METBANK LIMITED
versus
DAVID JOHN BRUNI N.O
and
IAN ROBERT McLAREN N.O
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 February 2025

Opposed Court Application

GRJ Sithole, for the applicant
D Tivadar, for the respondents

CHITAPI J: Case numbers HC 6028/23, HC 6088/23 and involve the same parties and this application case number HC 6540/23 involve the same parties and were consolidated for purposes of hearing. At the initial hearing of the matter on 14 March 2024, Adv *Sithole* for the applicant in case number HC 6540/23 applied for a postponement of the hearing. The postponement application was contested. I however postponed the hearing and issued an order as follows:

1) Postponement is granted with wasted costs to be paid by the applicant
2) Case numbers HC 6028/23 and HC 6088/23 are consolidated with case number HC 6540/23 for purposes of hearing.
3) The three (3) matters HC 6028/23, HC 6088/23 and HC 6540/23 shall be listed for hearing on 22 March 2024 at 10.00 am.

For context the parties in case number HC 6028/23 are as follows:

David John Bruni N.O 1st applicant

Ian Robert McLaren N.O 2nd applicant

and

Enock Kamushinda 1st respondent

Metbank Limited (formerly known as Metropolitan Bank of Zimbabwe Limited) -2nd respondent

Woold eagle Investments (Private) Limited - 3rd respondent

The matter is a court application for recognition of a foreign judgment. The applicant seeks an order that the judgment and order of the High Court of Namibia, per Parker AJ, delivered on 29 October 2020 in case number HC-MD-CIV-MOT-GEN-2019/00105 be recognised and registered as the order of the High Court of Zimbabwe. The applicants also pray for ancillary relief.

The parties in case No HC 6088/23 are as follows:

David John Bruni N.O 1st applicant

Ian Robert McLaren N.O 2nd respondent

and

Enock Kamushinda First respondent

Tawanda Mumvuma Second respondent

Chiedza Goromonzi Third respondent

In that case the applicants seek the recognition and registration of an order of the Namibian High Court dated 25 January 2021 in case No HC-MD-CIV-ACT-OTH-2019/02110 and ancillary relief.

In casu, that is in case No HC 6540/23 the parties are

Metbank Applicant

David John Bruni N.O 1st respondent

Ian Robert McLAren N.O 2nd respondent

Master of the High Court 3rd respondent

The applicants herein, that is in case No HC 6540/23 seek an order of rescission of the default judgment granted by MUSITHU J granted in case No HC 3999/23 dated 26 July 2023.

In case No HC 3999/23 the parties were

David John Bruni N.O 1st applicant

Ian Robert McLaren N.O 2nd applicant

And

Master of High Court N.O Respondent

In the said application the applicants applied for the recognition for purposes of the Insolvency Act [*Chapter 6:07*] of proceedings in the High Court of Namibia under case No HC – MD-CIV-MOT-GEN-2017/00227 wherein the winding up of proceedings of the Small and Medium Enterprises Bank (in liquidation) were authorized by the court. Significantly the applicants also applied for their recognition as the liquidators of the Small and Medium Enterprises Bank Limited (in Liquidation). The applicants were also authorized to apply to this court for registration and enforcement of judgments granted by the Namibia High Court being case No. HC – MD -CIV-MOT-GEN-2019/00105 and case No HC -MD-CIV-ACT-OTH-2019/02110. The applications case Nos HC 6028/23 and HC 6088/23 seek that the court should recognize the above judgments for which leave was granted by MUSITHU J to the respondents herein as applicants therein as in case No HC 3999/23 to have the orders recognized and registered. It follows therefore that if rescission of the order of MUSITHU J is granted, and applicants herein granted leave to defend case No. HC 3999/23, that application would have to be concluded first and only if the applicants herein succeed in case No HC 3999/23 can case Nos HC 6028/23 and HC 6088/23 not be heard. Should rescission be refused however, then the road will be cleared for the hearing of case Nos 6028/23 and HC 6088/23.

I therefore deal with the rescission application HC 6540/23. The applicant through the founding affidavit deposed to by its Executive Director duly authorized by a resolution of the

applicant annexed to the founding affidavit averred that the applicant is a Commercial Bank registered and operating in Zimbabwe. The first and second respondents are liquidators of the Small and Medium Enterprises Bank Limited (SME Bank) which was placed under liquidation in proceedings commenced and concluded in the High Court of Namibia. The court orders granted in relation to those proceedings have been transversed herein above. The third respondent was cited as a matter of law and also because the third respondent was the only respondent cited in case No HC 3999/23.

The applicant averred that the first and second respondents were appointed as liquidators of the SME Bank in unclear circumstances. It was averred that the applicant was a major share holder in SME Bank holding 30% shareholding. The other shareholders were listed as Namibia Financing Trust which held 65% as the majority shareholder and World Eagle Investments (Pvt) Ltd which hold 5%.

The applicant averred that first and second respondents should not have excluded the applicant when it only cited the Master or third respondents in case No HC 3999/23 because the two respondents knew or must have known about the interests of the applicant bank as a shareholder. The applicant noted that the two respondents had not said anything about seeking any relief against the majority shareholder, Namibia Financing Trust. The applicant contended that the two respondents in the full knowledge of the applicants shareholding in SME Bank must have been in their application for recognition of the judgments been advised to cite or at least to serve the applicant with the application. Applicant averred that it was necessary for the two respondents have cited all interested parties and that the failure to do so was a calculated and deliberate omission intended to obtain the default judgment. The applicants averred that the two respondents' *mala fides* were borne by the first that they now sought to register for purposes of execution the Namibia Court orders against the minority shareholders who include the applicant.

The applicant further contended that they prayed for an opportunity to defend case No HC 3999/23 because the upholding or recognition of the Namibia High Court was contrary to public policy in that the orders were issued in circumstances where for reasons not advanced the majority shareholder of the SME Bank was not pursued as a party to the litigations. The applicant averred that Namibia was not a designated country for purposes of reciprocal enforcement of judgments.

The applicants averred that it intended to advance that defence as well. The applicant averred that the applicant was a bank with shareholders and creditors who were not aware of the case and that therefore if the bank did not defend the suit, the depositors interests would be affected without their knowledge.

The respondents opposed the application with the first respondent filing the main opposing affidavit and the second respondent adopting the averments made by the first respondent. The opposing affidavit raised points *in limine,* significantly that the deponent to the founding affidavit was not duly authorized to represent the applicant because the resolution which he relied upon named a different person as the authorized agent to represent the applicant. The issue was not developed in argument, it must be taken to have been abandoned. The second point was that although the application purported to based upon an error committed by MUSITHU J such error was not spelt out. This type of objection is not a point *in limine* but one of substance and a defence to the merits of the application.

The respondents averred that there was no need to cite the applicant because it was not affected by the order sought. It was averred that the order did not affect the pecuniary and substantive interests and rights of the applicant. It was averred that the order only recognized the status of the first and second respondents as liquidators of SME Bank. It was averred that Metbank had been cited in Namibia in an application for registration. It was averred that the applicants interest could not have been affected by a mere acceptance that Zimbabwe Courts should accept or recognize that the first and second respondents were the liquidators of SME Bank. It was averred that the issue of registration of the Namibia High Court orders should be seen as separate from the issue of recognition of the liquidators. It was also averred that the Master did not oppose the application because he must have agreed with the application. The applicant also averred that it agreed that the applicant as shareholder had an interest in the liquidation proceedings in Namibia. It was averred that the order of MUSITHU J only recognized the proceedings but did not register them.

In my view, there is a splitting of hairs by the respondents. They accepted that the applicant participated in the proceedings which took place in Namibia or is a party thereto. It just does not make sense to have then excluded the applicant as a party in the application made before MUSITHU

J. The applicant clearly had a legal interest in the proceedings and to be heard on the issue of the exportation for enforcement of the proceedings concluded in Namibia into Zimbabwe and seeking to register them in the Zimbabwe Courts. It is trite that a court application must in terms of r 59(2) of the High Court rules be served upon every respondent. The first and second respondents did not plead any law which would have excused them from serving every respondent with the application. The application relied upon an order of the High Court of Namibia and the parties therein or who were involved in that litigation must perforce have been made the respondents. The application made before MUSITHU J was, holistically considered, akin to an *ex parte* application because the Master was not substantive party to the proceedings. I must accept that the first and second respondents went behind the back of all parties cited in the High Court case in Namibia and for interested parties like one applicant and obtained judgment in circumstances where they ought to have served interested parties including the applicant.

To this extent, I must accept that the judgment of MUSITHU J was granted in circumstances where it was erroneously sought and granted in the absence of the applicant which was not made aware or served with the application. In my view, where the court has inadvertently granted an order which affects a party that ought to have been served with the application but the party has a legal interest in the matter, a judgment obtained in those circumstances cannot stand. I take the view that this aspect on its own justifies a setting aside of the default judgment. I do not find it necessary to dwell on other issues raised if it be said there are such.

In relation to costs, the rescission granted means that case No HC 3999/23 is reopened and must procced to final determination. Accordingly, my view is that a just order of costs in the circumstances is that be in the cause in case No HC 3999/23.

Accordingly, I dispose the matter as follows.

IT IS ORDERED THAT.

1. The default judgment granted by MUSITHU J in case No HC 3999/23 on 26 July 2023, is hereby rescinded.
2. The first and second respondents herein as applicants in case No HC 3999/23 shall serve the applicant herein with application as provided for in the rules.

3. After service as provided in para 2, the matter shall proceed in terms of the rules.
4. Case Nos HC 6028/23 and HC 6088/23 shall not be set down for hearing until case No HC 3999/23 has been determined and are struck off the roll.
5. Copies of this order shall be filed in case Nos HC 6028/23 and HC 6088/23.
6. Costs of this application are in the cause in case No HC 3999/23.

CHITAPI J:……..

Samukange Hungwe Attorneys, applicant's legal practitioners
Mtetwa and Nyambirai, first and second respondents' legal practitioners