, he was no 4 from the Chief Executive Officer, the topmost officer.

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[12] These two other cases were *NBS Bank v Cape Produce Company [Pty] and Others* 2002 [1] SA 369 [SCA] and *South Eagle Insurance Company Ltd v NBS Bank Ltd* 2002 [1] SA 560 [SCA]

Mugwara's job description empowered him "*to generate, manage and control the bank's short term lending portfolio as well as* [to] *supervis*[*e*] *... Regional Offices*." Expressly, he was tasked with ensuring that his unit achieved its set business volumes and, significantly, he was also tasked with the "***disbursements of funds on approved facilities***." [my emphasis]

Among Mugwara's key decision making authority aspects was the approval of departmental expenses and the budgets for the Unit and the Regional Offices.

There was one further subtle detail on Mugwara's job description. Listed as one of the consequences of an error of judgment on his part in relation to, for example, financial/material loss, etc., i.e. what could happen to the organization if he made a wrong decision or failed to perform his job, was this:

> "***Catastrophic as bad decisions can lead to the insolvency of the bank*** *through the creation of a bad Loan portfolio*", and:
>
> "***Reputation of the bank can be on the line*** *if prompt and correct decisions are not made*" [my emphasis]

During trial, the Bank tried desperately to downgrade Mugwara's position. It tried to strip him of all manner of authority. I totally disagree. The evidence on whether or not Mugwara could issue guarantees on his single signature was inconclusive. Mugwara said he could. The Bank said he could not. The onus was on the Bank to prove that he could not. It did not refute satisfactorily Mugwara's claim that it was only guarantees initiated by subordinates that required to be counter-signed for validity. I find that the bank failed to discharge the onus on such a key aspect of its defence.

Mugwara was by no means a junior employee. I have found nothing from his contract of employment or his job description that precluded him from issuing those guarantees on his single signature. Admittedly, these documents did not expressly say he could. But equally, they did not expressly say he could not. There was simply nothing in them that was specific to any type of product the Bank was offering at the time. But when one considers objectively the overall job description and the trappings of his appointment, when one considers that an error of judgment on his part could lead to the Bank going bankrupt, or putting its reputation at risk, I find that the issuing of the guarantees in the manner Mugwara did, fell squarely

within the scope of the risk the Bank had assumed when it appointed him to that position. That, in my view, was *implied* authority for what Mugwara did.

With respect, it was disingenuous for the Bank to try and seek refuge from the provisions of the IDBZ Act that, as argued by Mr *Moyo*, reposed in its Board of Directors or the Chief Executive Officer the mandate to represent it or to consider funding for new projects. The argument was flawed because in terms of sections 4 and 4A of the IDBZ Act, the Board is in charge of the policy and administrative affairs of the Bank, not its operations. It can supervise all the activities of the Bank. But s 7 of the Act empowers the Board to establish committees and vest them with the requisite authority for the better exercise of functions. Persons appointed to such committees need not be members of the Board. I believe the PSPC was one such committee. As said before, Mugwara was a member.

Furthermore, and at any rate, the Board can delegate its powers to the Chief Executive Officer, who may, in terms of s 9 of the Act, employ staff necessary for the conduct of the Bank's business. Nobody said that the Bank's innovative strategy in offering non-traditional products in the post dollarization period was not sanctioned by the Board. Mugwara was expressly authorised to market that vision. This was consistent with his job description. The Bank held him out to the world as one authorised to do so. It provided him with the necessary stationery to issue out the guarantees. He could incept them. The Bank's complaint was only that he had to have had the guarantees counter-signed and that he did not follow the standard operating procedures. But to the rest of the world like Engen, those were minute details. They could not be of concern to it. Mugwara's position as Head of Corporate Banking, who had business cards issued to him by the Bank confirming such status, was not a "***nude appointment***". It was an appointment that had to be considered with "***all its trappings***": see *NBS Bank Limited* v *Cape Produce Co. [Pty] Ltd & Ors, supra*.

I find nothing unreasonable in Mudzengerere's reliance on Mugwara's job description as one who had the requisite authority to issue the guarantees. I find nothing that should have put him on his guard. When Mugwara called at his office for the first time, it was to interest Mudzengerere in a bulk fuel deal worth over a whopping $2 million. So when Mugwara came back a few weeks later, now in the company of a representative from Wedzera, with a guarantee for a trifle $300 000, it was not unreasonable for him to accept the guarantee. Mugwara's actions had a "*façade of regularity*". This particular guarantee ran its life without

the Bank's system of control detecting it: see *NBS Bank Limited, supra*. So again Mudzengerere cannot be faulted for accepting the two subsequent guarantees.

The Bank's reliance on fraud or bribery was problematic. Nothing was proved. The criminal case that the Bank had reported against Mugwara had collapsed. *In casu*, the Bank had no records or document of any sort to support the allegations. Its witnesses said that some of its records had been misplaced or had become unavailable when it had changed offices sometime after the incident. They further said that they had been unaware that Mugwara would testify for Engen until a few days before the trial. That was rather lame.

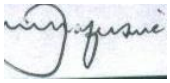
Whether or not Mugwara had been lined up to testify for Engen, did not detract from the fact that the onus would always lie on the Bank to prove fraud or bribery. It was the Bank making those allegations.

Furthermore, the Bank had reported Mugwara to the police soon after the guarantees had surfaced. Munengwa's witness' statement to the police did not contain any reference to Mugwara having received a cash inducement from Nhodza. The complaint was concealment by Mugwara of his transactions of which Munengwa concluded amounted to fraudulent misrepresentation. No wonder the State had declined to prosecute. In his testimony, Mugwara maintained that the allegations of fraud or bribery had never been made to him at any time before the trial. The Bank did not satisfactorily refute this.

For these reasons, I find the Bank liable to Engen for the guarantees issued by Mugwara in respect of Wedzera's indebtedness. Therefore, I make the following Order:

The second defendant shall pay the plaintiff the sum of US$847 847-65, or so much of it as has remained unpaid by the first defendant, together with costs of suit and interest at the prescribed rate from the date of this judgment to the date of payment.

15 April 2016



Wintertons, plaintiff's legal practitioners
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