CBZ BANK LIMITED
versus
MICHAEL ELIAS PETER MHUNDWA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 31 January 2017 & 27 September 2017

Civil appeal

T C Mashamba with *M Phiri,* for the appellant
E. Gijima, for the respondent

CHITAKUNYE J. The appellant and the respondent were in a banker-customer contractual relationship. The respondent operated a current account and a fixed deposit account with the appellant Bank.

In 2014 the appellant sued the respondent in the magistrates' court for:

1. payment of US$8 610-97
2. interest on the sum of US$ 8 610.97 at the rate of 28% per annum calculated daily in advance and compounded monthly in arrears from the date of summons to date of full payment
3. Collection commission calculated in accordance with By-Law 70 of the Law Society of Zimbabwe by Laws 1982 and costs of suit on a legal practitioner and client scale.

The plaintiff alleged that on 2 November 2011 the respondent's current account was erroneously credited with US$9 000.00 instead of US$3 000.00 due to a system or human error. By the time the appellant discovered the error and reversed the entries made in error on 8 November 2011, the respondent had withdrawn more than what was lawfully due to him. As a consequence the respondent's account became overdrawn. As the respondent was not forthcoming in reimbursing the money he had overdrawn, when his fixed deposit account

matured, on 23 December 2011,the appellant debited the sum of US$2 000.00 from the respondents account.

The appellant alleged that as at the date of issuance of the summons the respondent owed the appellant US$ 8 610.97 inclusive of bank charges and interest.
It is this debt that the appellant claimed with interest at the rate of 28% per annum calculated daily in advance and compounded monthly in arrears from the date of summons to the date of payment in full. The appellant also claimed collection commission, and costs of suit on a legal practitioner and client scale.

The respondent defended the matter and in-reconvention claimed the US$2 000.00 that the appellant had debited his account with on 23 December 2011 with interest at the rate of 28% per annum from 1 October 2010 to the date of full payment and costs of suit at a higher-scale.

The matter proceeded to trial after which the trial magistrate dismissed the appellant's claim and granted the respondent's claim in re-convention in the sum of US$2000.00. In dismissing the appellant's claim the trial magistrate held, inter alia, that:

- there was no overdraft facility between the appellant and the respondent and so there was no justification for the appellant's claim of interest at a rate of 28% per annum calculated daily in advance and compounded monthly in arrears;

- the appellant had failed to prove on a balance of probabilities that the money that was deposited into defendant's account did not come from the named McDowells.

As regards the counter claim the trial magistrate held that the appellant had failed to prove that the amount was not due to the defendant and so the US$2 000.00 that had been taken from the defendant's fixed deposit account must be refunded.

The appellant being aggrieved by the trial magistrate's decision launched this appeal.

The grounds of appeal were couched as follows:-

1. The learned magistrate erred both in law and in fact in dismissing Plaintiff's claim in that:
    a. The learned magistrate erred and misdirected himself in law and in fact by concluding that the Appellant had failed to prove that it had erroneously credited Respondent with US$6000.00.

b. The learned Magistrate erred and misdirected himself in law and in fact by disregarding the evidence of the Plaintiff.
c. The learned Magistrate erred and misdirected himself in law by failing to appreciate that Respondent failed to offer any sustainable defence at law to Appellant's claim.

2. The learned Magistrate erred and misdirected himself in law by failing to appreciate and incorrectly applying the principles of proof on a balance of probabilities and onus or burden of proof.
3. The learned Magistrate erred in law by failing to appreciate that Appellant was entitled to charge interest above the prescribed rate of interest.
4. The learned Magistrate erred in law and in fact by holding that Respondent did not have an overdraft facility with Appellant.
5. The learned Magistrate erred at law in upholding the Respondent's claim in reconvention.

It is trite law that in civil matters, the standard of proof is on a balance of probabilities. The position was succinctly put in *Zimbabwe Electricity Supply Authority v Dera* 1998(1) ZLR 500(S) wherein the court held that:-

> "..in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims."

In P J Schwikkard *et al in Principles of Evidence*, 3 ed, Juta and Company at 580 the above was illustrated as follows:

> "In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a 'balance of probabilities' but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed. In *Miller* v *Minister of Pensions* 1947 2 All ER 372 at 374, Lord Denning expressed the civil standard of proof as follows: 'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if probabilities are equal it is not.' The civil standard of proof on a balance of probabilities is applied consistently irrespective of the cause of action… The suggestion that there might be different degrees, or standards of proof, depending upon the nature of the facts in issue, is not correct, and has been rejected in South African law."

In *casu*, Counsel for both parties were in agreement on the standard of proof required.

The issue was thus whether the appellant had discharged such onus and whether the trial magistrate misdirected himself in the assessment as to whether the standard of proof had been attained or not.

In his reasons for judgement the learned trial magistrate made a finding that there was no overdraft facility between the parties and so the appellant would not charge an interest rate of 28%. He alluded to the fact that the appellant's witness had indicated that an overdraft facility had to be by agreement and there was no such agreement in this case.

It would however appear to me that the trial magistrate erred in this regard. Firstly, what was being alleged in this matter was an overdrawn account. The trial magistrate appeared to half heartedly acknowledge this when at p 8 of the record of appeal he stated that: -

> "There were, however, sustainable allegations of an overdraft, not overdraft facility, which would have arisen from the fact that defendant would have spent more money than he had or was entitled to. This could be because of an erroneous deposit into his account, which is not an all too unfamiliar thing in the banking industry."

Whilst it is true that an overdraft facility is by agreement, such agreement can be express or implied. As stated at p 182 *Paget's Law of Banking* 10 *ed:*

> "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." *See also Madondo NO v ZimBank Corp* 2008(1) ZLR102 (H)."

In *casu*, the appellant's witness testified that whilst there was no specific overdraft facility between the parties, the respondent's account was capable of being overdrawn.

In this regard he referred to the declaration signed by the respondent on the opening of the current account wherein the respondent declared, inter alia, that:

> "I/we agree to the terms and conditions governing this Account and agree to abide by them and such other rules as may be in force from time to time. …..
> I/we hereby authorise the Bank to combine any of the accounts in my/our name at any time without notice and to return cheques, which as a result of your having taken such action would overdraw the combined accounts.
> I/we hereby agree to be liable for any overdraft or debt due to you on this account or any other account in our name and that the Bank reserves the right to close my/our account without warning if it is not conducted satisfactorily."

At p 33 of the record of appeal, the following exchange took place as the respondent was being cross examined by the appellant's legal practitioner on the contents of the application to open an account, exhibit 1.

"Q. it also says you agree to the bank combining accounts?

A. Yes

Q. and to be liable to any overdraft or debt due to this or any other account?

A. yes

Q. So you agreed to an overdraft?

A. According to form yes."

The above exchange confirms that the respondent was alive to an overdraft being possible depending on how he operated his account. In the face of the above it cannot be said that there was no agreement on overdraft whatsoever. Whilst there was no separate and distinct overdraft facility agreement, both parties clearly understood that in the event of an overdraft in the respondent's account, the respondent would make good the overdraft; such overdraft could be a result of an overdrawn account.

In *Zimbank v Chibune & Another* 2004 (1) ZLR 301(H), court was faced with a similar suit for an unauthorised overdraft in the defendant's bank account. In essence court 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. 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. The bank is entitled to debit the customer's account with the amount drawn, even if there is no agreement for overdraft facilities."

The reversal of credit entries made in error or resulting from dishonoured instruments even where a client's account has no funds should not depend on the existence or otherwise of a specific or formal overdraft facility agreement but is a result of normal banking practice.

A defendant can thus not evade liability on the basis that he had not entered into a formal overdraft agreement.

In *casu*, the respondent did not deny that the reversal of credit entries made in error is a normal banking practice employed by the appellant.

The situation at hand, being one of an overdrawn account, would not in my view depend on the existence of a formal overdraft facility.

In terms of the application for opening account that the respondent signed, once one account was overdrawn, the bank was entitled to use funds from other accounts held by the customer to liquidate or reduce such indebtness.

The issue is thus was the respondent indebted to the appellant? The trial magistrate held that the appellant had failed to prove the indebtness. In alluding to this aspect the trial magistrate seemed to raise the standard of proof to beyond a preponderance of probabilities. At page 8 of the record (p5 of the judgement) the learned magistrate reasoned that:

> "Plaintiff was herein called upon to prove that the amount that was deposited into Defendant's account did not come from the named McDowells. Plaintiff needed to furnish the court with bank account details showing that the three US$3 000.00 deposits into Defendant's account, only one can be traced to an account number belonging to McDowells. The account number and Bank whence it came should have been furnished. Furthermore, plaintiff ought to have shown that the other US$ 6 000.00 can only be traced to an internal error. There was need to prove that there are not three different accounts responsible for the "from McDowells International", "ex-McDowells to Mhundwa" and finally "ex-McDowells Invest to Mhundwa". The onus to prove that was surely on Plaintiff as it is the one which argued that there are no such 3 different accounts and that in fact there was only one valid deposit of US$ 3 000.00 to Defendant. Plaintiff cannot just say it reversed the US$6 000.00 therefore it was deposited erroneously. A bank deposit has a trail of electronic and paper work. Plaintiff needed to do more to discharge its onus."

The above gives the impression that the learned magistrate expected the plaintiff to prove its case beyond merely the balance of probabilities. I say so because the account number for McDowells which was debited with the three deposits was provided (see p 94). This aspect will be reverted to later.

In civil matters the standard of proof is that of a balance of probabilities. It entails examining the two versions by the parties and deciding which of the version is more probable.

The two versions that obtained in this case were basically that the appellant alleged that it received a single Funds transfer (deposit) as evidenced by exhibit 3 dated 2nd November

2011. An error then occurred where by this single deposit was triplicated. Upon realising the error the appellant reversed the credit entries that had been in error on the 8th November 2011.

The Respondent, on the other hand, contended that there was no error but that he had been expecting a sum of about US11 000.00 from his client McDowells and this money was deposited from different accounts as reflected in the narrations against the deposits.

Another aspect that seemed to have swayed the court a quo in dismissing the appellant's case is the apparent discrepancies in the descriptions of entries on exhibit 2 and exhibit 6. The appellant's witness testified to the effect that the differences in narration of the entries was not material, what was important was the fact that only USD3 000.00 was deposited by virtue of exhibit 3. The other credit entries made in favour of the respondent were a duplication of this one deposit albeit described differently.

Though the transaction descriptions differed, the amounts involved were the same. The appellant's evidence was that the description was immaterial as there was only one deposit made during the period in question.

Unfortunately in his reasons for judgment the trial magistrate made no reference to the one deposit, exhibit 3. He instead gave the impression that no evidence of a single deposit had been tendered. This was clearly wrong as the appellant's stance was that exhibit 3 was the only deposit made in favour of the respondent and it was from this exhibit 3 that three credit entries were made in favour of the respondent.

In a bid to illustrate the fact that transaction description was immaterial counsel for the appellant referred to the description pertaining to a sum that the respondent acknowledged related to only one transaction he had made yet it had been described differently in the two exhibits. At p 38 of the record the respondent accepted the difference in description between exhibits 2 and 6 relating to a transaction of US$900.00. In exhibit 2 that transaction is described as TRF IFO FUJI TRADING TO TOYAMA MASAMI REF 029ROTT113070016 and is dated 3/11/11. In exhibit 6 that same transaction is described as follows: outgoing telegraphic transfer.'

The respondent conceded that the sum was in fact for a payment by bank transfer he made to a firm in Japan. It was a single transaction.

Besides the above, it may be noted that there are two ATM withdrawals made on the same date for sums of US$ 100.00 each but are described differently on exhibits 2 and 6. Such

discrepancies tended to confirm the appellant's argument that the transaction description is immaterial.

What is paramount is the nature of the transaction and the amount involved. In this case there was a deposit of US$3 000.00 which was erroneously triplicated. Exhibit 3 shows the applicant's details as McDowell's International and reflects one account number for the applicant. That is the account from which the sum credited to respondent was to be debited.

Though the respondent contended that the amounts were from different accounts, such was mere say so and he had no evidence in support of such assertion.

Further a bald assertion that he was expecting money from McDoweell's different accounts was not backed by any evidence. It was surely upon him to rebut by evidence what the appellant had shown as proof of the only deposit made from one account.

As between the appellant's and the respondent's versions on the McDowells account debited, the appellant's version is more credible. In this regard p 94 of the record is a Bank statement of the bank account for McDowells International dated 25 September 2015. That statement covers the period 1 November 2011 to 11 November 2011. The account number is 20646820027 which is the same account number from which exhibit 3 was drawn on. This statement shows 3 debit entries of US$3 000.00 each made in favour of Mhundwa on 2 November 2011. The entries are recorded as – 'to Mhundwa; ex-Mcdowells to Mhundwa; and 'ex-Mcdowells Invest to Mhundwa.' These debit entries are then reflected in the respondent's account as credits on the same date in exhibits 2 and 6 (page 102 and 110). It is pertinent to note that these emanated from the single Funds transfer slip, exhibit 3. There was no other Funds transfer slip tendered by either party. The appellant maintained that this was the only Funds transfer slip from which the triplication was made. If the respondent was candid in his assertion that there were other deposits or funds transfer slips made by McDowells in his favour it was surely upon him to establish the existence of such slips. As at the end of the trial he had not done so.

Another aspect to note on the statement at page 94, already referred to above, is that on 8 November 2011, as testified to by appellant's witness, 2 x US$3 000.00 reversal entries were made in respect of the debit entries that had been made in Mcdowells account. This tallies well with the entries made on the same date in the respondent's account reversing credit entries that had been made in error.

In my view the appellant's version of events is more probable than the respondent's regarding the circumstances that led to the respondent's account being overdrawn. The evidence shows clearly that the 3 x $3 000.00 credited to the Respondent related to one account of McDowells and not three different accounts.

The respondent's contention that the appellant only informed him of the error after about two and half years and this was after appellant had failed to recover its money from McDowells which was placed under liquidation is not credible at all.

The McDowells account in question, as on the date of the error in crediting the respondent's account (2 November 2011), had a credit balance of US$ 47,410.96. After the error in debiting the account and other debit entries made, it remained with a credit balance of US$ 34 906.96. On the date of the reversal entries the account was still with a healthy credit balance.

Further, Exhibit 3 reflects that as on the 2nd November McDowells account had a credit balance of US45 000.00. If therefore on or about the same date McDowells had made further deposits into respondent's account those could easily have been met from that balance. The respondent did not show that as at the 8th November McDowells account no longer had money, as that is the date a reversal was made resulting in the respondent's account being overdrawn.

Clearly therefore the contention by the respondent in this regard cannot hold. Instead the appellant's assertion that the reversal had to be done because only one deposit of US3 000.00 had been made by virtue of exhibit 3 and the bank had in error credited respondent's account with 2 more sums of US$ 3 000.00 making a total deposit of US$ 9 000.00 instead of just US$ 3 000.00 is most probable.

It is also improbable that when his fixed deposit was liquidated on the 23rd December 2011 the respondent would not have known about it for two and half years after its maturity. Clearly respondent was aware of the overdrawn account and hence did not file a claim for his fixed deposit sum after the date of maturity. He only sought to claim the US$ 2 000.00 after being sued over the debt in question.

It cannot, therefore, be true that the appellant decided to go after the respondent because it had failed to recover its money from McDowells.

It is also clear that the reversal of entries was not made some two and half years after the error but within a few days. The statements are there for anyone to see.

The respondent in his evidence, in fact acknowledged that he became aware of the over drawn account much earlier than the two and half years. At page 39 of the record of proceedings the following exchange took place as the respondent was being cross examined by appellant's counsel:

"Q. how long have you used CBZ Bank?

A. From the time I opened my account. I cannot remember up to when. I stopped using it when this issue started.

Q. which year?

A. Maybe 2011. I am not sure.

Q. you had a fixed deposit?

A. yes

Q. what happened?

A. It matured. I forgot the date. I told them that we continue. This was after this. The bank was in touch with me. I then heard they had removed money to cover debt. I forget the date.

Q. go to exhibit 2 where you shown these statements when you were disputing maturity?

A. I cannot recall

Q. Go to 23 December 2011. Can you see fixed deposit liquidation? Was that when they told you?

A. that is when I told them to continue."

From the above exchange it is apparent that the respondent was informed about the error in 2011. As of 23 December 2011 he was informed that the US$2 000.00 that had been in his fixed deposit account had been used to liquidate/reduce the overdrawn account.

Further, the respondent stated that he stopped using the CBZ account when this issue arose. According to exhibit 2, after the reversal of the entries on 8 November 2011 the respondent did not transact in that account again. What remained in the account was a debit balance which ballooned due to interest charges. So it is true that when the issue arose, the

respondent stopped using the account and this was in 2011. The respondent was thus not being candid with court when he contended that he was only informed of the error in 2014.

It may also be noted that in his plea the respondent categorically denied that he operated a current account. He contended that he operated a savings account. As the application to open an account showed, the respondent was simply being untruthful as the application form confirms in no uncertain ways that the respondent opened a current account. In his evidence he confirmed the same. Clearly by stating in his plea that he operated a savings account and not a current account, the respondent was trying to distance himself from the banking practices that pertain to operating a current account. It cannot be said that he had forgotten the type of account he had opened as the summons served on him had a copy of the application attached to it.

I thus conclude that the respondent's account was indeed overdrawn by a sum of US$ 6 000.00 by virtue of the error that had been made and which was subsequently reversed albeit after respondent had swiftly utilised the money.

Having made such a finding it follows that the trial magistrate erred in dismissing the appellant's claim when the evidence showed clearly that an error had been made that resulted in the respondent's account being credited with an extra US$6 000.00.

In as far as the respondent's account became overdrawn when that error was corrected, it followed that the normal banking practice where an account is overdrawn had to apply. By virtue of signing the application to open an account, exhibit 1, the respondent bound himself to the banking practices of the applicant where a current account is overdrawn.

The appellant's witness testified that in terms of its banking practices, where an account is overdrawn, the bank is entitled to charge the respondent interest compounded monthly on the daily balance owing by the respondent from time to time at the current overdraft interest rate. For the period in question such an interest was at a rate of 28%.

In *Deweras Farm Pvt Ltd & Others v Zimbank Corp* 1997 (2) ZLR 47(H) at 59B - D GILLESPIE J aptly noted that:

> "*Prima facie*, it would appear, the regular charging of interest on an overdraft, at rates within the bank's discretion, is permissible: the failure to challenge any such action despite regular statements being rendered is significant. This *prima facie* position of the bank is such that it would perhaps take rather more than the superficial challenge by the applicants to displace it."

In *African Banking Corporation of Zimbabwe Ltd v Sunjet Development Holdings Pvt Ltd* HH190/14 the court held that a party should not question an interest rate they assent to only when the money becomes due and payable.

In the circumstances therefore the respondent by agreeing to be bound by the banking practices of the appellant, which include the rate of interests on overdraft accounts, should not be seen challenging such a rate only because he has been sued.

In conclusion I am of the view that the court a quo erred in dismissing the appellant's claim as the evidence adduced proved on a balance of probabilities that the appellant credited respondent's account 3 times with the same amount emanating from one Funds transfer transaction. The trial magistrate erred in disregarding ample evidence adduced by the appellant in this regard.

As for the collection commission, this appeared not to have been persisted with and clearly there was no justification for it in the circumstances.

As for the respondent's claim in reconvention, the trial magistrate erred in finding for the respondent when the evidence showed clearly that in terms of the appellant's banking practices, the appellant was entitled to utilise the funds in the respondents other accounts to liquidate any overdrawn amount in any account held by the respondent. In *casu*, the appellant was perfectly entitled to use the funds to reduce the debit balance in respondent's current account when the fixed account became mature. The respondent had agreed to such an arrangement at the time of opening the account.

In the court *a quo* the appellant had also sought costs on the legal practitioner/client scale. It is my view that the circumstances warranted such costs. The respondent was being dishonest in denying that he had opened a current account and that he was aware of the overdrawn account. He clearly was aware of the overdrawn account and that he was required to reimburse appellant the overdraft sum as from end of 2011 when the reverse entries were effected and when the US$2 000.00 in his fixed deposit account was used to reduce the overdrawn amount.

Accordingly, the appeal be and is hereby allowed with costs.

The judgement of the court a quo be and is hereby set aside and is substituted by the following:

1. The plaintiff's claim for the payment of US$ 8 610.97 plus interest at the rate of 28% per annum calculated daily and compounded monthly from the date of summons to date of full payment be and is hereby granted with costs on the attorney- client scale.

2. The defendant's claim in reconvention is hereby dismissed with costs.

NDEWERE J. I concur ……..

Muvingi & Mugadza, appellant's legal practitioners
Mapaya & Partners, respondent's legal practitioners