SKORUS INVESTMENTS (PRIVATE) LIMITED
versus
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 23 January 2025 & 5 February 2025

Urgent application

S. Murondoti for the applicant
W. Musikadi for the respondent

DUBE-BANDA J:

[1] The applicant approached this court on an urgent basis seeking to temporary interdict the respondent from closing its bank accounts pending the return date. The provisional order sought is couched in the following terms:

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

i. It is declared that sanctions issued under Executive Order 13818 of the United States Government and the Designated Nationals and Blocked Persons List by the United States of America's Office of Foreign Assets Control under the Global Magnisky Program or any United States law have no application in Zimbabwe.

ii. The email communication of the respondent to the applicant dated 3rd of January 2025 or any other communication to similar substance and effect on the of the Designated Nationals and Blocked Persons List by the United States of America's Office of Foreign Assets Control under are null, void and of no force or effect.

TERMS OF THE INTERIM ORDER SOUGHT

That pending the determination of this matter, the applicant be and is hereby granted the following relief:

The respondent be and is hereby temporarily prohibited from acting pursuant to its email communication dated the 3rd January 2025 and or any other letter as may be written communicating the same message in substance.

SERVICE OF THE PROVISIONAL ORDER

Leave be and is hereby granted to the applicant's legal practitioners to serve a copy of this order on the respondent.

[2] The application is opposed.

BACKGROUND

[3] This application will be better understood against the background that follows. On 20 December 2017 as part of the USA Sanctions Program, the President of the United States of America ("USA") issued an Executive Order 13818 to block the property of persons involved in serious human rights abuse or corruption. Pursuant and in terms of the Executive Order, on 9 December 2024 the USA Office of Foreign Assets Control listed and designated the applicant as a Specially Designated Person.

[4] The applicant is a gold trader registered with Fidelity Gold Refinery (Private) Limited and operates bank accounts with the respondent, a commercial bank. On 3 January 2025 the respondent sent an e-mail to applicant with the title "closure of accounts linked to sanctioned entities." The email said "following the recent designation of individuals and entities linked to the Gold Mafia Scandal by OFAC on 10 December 2024. We advise that we are closing the following accounts in our books. We also request that you advise us where to transfer the balances on Skorus accounts." On 3 January the applicant furnished the respondent with directions as to where the funds should be transferred. On 9 January 2025 the respondent sent an email to the applicant indicating that "Letter received. We will advise of once all the processes are completed." It is against this background that on 23 January 2025 the applicant launched this application seeking the relief mentioned above.

POINTS IN LIMINE

[5] Other than resisting the relief sought on the merits, respondent took a number of points *in limine*. I now turn to points *in limine* taken by the respondent.

[6] In its papers the respondents raised four points *in limine.* It contended that the applicant is guilty of non-disclosure of material facts; that the relief sought is incompetent; that the matter is not urgent; and that the dispute is now moot. At the hearing of the matter, the respondent abandoned the three points *in limine* and persisted with the attack on

urgency. No further reference shall be made to the abandoned points *in limine*, except for the issue of non-disclosure which was argued in the context of urgency.

URGENCY

[7] The respondent argued that the matter is not urgent. It conceded that indeed the need to act arose on 3 January 2025, and however took issue with the fact that the applicant has not shown what prejudice it will suffer if this matter is not accorded an urgent hearing. It was argued that the urgency is self-created in that both the certificate of urgency and the founding affidavit failed to identity the irreparable harm the applicant will suffer if the accounts are closed. It was argued further that the fact that the banker-customer relationship will be terminated or was terminated does not constitute irreparable harm. It was submitted that in the event the court declares that the agreement was unlawfully terminated, the applicant can still seek relief under the law of contract.

[8] It was argued further that the applicant accepted the closure of its accounts and the respondent proceeded to close the accounts. The funds in the accounts were transferred to another account chosen by the applicant. It was further argued that there are nineteen licenced banks in Zimbabwe and the applicant can open accounts with any other bank of its choice. The applicant sought that the matter be struck off the roll of urgent matters.

[9] Per *contra*, the applicant argued that a loss of banking services to a gold company cannot be said to be of no consequence. It was argued further that it is harmful to any business, more so a business of gold to be excluded banking services, and to be excluded at the behest of a foreign law adds insult to injury. The applicant argued that the matter is urgent and must be accorded an urgent hearing on the merits.

[10] The applicant in an urgent application must satisfy the requirements of urgency set out in the jurisprudence developed by the superior courts. Urgent applications are not for the asking as they interfere with the normal orderly arrangement of court rolls and get prioritized over already scheduled matters. They enjoy an unfair advantage over other matters on the roll, which is the reason a closer scrutiny by the court is required to determine whether indeed the matter passes the test of urgency. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H); *Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240 at 244 C; *Gwarada* v *Johnson* 2009 (2) ZLR 159.

[11] In oral submissions the respondent argued that the non-disclosure in the founding affidavit that the applicant accepted the closure of its accounts rendered the matter not urgent. In that it suffered no prejudice because it accepted the closure of the

accounts. The respondent referred to the e-mail dated 3 January 2025 in which the applicant directed that funds in the Zimbabwean currency account to transferred to CABS, and that the funds in the United States currency account would be withdrawn in cash. Per *contra*, the applicant argued that this e-mail was written not as an acceptance of the closure of its accounts, but to protect its funds in those accounts.

[12] In *Bulawayo Dialogue Institute v Matyatya NO & Ors* 2003 (2) ZLR 79 (H) the court said in an urgent *ex parte* application, utmost good faith must be shown by the applicant to lay all relevant facts before the court, so that the court may have full knowledge of all the circumstances of the case before making its order. In *casu*, although it must have been prudent for the applicant to disclose the e-mail of 3 January 2025, its non-disclosure is not fatal to its claim to urgency. I say so because my interpretation of the e-mail does not suggest that the accepted the closure of the accounts. It appears that the applicant merely indicated how the funds in the accounts should be dealt with. This seems to be sync with its explanation that it sought to protect the funds in the accounts. The argument by the respondent that the funds in accounts were insignificant is of no moment. It was imperative for the applicant to protect whatever amounts were in those accounts. In addition, I take the view that it is prejudicial to any business to be excluded from banking services. It is important that this matter be dealt with in the roll of urgent matters to enable the issue of the closure of the accounts to be adjudicated without any delay. There is case law in this jurisdiction that urgency may be based on a commercial loss. See *African Tribune Newspaper (Pvt) Ltd & Ors v Media & Information Comm & Anor* 2004(4) ZLR 7 (H). In *casu,* I take the view that a closure of banking accounts for a business entity can support a claim that the matter is urgent. In the circumstances, the matter passes the test of urgency. It is for these reasons that the point *in limine* that the matter is not urgent is refused.

MERITS

[13] In this case the respondent filed a notice of opposition and heads of argument, and in turn the applicant filed an answering affidavit and heads of argument. The parties argued and re-argued the matter as if what was sought was a final order. Notwithstanding the voluminous record and the length oral arguments by the parties, this matter turns on a narrow compass, namely, whether the applicant has established a *prima facie* case for the provisional relief sought. It is important in this regard to heed

and keep in mind the words of CHITAPI J in *Citizens For Coalition For Change v Tshabangu* HH 652/23 that:

> "I also note that the respondents in urgent applications invariably file detailed opposing papers and then argue the application as though a final relief is sought by the applicant. The judge must not fall into the trap of deciding the matter as if it is for final relief. The judge must avoid making definitive and final effect findings of fact renders as this will amount to pre-determining the final relief sought. The making of definitive and final effect findings of effect renders such findings *res-judicata* on the return date. The judge must be guided by the consideration that only a *prima facie* case needs be established by the applicant at this stage."

[14] I agree with CHITAPI J that if the provisional order stage involved a full hearing on the merits, the court' s findings may be binding on the return date due to the doctrine of *res judicata.* Therefore, it is important that I navigate a delicate balance, i.e., to determine whether the applicant has established a *prima facie* case for the provisional order sought while staying clear of making findings that may prejudice the litigants should the matter proceed to the return date.

[15] At this stage, I consider and restrict myself to the requirements that the applicant must satisfy in order to claim entitlement to the interim interdict sought pending the return date. Briefly these requirements are that the applicant for such an interdict must show: (a) that the right which is the subject matter of the main action and which it seeks to protect by means of an interim relief is clear, if not clear, is prima facie established, though open to some doubt; (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory remedy. See C.B. Prest *Interlocutory Interdicts* (Juta & Co. Ltd 1993) 55; *Ismail No v St John's College & Ors* 2019 (3) ZLR 753 (CC).

[16] It is clear that in an application for an interim interdict, the right to be established is a low threshold of *prima facie,* i.e., it would have been established even if there is some doubt. The right will, therefore, in my view, be established, if the applicant puts up facts that demonstrate *prima facie,* even if there are doubts, that he or she has such right to be protected.

[17] It is undisputed that the applicant holds with the respondent bank accounts subject to this application. In its e-mail of 3 January 2025, the respondent said it was closing accounts linked to sanctioned entities. The e-mail said the accounts were being closed because the applicant was linked to the Gold Mafia Scandal, and hence subject

of sanction in terms of Executive Order 13818. At this stage, I accept that the accounts were sought to be closed on the basis of the Executive Order 13818. In addition, the decision to close the accounts appears to have been a result of an arbitrary act. The argument by the respondent that it has a right to close the accounts in terms of s 2 (f) of the Account Opening terms and Conditions which says the bank may at any time without prior notice suspend or close any of the applicant's accounts is not an issue to be determined at this stage. I say so because the e-mail of 3 January 2025 made no reference to s 2 (f), it provided a reason for closure as the Executive Order 13818. In any event, on a *prima facie basis,* I do not think that the respondent may arbitrarily and without hearing the affected party close banking accounts on strength of s 2(f). In addition, the argument that what is sought to be interdicted has already occurred, does not appear to be borne out by the facts. I say so because the applicant in its e-mail of 3 January 2025 did not appear to accept the closure of the accounts. In any event, the respondent's e-mail of 9 January 2025 suggests that the accounts have not been closed, because it said it will advise once all the processes are completed. In other words, the respondent was saying it will advise the applicant once the accounts had been closed. At the time of filing and hearing of this application, no such communication had been received from the respondent, and hence the accounts have not yet been closed.

[18] The applicant has established that indeed they are issues in this matter that require closer scrutiny on the return date, i.e., *inter alia* whether a bank in Zimbabwe can close a customer's accounts on the premise of a foreign law; and whether s 2 (f) permits the respondent to close a bank account arbitrarily and without giving the account holder a right to be heard. In the light of the above, I take the view that the applicant has met the threshold of a *prima facie* case required at this stage of the proceedings.

[19] In respect of what constitutes irreparable harm, the circumstances and facts of each case under consideration define the irreparable harm which a litigant may be may potentially suffer.

Irreparable harm or loss is the loss of property in circumstances where its recovery is impossible or improbable. See *Insaaf Investments (Pvt) Ltd v Chatpril Enterprises (Pvt) Ltd* HH 297/23; *Braham* v *Hood* 1956(1) SA 65 D at 655 B and *Cliff* v *Electronic Media Network (Pvt) Ltd Anor* 2016(2). All SA 102 (GJ).

[20] I find that the applicant has, at this stage established that it will suffer irreparable harm if the interim interdict is not granted. The applicant is a business entity, a gold trader registered with Fidelity Gold Refinery (Private) Limited, it is important that it holds bank accounts. To crown it all, without bank accounts it might face serious challenges and difficulties in navigating its business and banking transactions.

[21] Regarding the balance of convenience, in exercising its discretion the courts weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted. I find that the balance of convenience favours the grating of an interim interdict as no submissions have been made of the prejudice that the interdict will cause to the respondent. In any event, if on the return date the provisional order is discharged, the respondent will close the accounts. If the interim interdict is refused, the applicant will encounter challenges in navigating its business transactions. Besides, the established facts favour granting of the interim interdict. I further find that the applicant has no other satisfactory or adequate remedy.

[22] In light of the above conclusions, I am of the view that the applicant established that it is entitled to the interim interdict sought, after proving that it has a *prima facie* right to be protected, if not, it stands to suffer irreparable harm. I further find that the balance of convenience favours the granting of the interdict.

In the circumstances, I grant an order for interim relief in terms of the provisional order.

DUBE – BANDA J: ……

Absolom & shepherd Attorneys, applicant's legal practitioners
Chimuka Mafunga Commercial Attorneys, respondent's legal practitioners