Copy to Secretary, Law Society of Zimbabwe

Judgment No. S.C. 44/2000
Civil Application No. 74/2000

ASHOK MOTIWALA v YUSUF ISMAIL

SUPREME COURT OF ZIMBABWE
HARARE, MAY 24, 2000

A Matika, for the applicant

P Nherere, for the respondent

Before McNALLY JA: An application in Chambers, in terms of s 31 of the Rules of the Supreme Court of Zimbabwe

At the hearing of the matter I refused the application for an extension of time in which to appeal, with costs. I further directed that the firm of Manase & Manase, and in particular Mr Wilson Manase, should not recover from the applicant any of the costs incurred by them in making and prosecuting this application.

I believe it necessary to give written reasons for this decision because I am disturbed about the way in which this case has been handled from the beginning by Mr Wilson Manase (Mr Manase). I propose to direct that a copy of this judgment be sent to the Secretary of the Law Society for such further action as that Society may consider appropriate.

The facts of the matter are relatively uncomplicated. Mr Motiwala, a businessman, had dealings with a company called Zimland Investments (Private) Limited (Zimland). It seems that Zimland imports goods and Mr Motiwala proposed to buy some of them.

In pursuance of this transaction Mr Motiwala made out a cheque to Zimland for $500 000. It was made out some time before 3 July 1998, but it was post-dated to 30 July 1998. It was originally marked "A/c payee only" but Mr Motiwala cancelled that marking at the request of the payee. In his affidavit he explains that this was done "for whatever reason". (Later he says it was to facilitate its deposit in a Building Society account).

Mr Motiwala also explains that the cheque was post-dated because the goods had not yet arrived in Zimbabwe. By 3 July 1998 it became apparent that the goods would not be available, and Zimland wrote on that date to Mr Motiwala advising him to stop payment on that cheque (and another). He did so.

So far, all was well. But on 31 July 1998 a Mr Yusuf Ismail sought to deposit the cheque in his account. It had been endorsed to him by a Mr M Chokour, a director of Zimland, acting on behalf of Zimland. The date of that endorsement is not known. The cheque was returned marked "Payment Stopped".

Mr Ismail sued Mr Motiwala on the cheque. He issued summons and declaration. Appearance to defend was entered. Application was made for summary

judgment. Mr Motiwala, now represented by Mr Manase, was in default. Summary judgment was granted.

An application for rescission was made. The excuse was made that an incompetent clerk mis-filed the application. The application was refused (on the merits) on 27 January 2000. Mr *Matika*, instructed by Mr Manase, was in court. He made the application. He heard the refusal. But no attempt was made to note an appeal within the time limit.

Hence the application for leave to appeal out of time. The client had been away in India, Mr Manase was busy with cases all over Zimbabwe. Although the client was back in Zimbabwe on 19 February 2000 he did not contact Mr Manase until 9 March and the application was filed on 14 March.

This is not the first time Mr Manase has been out of time. But had there been merit in the defence put up on behalf of his client, it might have been possible to condone the delay.

I have to say, however, that I am quite appalled by the standard of the submissions in the affidavits made by Mr Motiwala which were presumably drafted, or at least checked, by Mr Manase. They betray a total lack of understanding of the law relating to negotiable instruments.

In his application in the High Court, where for the first time the defence is revealed, Mr Motiwala says:

1. The cheque was not a personal cheque but was issued on behalf of a partnership called Budget Hitec.

2. He never did business with Mr Ismail.

3. The cheque could not be endorsed as it was "written" (sic) to a company.

4. When Mr Ismail telephoned him about the cheque before the stop payment instruction, "I told him that the cheque would be good and available only if goods to the equivalent were supplied by Zimland Investments (Private) Limited to whom the cheque had been issued".

The first three defences are simply nonsense. The fourth one has given me cause for reflection. Can it be said to amount to an allegation that Mr Ismail is not to be deemed to be a holder in due course because he did not take the "cheque" in good faith? There is no allegation that he did not take it for value. I do not think, even if the allegation is true (and Mr Ismail denies that version of the conversation) that it is an adequate basis for an allegation of bad faith. Mr Motiwala knew that Mr Ismail was the holder. Surely it was for him to advise Mr Ismail, on or soon after 3 July 1998, and before 30 July, that the cheque had been stopped because the goods had not been delivered. In the absence of any further notification before 30 July 1998 (on which date what had previously been a bill of exchange became a cheque properly so called) was he not entitled to assume that the cheque was good and available?

In this connection Mr *Matika* referred me to Holden *The Law and Practice of Banking* Vol 1 paras 5-121. Here, under the general heading "No notice of defective title" the learned author says:

> "The Act does not define 'defect of title' but gives examples: thus the title of a person who negotiates a cheque is defective when he obtains the cheque by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as to amount to a fraud. Notice of defects of title may be either particular or general. Particular or express notice is where the holder had notice of the particular facts avoiding the cheque. General or implied notice is where the holder had notice that there was *some* defect affecting the cheque, though he did not know exactly what it was. Furthermore, a failure to enquire into the circumstances, when they are known to be such as to invite enquiry, in order to avoid possible actual knowledge will amount to general or implied notice."

It seems to me there is a world of difference between having notice "of some defect though he did not know what it was" and having notice of a potential defect which might never eventuate. Equally, there is world of difference between having notice of a defect "at the time the bill was negotiated to him" (s 28(1)(c) of the Bills of Exchange Act [*Chapter 14:02*]) and having notice subsequently of a potential but not actual defect. There is no allegation that Mr Ismail had notice of any defect, actual or potential, at the time the post-dated cheque was negotiated to him.

In this context Malan on *Bills of Exchange, Cheques and Promissory Notes* 2 ed para 191, p 296 has this to say:

> "A post-dated cheque is a bill payable on a future date and becomes a cheque on that future date. It can be negotiated before the date, and if he acquired it in good faith and for value, its purchaser will be a holder in due course."

In my view, no defence to Mr Ismail's claim is revealed on the papers before me.

There is, however, a further serious concern. On the papers that were before me at the time the hearing began, I was of the view that a great deal of suspicion attached to the conduct of Zimland and of its director, Mr M Chokour. Questions which arose were –

1. Why did Mr Chokour want the words "A/c payee only" deleted? He says it was because he wanted to pay it into his Building Society account. But why would he want to do that before he had delivered the goods for which the cheque was payment?

2. Why did Mr Chokour endorse the cheque to Mr Ismail?

3. When did Mr Chokour endorse the cheque? Was it before 3 July 1998 or after? If it was before, why did he not tell Mr Motiwala when he advised the latter to stop payment? If it was after, what was he up to?

4. For what reason or for what value did he endorse the cheque to Mr Ismail?

5. Why has he not filed an affidavit, despite the fact that on the papers he is apparently collaborating with Mr Motiwala?

For all these reasons I was wondering why Mr Motiwala had not attempted to join Zimland and Mr Chokour in the proceedings.

I then learned, during the course of the application hearing, that one affidavit had somehow been omitted from the papers submitted to me by Mr Manase.

This was an affidavit by Mr Ismail. He had undertaken a search at the Companies Office and had found that Mr Manase himself was a director of Zimland and a co-director therefore with Mr M Chokour.

This raises questions about the propriety of Mr Manase acting for Mr Motiwala. They are questions which I think should be put to Mr Manase by the Law Society of Zimbabwe. *Prima facie* Mr Manase has an interest in the matter which is adverse to the interests of his client.

I direct therefore that a copy of this judgment be sent to the Secretary of the Law Society of Zimbabwe.

Manase & Manase, applicant's legal practitioners

Hussein Ranchod & Co, respondent's legal practitioners