

HC 8602/02

TIME BANK OF ZIMBABWE LIMITED
versus
JEFFREY PARADZAI MAKAYA

HIGH COURT OF ZIMBABWE
SMITH J
HARARE 2 March and 30 April 2003

Mr *Mafusire* for applicant
Mr *Mazonde* for respondent

SMITH J: This is an application for summary judgment. The applicant (hereinafter referred to as "Time Bank) issued summons claiming from the respondent (hereinafter referred to as " Makaya") payment of \$42 572 183,01 in respect of an overdraft facility granted to him. Time Bank claimed that Makaya had drawn down \$23 159 653,63, accrued interest amounted to \$19 990 808,38 and there were sundry charges amounting to \$108 823,00 and Makaya had made deposits amounting to \$518 672,25. Makaya had been a customer of the bank since November 1998. In May 2000 banking facilities were advanced to Makaya as working capital. As continuing security for the debt, in September 2000 Makaya passed a mortgage bond in favour of Time Bank over his farm in Mazoe, subdivision A of Vergenoeg. Time Bank started to press Makaya for payment and after meetings and correspondence between the parties, Makaya wrote to Time Bank making arrangements to pay \$18 million to the bank. That letter was received by Time Bank I August 2001.

The amount offered by Time Bank in terms of the facility granted on 5 May 2000 was \$29 936 371,00. It was to be repaid over a period of 3 years by annual instalments of \$9 978 791,00. It was advanced for working capital and capital expenditure and accrued interest on a daily balance at a rate of interest which was 11.5% above the bank's lending rate. Time Bank claims that there were three drawings made by

Makaya, \$17 908 471,62 on 1 May 2000, \$50 000,00 on 9 October 2000 and \$5 201 182,01 on 16 November 2000. Apparently a number of Cold Storage Commission Bills (hereinafter referred to as "CSC Bills") were ceded to Makaya. Trust Bank says that, because of the difficulties associated with them, the cession was reversed and all transactions relating to them were deleted from Makaya's account. All it is seeking in this application is payment of the working capital component of the debt owed by Makaya which is made up of money advanced directly to him.

Makaya opposes the application. He claims that despite the promises and assurances given to him about the assistance that would be given by Time Bank to enable him to sow seed, cultivate and harvest his crops for the three seasons, Time Bank let him down. As a result, his crop was a failure. He admits that he owes Time Bank \$18 million but denies owing the amount claimed.

Mr *Mafusire* argued that summary judgment should be granted for the amount claimed. He submitted that only 17 months before summons was issued, Makaya had acknowledged receipt of \$29 936 371,00. Then a month before summons was issued respondent freely and voluntarily admitted that he intended to repay the \$18 million that he owed. He further submitted that Makaya had not raised a good *prima facie* defence - see *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H). He has not alleged facts which, if proved at the trial, would entitle him to succeed in his defence.

Mr *Mazonde* submitted that there are material disputes of fact on the papers. In *Jena v Nechipote* 1986 (1) ZLR (S) 29 at p 30 it was said that all a defendant has to establish in

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order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success"; "he has a plausible case"; "there is a triable issue"; "there is a reasonable possibility that an injustice may be done if summary judgment is granted".

On 31 March 2000 Time Bank offered Makaya a loan facility in the sum of \$29 936 371,00. Makaya accepted the offer. That does not mean, however, that Makaya was loaned that amount. Time Bank alleges that Makaya drew down \$23 159 653,63 in terms of that facility. The initial draw down was an amount of \$17 908 471,62. Makaya denies that he would have made such a large draw down on one day. I consider that the schedule showing a month-by-month analysis of the debt claimed by Time Bank is not sufficient basis on which to grant summary judgment for that amount. There are only debits shown in the schedule, one amount for legal fees and two deposits. The other six entries all relate to interest. The founding affidavit should have expanded on the various entries shown in the schedule. I consider that there is a reasonable possibility that an injustice may be done if summary judgment is granted for the full amount claimed.

As Makaya has admitted owing \$18 million, summary judgment will be entered for that amount. Makaya did not tender payment of the \$18 million. Time Bank had to make this application in order to obtain the order. It is therefore entitled to its costs.

Summary judgment is granted to the applicant against the respondent as follows:

1. The respondent pay the applicant \$18 000 000,00 with interest thereon at the rate of 41.5% per annum from 31 July 2001 to the date of payment, such interest to be capitalized monthly on a daily debit balance.
2. The respondent to pay the costs of this application.

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Scanlen & Holderness; applicant's legal practitioners
Chigwanda Legal Practitioners; respondent's legal
practitioners