

CBZ BANK LIMITED  
and  
HOTHFIELD ENTERPRISES PVT LTD  
and  
TONY RENATO SARPO  
versus  
TRIANGLE SUGAR CORPORATION LIMITED  
t/a Tongaat Hullet, Triangle Limited  
and  
TUNGAMIRAI ISAAC RUKATYA  
and  
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
TSANGA J  
HARARE, 13 September 2017

**Urgent chamber application**

*T Biti*, for the 1<sup>st</sup> applicant  
*T Dzvetero*, for the 2<sup>nd</sup> and 3<sup>rd</sup> applicants  
*B Mahuni*, for the 1<sup>st</sup> respondent  
*I. F. Muzenda*, for the 2<sup>nd</sup> respondent

TSANGA J: On the 9<sup>th</sup> of August I granted the applicants an interim order in the following terms:

“That pending the determination of the main matter being the case of *CBZ Bank Limited v Hothfield Enterprises (Pvt) Ltd and Ors* HC 12629/16, the applicants are granted the following relief:

1. Forthwith, the 1<sup>st</sup> Respondent be and is hereby barred and interdicted from remitting proceeds of the sugar cane sale from Grower No.591 to other accounts and beneficiaries other than those identified in the letter of instruction of the 9<sup>th</sup> of October 2013.
2. The 1<sup>st</sup> Respondent be and is hereby ordered to remit all proceeds of this season’s sugar cane sale due to Grower 591 Hothfield, the 2<sup>nd</sup> applicant on the 10<sup>th</sup> of August 2017, to the 3<sup>rd</sup> Respondents bank account, to be held in trust pending the final determination of the main matter”.

## **The facts**

This order was against the following background facts: The second applicant Hothfield Enterprises Private Limited, (Hothfield) was set up as a joint venture between a company called Dorphin Private Ltd and second respondent Tungamirai Isaac Rukatya's father who is now deceased. It was set up for purposes of growing cane. The second respondent (Rukatya) took over from his father after his death.

Of relevance is that Hothfield had a revolving loan credit facility with CBZ Bank Limited (CBZ). On the 9<sup>th</sup> of October 2013, the second applicant Tony Sarpò, in his capacity as the authorised signatory and a director of Hothfield, wrote to the first respondent, Triangle Sugar Corporation Limited trading as Tongaat Hullet (Tongaat), an irrevocable written instruction to forward 100% of the sugar cane revenue to CBZ. Tongaat comes into the picture in that it would advance inputs and then pay for the sugarcane that it sourced from the farm under an agreed grower number. In the written instruction, Hothfield undertook not to access any additional inputs or services from Tongaat without consent from CBZ. They also undertook not to amend the instruction without the written consent from CBZ. Critically therefore, CBZ had a standing order to receive proceeds paid by Tongaat in order to service the revolving loan.

The revolving credit facility having remained unpaid, CBZ issued summons on the 14<sup>th</sup> of December 2016 for the sum of \$160,165.02 made up of a capital claim of \$94,286.75 advanced to Hothfield for working capital requirements, the sum of \$65 277.52 being interest charged, and, \$650.75 being bank charges. Of significance is that some time in 2013 the joint venture initiative had fallen into problems leading to a consensus that each would go their separate ways. Certain steps were to be taken in finalising the termination of that relationship. In a letter dated 14<sup>th</sup> of March 2014 from Hothfield's then legal practitioners, written to Rukatya who had not taken over the running of the entire farm, it was made clear that the company would need to be liquidated and that the overdraft facility would have to be retired. The relevant part of that letter read as follows:

**“One of the consequences of the termination of the partnership agreement is that the company Hothfield has to be liquidated .As you are aware there is an overdraft facility in place which was being used to fund the operations of the company that would need to be retired. Our company has no desire to continue in any relationship whatsoever with you and will seek that the company be formally liquidated once the overdraft facility is cleared.”** (My emphasis)

It was a fact put out at the hearing that there has to date been no formal liquidation of the company as per legal requirements and neither has the overdraft facility been cleared. In essence, Tungamirai Rukatya remains a director of Hothfield because the company has not yet been legally dissolved even though the parties in principle agreed to go their separate ways.

It also emerged that it was at the pre-trial conference for the main matter that it had unfolded that the proceeds were not being deposited by Tongaat into the specified account as had been arranged in October 2013. What had stopped the non-payment into the account was that in July 2014 Rukatya had written to Tongaat requesting to change grower details and to be issued with a new grower number. The response from Tongaat dated 2<sup>nd</sup> of July 2014 had stated as follows:

“Given that the previous quota and cane purchase agreement was in the name of T Sarpo as the owner of Hothfield Enterprises (which presumably is the one and the same with Hothfield (Private Limited), and in order to protect both Triangle Limited and Hippo Valley Estates from any future possible counter claims emanating from this requested change, we will require the following documents and written undertakings to be presented:

1. A resolution by the directors of Hothfield Enterprises confirming that they have stopped farming sugar cane and accordingly authorize and approve the cancellation of their cane purchase agreement with Triangle Limited, and
2. That they have no objection to a replacement cane purchase agreement being entered into by and between Triangle Limited and I.V Rukatya Estate, whereby the quota previously afforded to Hothfield Enterprises be transferred to the said I V Rukatya Estate (the previous quota was based on 100 hectares of cane and producing 12 000 tonnes of cane during the milling season.
3. ....”

None of these documents had been availed but for unknown reasons the grower details had nonetheless been changed by Tongaat. All proceeds were now channelled to grower 346 being I.V Rukatya Estate and not 591 being Hothfield as per original agreement. The result is that the loan advanced by CBZ to Hothfields has not been paid. Tony Sarpo who signed for the credit facility on behalf of Hothfield accepted fully that money sued for by CBZ was indeed owing. Since Rukatya now ran the farm by himself and since he remains a legal director Hothfield which has not been liquidated, both CBZ and Tony Sarpo argued that it was Rukatya’s responsibility to pay the loan that had been sourced to serve the capital requirements of Hothfield. Tony Sarpo argued that he had been prevented from farming the joint venture land by Rukatya who was now in full control of Hothfield. Both CBZ and Sarpo

further argued that what Rukatya had done by replacing the grower number effectively amounted to side marketing to avoid payment of the loan.

Rukatya's argument that the "partnership" was dissolved had no legal basis since the joint venture entity was a legally registered company and has yet to be dissolved in accordance with applicable laws. He also argued that the irrevocable written instruction had been written before the facility was granted on the 18<sup>th</sup> of November 2013 and that the funds had been received by Tony Sarpo after the partnership had folded. However, what was factually explained at the hearing was that the loan was a revolving loan which had simply been rolled over and over at the time when a further facility was advanced. What had been further elucidated was that the irrevocable letter was underscored by previous transactions as well as future indebtedness.

### **The legal arguments**

CBZ as the main applicant argued that it had satisfied the requirements of an interdict *viz*:

- a) *A prima facie right*, even if open to doubt
- b) Apprehension of irreparable harm
- c) Balance of convenience favouring the granting of the order
- d) No other satisfactory remedy

For a recent elucidation of these settled principles, see *Nyambi & Ors v Min of Local Government & Anor* ZLR (1) 2012 569 (H) and *Mutarisi v United family Intl Church & Anor* ZLR (2) 2012 434 (H).

Since the debt was acknowledged by Tony Sarpo on behalf of Hothfield, what CBZ sought was an anti-dissipation interdict to prevent Rukatya from squandering the proceeds which were the subject matter of the debt. Having advanced the credit facility and in view of the irrevocable letter of undertaking, CBZ's argument was that it had established *a prima facie* right to the proceeds that were due to be paid by Tongaat to Rukatya on the 10<sup>th</sup> of August 2017. It specifically sought for these proceeds to be transferred to the Sheriff of the High Court, being the third respondent in this matter.

In terms of irreparable harm CBZ argued that the real income is from the proceeds of farming and that if these proceeds from the cane are not re-diverted to the proper account

towards paying the loan, there would be irreparable harm in that the loan would remain unpaid. It further argued that the balance of convenience favoured it given that Hothfield through Tony Sarpo, was not disputing the loan. Furthermore, CBZ argued that Rukatya's claims could always be tested in the trial.

### **Legal and Factual Analysis**

It was the court's view that the above elements were satisfied for the following reasons.

There was sufficient *prima facie* showing of entitlement to the order sought by CBZ in that it had advanced the revolving loan facility which to date remained unpaid. All that is required is a *prima facie* showing of a right even if that right is open to some doubt. Sufficient evidence to support the claim was made. Tungamirai Rukatya's argument that the partnership had been terminated in August 2013 was not supported by any legal documents showing that the company had indeed been properly liquidated. As long as the company remains un-liquidated, and as long as he remains a co-director of that company it cannot be argued that he is not liable for any monies advanced to the company of which he is a director.

In terms of avoiding irreparable harm, what CBZ particularly sought was a *mareva interdict* or an anti-dissipation interdict.

"It entitles a creditor to what we call an interim interdict against his debtor, and prevents him from disposing of his assets if it appears that the debt is due and owing, and that there is a danger that the debtor may dispose of his assets so as to defeat the creditor's claim before judgment"<sup>1</sup>.

Where a strong *prima facie* case is made and where there is no genuine defence to the action, the order will be granted. Furthermore where the objective in disposing of the assets in question is to defeat a genuine claim, the order will be granted. For a full discussion of the nature of the interdict and its application in our context see for example, *Northern Farming [Pvt] Ltd v Vegra Merchants [Pvt] Ltd t/a Vegra Commodities & Anor 2013 (2) ZLR* at 343 (h); and *Shabtai v Bar & Ors 2014 (2) ZLR 862 (H)* where such an order was granted.

*In casu*, since the monies had been diverted from being paid in to that account by Rukatya, there was no doubt that CBZ was being deprived of its entitlement to repayment of the loan and that the result would indeed be irreparable harm as the loan would not be repaid.

The fact that the anti-dissipation order is in the manner of a final order is not the point. That arises from the very nature of an anti-dissipation order and the harm that it seeks

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<sup>1</sup> Haydn Hillestad, *Never Mareva*, 3 Juta's Bus. L. 29, 30 (1995)

to prevent. Though it is an interim interdict, its substance is preservation of an asset. As has been observed:

“Although it is an ancillary order to the main action, it often has a decisive effect on the case: 'It is in effect, together with the *Anton Piller* order, one of the law's two "nuclear" weapons.'<sup>2</sup>

Ultimately it is against the backdrop of the existence following factors that an anti-dissipation order is generally granted<sup>3</sup>:

- (a) The plaintiff must have a substantive cause of action within the jurisdiction
- (b) the plaintiff must have a good and arguable case
- (c) The defendant must have assets within the jurisdiction
- (d) There must be a real danger that the defendant will remove the assets from or dissipate them within the jurisdiction.
- (e) It must be just and convenient to grant the injunction.

It is these factors that were found to exist so as to justify granting the type of order that was sought. Also considered was whether this was a grievance which could be addressed by other remedies. This is a fundamental requirement to be satisfied by those seeking an urgent interdict since it would be an abuse of the court's discretion were the remedy to be granted in the face of the existence of other remedies. The conclusion that there were no other remedies was arrived at on the basis that the arrangement of repayment of the loan was that the proceeds would be paid into a specified growers account as per letter of instruction of October 2013. The loan would there be serviced from monies paid into that specific account. To the extent that Rukatya put in place mechanisms that diverted proceeds from being paid into that account, thereby preventing servicing of the loan, CBZ as the main applicant was indeed left with no other remedy than to get an order to divert monies received from the sugar cane back into the appropriate account. The argument that since certain property had been hypothecated, irreparable harm would not be suffered is not a justification for diverting the funds that had been agreed would service the loan. CBZ fastened on the proceeds from the sale of the cane because that was the agreed arrangement with regards to how the loan was to be settled. Materially, this channel of recovery was still possible and remained available as an option by the granting of the provisional order. Selling hypothecated property is always a remedy of final resort. It was not called for in this case where funds and been deliberately diverted through side marketing.

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<sup>2</sup> Hillestad above at p 307 citing Donaldson J in *Bank Mellat v Nikpour* [1985] 11 FSR 87 (CA) 92.

<sup>3</sup> Wilna Faul; F. R. Malan, *The Mareva Injunction*, 2 S.Afr. Mercantile L.J. 305, 327 (1990)

As regards the balance of convenience, where there are competing interests it is all the factors that are taken into consideration in deciding where the balance of convenience lies. An important facet of this balance that I took into account was that the money for this season was to be deposited into the Sherriff's account. This means that it will remain in a neutral account until the final matter is heard given that what was granted was a provisional order. I also placed weight on the fact that Tongaat having requested evidence of proper authority to change the payment arrangements, that this had not been furnished. Also taken into account in deciding on the balance of convenience was that Rukatya had been fully advised of the need to settle the loan arising from the joint venture and the need to properly wind up Hothfield. This he had simply ignored. I took into account that the payment to the Sherriff is of this season's proceeds only and that in the event of the monies being settled there will be no need for CBZ to perpetuate such an order.

It was the balance of the totality of all the above factors that led to the conclusion that the money for the season ought to be deposited into the account pending the finalisation of the main matter and that the provisional order prayed for was granted.

*Tendai Biti Law*, 1<sup>st</sup> applicant's legal practitioners  
*Antonio & Dzvetero*, 2<sup>nd</sup> and 3<sup>rd</sup> applicants legal practitioners  
*Scanlen and Holderness*, 1<sup>st</sup> respondent's legal practitioners  
*Muzenda & Chitsama Attorneys*, 2<sup>nd</sup> respondents legal practitioners