ZIMBABWE DEVELOPMENT BANK
versus
NAGA SALONS
and
NYARAI CHIWAURA
and
BETTY CHIWAURA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 27 and 28 February and 5 April 2006

Civil Action

Miss *N.G. Maphosa*, for the plaintiff
Mr *Mudhara*, for the defendants

KUDYA J: The plaintiff, the Zimbabwe Development Bank, hereinafter referred to as the bank, issued summons out of this court on 17 December 2004 seeking, against the three defendants jointly and severally, the one paying the others to be absolved, payment of $587 612 879.86 and interest thereon capitalized monthly at 1% per day calculated from the date of issue of summons to the date of full payment and costs of suit on a legal practitioner scale and collection commission as provided for under the Law Society of Zimbabwe By-laws 1982. On 6 January 2005, the defendants entered appearance in which they indicated that they had received the summons on 4 January 2005.

Ms *Maphosa* for the plaintiff applied to amend the summons and declaration during the plaintiff's cross-examination. She sought the deletion of the claim of interest on the bank charges, and the substitution of the payment of interest from the date of issue of summons by the date of service of summons. The application was not opposed. It was therefore granted. In essence the plaintiff therefore seeks interest, from the date of service of summons calculated at 1% per day to the date of full payment, on the sum of $500 million.

The plaintiff called the evidence of its credit controller, one Dumisani Sibanda and produced 3 documentary exhibits in a bid to prove its claim. The defendants called the evidence of Betty Chiwaura the 3rd defendant to counter the claim.

It was common cause that the plaintiff is a company duly incorporated in accordance with the laws of Zimbabwe and is a registered financial institution while the 1st defendant is a company also duly incorporated in accordance with the laws of Zimbabwe while the other two defendants who are mother and daughter are directors of the 1st defendant and sureties and co-principal debtors with 1st defendant of the plaintiff. On 22 March 2004, the 1st defendant (the company) which was represented by the 3rd defendant executed an Invoice Discounting Agreement Exhibit '1' (the agreement) with the plaintiff. On the same date, the 2nd and 3rd defendants bound themselves jointly and severally with the 1st defendant as sureties and co-principal debtors of the plaintiff.

It was common cause that before the execution of the present agreement, the parties had executed three similar agreements which had been discharged. The defendants were therefore alive to the contents of exhibit '2, the General Conditions of the Invoice Discounting Agreement, which consists of 32 conditions on three pages, which governed the operation of the agreement.

On 24 March 2004, the plaintiff disbursed $250 million to the company in terms of the agreement. Notwithstanding the fact that the plaintiff averred in its declaration that the invoice discounting fee in terms of the agreement was set at 25% of the capital sum disbursed, the company corrected it in its plea by stating that the 25% per month was variable and would be compounded.

In its declaration, the bank had stated that the company would repay the capital sum and interest, 60 days after the inception of the facility as a lump sum. The defendants in their plea disputed the averment stating in turn that repayment was in terms of paragraph 4 of the agreement. The agreement referred to the general conditions of the agreement for guidelines on the dates of repayment Exhibit '2' however does not give the duration of the agreement. In his testimony Sibanda alleged that the agreement had a lifespan of 1 month, a fact which was confirmed by 3rd defendant in her evidence in chief. The agreement was therefore for a duration of 30 days.

The defendants fell on hard circumstances and failed to meet their obligations to the plaintiff.

At the pre-trial conference held on 8 September 2005, the defendants admitted owing the plaintiff the aggregate sum of $500 million made up of capital of $250 million and interest of $250 million. The following issues were referred for determination:-

1. Whether or not the defendants are liable to pay to the plaintiff bank charges in the sum of $87 612 879.86.
2. Whether or not defendants are liable to pay interest on both capital and interest on $500 million from date of summons to date of full payment.
3. Whether or not the defendants are liable to pay costs on an attorney/client scale and collection commission.

I have chosen to word the issues in the manner in which they were captured by the judge who presided over the pre-trial conference in his handwritten notes in preference to the manner in which they are captured in the joint pre-trial conference minute filed by the parties on 13 September 2005. This is because the presiding judge's minutes captured the essence of the defendant's plea which cast the onus on the plaintiff to prove that the bank charges and interest were due and in the event that they were due, to establish how they arose and their arithmetical computation. The plea also joined issue with the plaintiff on costs on a legal practitioner and client scale and collection commission.

The evidence led by each witness which was in dispute will be resolved as I determine the issues referred to trial by the parties.

WHETHER OR NOT THE DEFENDANTS ARE LIABLE TO PAY THE BANK CHARGES IN THE SUM OF $87 612 879.86

In his testimony Sibanda stated that before the bank disbursed the $250 million to the company it assessed and approved the application made. The purpose of the loan was for the company to liquidate its own debtor's invoices. The bank would benefit from the transaction by charging an invoice discounting fee and a processing fee on the total amount that was advanced. These two heads of fees were collectively called bank charges. In the agreement they are referred to as the discount rate and the processing fee.

These fees were levied at the rate of 25% or its variable rate and at a fixed rate of 3.5% respectively. He explained in his evidence in chief that on the date the agreement was executed by the parties the discount rate was 25% per month variable (compounded). He stated this meant that the life span of the transaction was 30 days and the advanced loan attracted a rate of 25% or its variable equivalent. The variable equivalent was a rate in tandem with the market rate prevailing on each day of the 30 day period. He produced exhibit '3, the in duplum schedule of the parties transaction. The bank charges are represented by a figure of $13 272 000.00 and $74 340 879.86. These were debited to the company's account on 24 March 2004. Sibanda explained that the discount rate is represented by $74 340 879.86. He deduced that this amount represented 29.7% of the capital sum loaned to the company. That was the only fact THAT he was certain of. He alleged further that it had been rounded off to 30%. A calculation of the amount as a percentage of the capital sum shows that the rate used was indeed 29.74%. Sibanda's suggestion that it was rounded off to 30% was therefore incorrect. The discount rate together with the processing fee would be paid together with the capital amount on due date, of the 30 day account. Even though Ms *Maphosa* equated the discount rate to interest, it was apparent that though a rate is used to determine it, it is not interest but a fee levied for advancing the amount in question. The witness however admitted that in layman's language the discount rate could be referred to as interest on the loan.

Under cross-examination he was asked to explain the amount of $74 340 879.86 and to highlight whether the rate used was higher or lower than 25% per month. He stated that it was the higher rate of 29.7% which equated to the then current market rates then in use. The bank charges, in his explanation, were due and payable within 30 days. He repeated his evidence-in-chief that in layman's language the discount rate was interest which was charged on the loan within a period of 30 days.

The witness failed to express himself clearly on the discount rate. He confused himself by seeking to equate it with interest when it was not interest. I however understood him to say that though this discount rate was not interest, it was calculated in the same way as interest. The discount rate is arrived at after 30 days. It is determined by the average rate of the total rates prevailing over the 30 day period. In other words it is calculated daily and then compounded at the end of the 30 day period.

The defendants sought clarification not only on how the rate which was used (of 29.7%) was arrived at but on whether or not it was accurate. In my view this obliged the plaintiff to lead evidence on what each rate was on each day of the 30 day period and then demonstrate how the rate which resulted in the sum of $74 340 879.86 was arrived at. Sibanda failed to do so. His failure to lead such evidence was not cured by the defendants' failure to lead evidence on what the correct rate was. The onus lay on the plaintiff to do so, and not on the defendants.

It emerged as the 3rd defendant was being cross-examined that the rate could even have gone below 25%. It was also clear from her testimony that even though the method of calculating the discount rate was explained to her she did not understand the explanation.

Mr *Mudhara* for the defendants submitted that the defendants could be liable for the discount rate calculated at 25% per month of $62 500 000.00. I did not take this as a concession. The plaintiff still had the duty to prove that the discount rate was 25% regard being had to the fact that it could move to below that percentage.

In his testimony Sibanda explained that the $13 272 000.00 represented the processing fee calculated at the rate of 3.5% of the capital amount. He conceded during cross-examination that 3.5% of the capital amount was $8 750 000.00. This concession drove the plaintiff to seek to amend that figure on its *in duplum* schedule and to reduce its bank charges to an aggregate figure of $83 090 879.86.

It seems to me that the plaintiff has not shown that it is entitled to the discount rate in the sum of $74 340 879.86. I would grant it absolution from the instance on that figure.

I am however satisfied that the plaintiff proved that it is entitled to claim $8 750 000 as bank charges, representing the processing fee.

WHETHER OR NOT THE DEFENDANTS ARE LIABLE TO PAY INTEREST ON BOTH CAPITAL AND INTEREST ON THE SUM OF $500 MILLION FROM THE DATE OF SUMMONS TO THE DATE OF FULL PAYMENT

The second issue deals with the question of when interest commences to run after reaching the *in duplum* level, that is, whether it commences to run from the date of the service of summons or from the date of judgment.

Ms *Maphosa* for the plaintiff contended that it commences to run from the service of summons, while Mr *Mudhara* was of a contrary view, submitting that it starts to run from the date of judgment.

The plaintiff's witness, Sibanda in his testimony stated that the bank was entitled to interest beyond *in duplum* because the money owed to the bank remained an outstanding cost to the bank as the bank finances this expense from the bank's own reserves from which it should be earning further income.

The *in duplum* rule remains part of our law. See:-

1. *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd and Others* 1996 (2) ZLR 420 (H) at 441E
2. *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998(2) ZLR 488(S)
3. *Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136(H) at 137E
4. *Conforce (Pvt) Ltd v City of Harare* 2000(1) ZLR 445(H)

It is also firmly entrenched in the South African Law. See

1. *LTA Construction Bpk v Administrator Transvaal* 1992(1) SA 473(A) at 482B-D
2. *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 511 at 560
3. *Standard Bank of SA Ltd v Oneanate Investments Pty Ltd* 1998(1) SA 811(SCA) at 827H

In the South African Supreme Court of Appeal case of Standard Bank *supra* at 827H ZULMAN JA stated:

> "It is undoubtedly part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount."

In Zimbabwe GILLESPIE J, with the concurrence of SMITH and BLACKIE JJ in the *Commercial Bank of Zimbabwe case supra* at 441E stated:

> "In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby the capital sum is payable together with interest thereon at a determined rate, once the accrued interest attains the amount of capital outstanding."

The issue that confronts me relates to whether or not after the double is reached, interest commences to run afresh, and if so at which stage and on which amount.

GILLESPIE J in the *CBZ case supra* at 441E-F confirms that interest starts to run again and it does so from the date of judgment. He states:-

> "Upon judgment being given interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted."

Mr *Mudhara* urged me to follow the *CBZ case*, *supra* on the basis that it is highly persuasive as it was a decision of a three-judge panel of this court. Ms *Maphosa* on the other hand submitted that I should follow the persuasive authority of the Supreme Court of Appeal in South Africa in the Standard Bank case, *supra*. She submitted that it overturned the earlier decision of SELKOWITZ J in the Cape Provincial Division, which decision she contended GILLESPIE J had followed. She referred to the local case of *Ehlers supra*, in which MALABA J came to a conclusion contrary to that of GILLESPIE *et al*.

Ehler's case was an application for condonation co-joined with an application for a partial rescission of a default judgment. *Ehlers* submitted that he had prospects of success on appeal as the interest that had been levied on him which was confirmed by the default judgment ran foul of the *in duplum* rule. MALABA J dismissed both applications holding that there were no prospects of success against the default judgment as *Ehler* was not only in willful default but had no prospects of success as interest in excess of the double commenced to run again on the date of service of the summons. At page 139G-140B he stated:-

> "The learned judges preferred the view that interest only commences to run anew as from the date of judgment. I must, with respect, express my dissent from the decision in *Commercial Bank of Zimbabwe's Case supra* on the date on which interest commences to run afresh in a case where the *in duplum* rule applies. This view of the law does not give effect to the policy behind the *in duplum* rule, nor does it recognize the discretion enjoyed by the court in the matter. In *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998(2) ZLR 488 (S) at 495D GUBBAY CJ said that the *in duplum* rule is based upon a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse. The principle that interest commence to run afresh from the date of *litis contestatio*, which in this case is the date of service of summons is based upon the recognition of the fact that from that date the creditor ceases to be in control of the process by which interest accumulates."

The learned judge dissented from GILLESPIE J's decision on the basis that levying interest from the date of judgment did not give effect to the public interest sought to be protected by the in *duplum* rule and secondly that making it an immutable rule cast in stone tended to deprive judges of their discretion in the matter. In my view, he did not hold that in all matters involving interest above the double that interest starts to run after the date of service of summons. The date of service of summons in *Ehlers case* was the date on which the parties were deemed to have joined issue (*litis contestatio*). L*itis contestatio* is reached at the time that pleadings are closed. *Ehler's case* therefore does not support Miss *Maphosa's* contention.

The effect of ZULMAN JA's decision in the Standard Bank case was to order interest to run from the date of service of summons, (the 26 November 1990 in that case). The learned judge of appeal was in no measure influenced in arriving at his decision by the delay in concluding the matter before him which had started in 1990. He held that public policy considerations would not favour the debtor who kept the creditor who had timeously instituted recovery but was frustrated by delays endemic in the legal system out of his money when interest is the lifeblood of finance in modern times. It was his conclusion that such a creditor could not be held to have exploited the debtor.

The conclusion of ZULMAN JA, with respect, is difficult to follow, and appears out of sync with his reasoning on the entrenchment of the *in duplum* rule in our law. He recognized that it was part of our law (at 827H). He accepted that interest did not lose its identity whatever label it was given (at 828-I to 829-A). He recognized that the rule in *Clayton's case* as to appropriation is a presumption of fact (831E). Thus far the learned judge of appeal acknowledges the *in duplum* rule.

It is difficult to reconcile the learned judge's conclusion with the opinion he states on page 832H. He poses the question:

> "If during the course of litigation the double is reached, whether interest stops running and only begins to run again once judgment is pronounced."

His preliminary response to that rhetorical question is that:-

> "There is no dispute that in this case the bank is entitled to interest as from the date of judgment at the agreed rate and inspite of the double having been reached."

The difficulty presents itself further when the learned judge surveys commentaries of *Van der Keessel, Scheltinga, Van Bynkershoek, Huber, Ganes* translations from *Huber to Carpzovius* *and Sande*. This survey resulted in the finding that a judgment cannot and does not novate the original debt.

The effect of the conclusion resulted, with respect, in the proverbial throwing away of the baby with the bath water. It undermined the *in duplum* rule and made it irrevelant especially on the basis of unproven suspicions that in the olden times legal interests were low. The suggestion begged the question of the necessity of introducing such a rule of law as the *in duplum*. If necessity is the mother of invention, clearly the rule came into being because at some point in our dim past, hyperinflation must have reared its ugly head.

I decline to follow the Supreme Court of Appeal decision in South Africa not only for the reason that it undermines before judgment, the *in duplum* rule but also because on the facts it is distinguishable from the case before me. In *Standard Bank case*, *supra*, on the facts interest reached the double after litigation had commenced. In the present matter it did so before litigation had started. The factual situation which therefore confronted the Supreme Court of Appeal in South Africa is distinguishable from the facts in the present matter. Indeed the learned judge of appeal's parting remarks at page 834G-H appear to recognize that in cases such as the present one, interest commences to run after judgment.

Miss *Maphosa's* contention as to when interest should again commence to run after the double cannot as I have demonstrated be based on *Ehlers case*, nor can it be based on the Supreme Court of Appeal of South Africa's decision. If however it could be so based, I would distinguish the basis on which those decisions were made with the present matter. It is on the following basis.

In *Georgias and Anor supra*, GUBBAY CJ at 497A-B, approved the sentiments of GILLESPIE J in the *CBZ's case supra*. He stated as follows:-

> "Reverting to the considerations behind the *in duplum* rule, they are correctly summarised and stated to be based on:
>
> > "a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor."
> >
> > Per GILLESPIE J in Commercial Bank of Zimbabwe case at 465G. Thus there are two main objectives:-
> >
> > (a) protection of a debtor against exploitation and
> >
> > (b) enforcement of a sound fiscal discipline on a creditor.
> >
> > It follows that as waiver of the *in duplum* rule in advance cannot be sanctioned, for to do so would defeat these two objectives."

In coming to the decisions they did, MALABA J and ZULMAN JA supra, did not with respect, consider the desire to enforce a sound fiscal discipline on the creditor. Neither did they consider the unconscionable aspect of discarding the *in duplum* rule.

I find comfort in the remarks of CHINHENGO J in the *Conforce case*, *supra* at page 457B-D. At page 458A-F he noted:-

> "I venture to say that the public interest served by the *in duplum* rule is not identified with sympathy for the debtor, so as to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor to securing fiscal discipline on the part of lenders to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere v Mukura* 1997(2) ZLR 361(H) at 364G) and to the interests of commerce generally and perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were so restricted, I cannot see anything incompatible with the rule serving those interests if it were applied in the manner advocated for in *MM Builders case*. The creditor's claim for interest would be limited to an amount that does exceed the capital. In my view, the danger in adopting the approach in *Oneanate and Ehlers cases supra* is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with

> the result that the rule is rendered inoperative. I do not see anything that is against the public interest or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by GILLESPIE J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution of proceedings or that the stage of *litis contestatio* has been reached. Where in particular the double has not been reached, I find no relevance at all of the event of institution of proceedings. Interest must continue to run until it equates to the capital amount soon after or long after the institution of proceedings, but that is immaterial. I am therefore unpersuaded by the conclusion reached on this point in *Oneanate and Ehlers cases.* I must respectfully express my dissent from those judgments."

I associate myself with these views so ably expressed by CHINHENGO J.

It does not appear to me that the plaintiff in the present matter has even began to discharge the onus on him on a balance of probability to circumvent the *in duplum* rule. It does not appear to me that it can be circumvented.

In the premises I hold that interest on the sum $500 million dollars in casu can only commence from the date of judgment.

WHETHER OR NOT THE DEFENDANTS ARE LIABLE TO PAY COSTS ON AN ATTORNEY/CLIENT SCALE AND COLLECTION COMMISSION

Clause 2 of Part 1 of the General condition of the Invoice Discounting Agreement reads:-

> "Unless stated otherwise, this Invoice Discounting Agreement provides for a maximum amount of confirmed orders, advance payment amount, and discount rate together with additional interest levied on past due amounts, processing fees and costs relating to the enforcement of this agreement, recovery of charges incurred or paid by ZDB for legal, accounting, audit, consultancy or monitoring services where applicable."

It was submitted by the plaintiff that this clause obliged the defendants to pay Attorney and Client costs as apprised to party and party costs. Sibanda in his testimony alleged that the defendants were opposed that they would pay the actual costs expended by the plaintiff in enforcing the agreement. This was disputed by the defendants.

The onus was on the plaintiff to show that clause 2 referred to Attorney and Client costs. This was because it was the plaintiff who made that allegation. The clause does not on the face of it use the words Attorney and Client costs. There are two types of legal costs. These are Attorney and Client and party and party. The use of the words costs, charges incurred or paid may relate to either Attorney/Client costs party and party costs. The *contra preferentum* rule penalizes the author of a contract by having it interpreted against him if it is ambiguous. Clearly the plaintiff could easily have made its intention apparent by specifying that it would seek Attorney and Client costs. The ambiguity in the expressions favour the defendant's position.

Thus while it is clear that parties to a contract can agree on the inclusion of Attorney and Client costs, see INNES CJ in *Texas Co. S.A. Ltd v Cape Town Municipality* 1926 AD 467 at 485, the stipulation must be clear. In the present matter it is not. Contractually stipulated Attorney and Client costs are not punitive costs in the sense highlighted in *Van Dyk v Conradie and Anor* 1963(2) SA 413.

I hold that in the present matter the plaintiff has failed to satisfy me that the agreement contemplated Attorney and Client costs.

The plaintiff also sought to use clause 5 of part 1 of the General Conditions to found the claim for collection commission. The clause reads:-

> "When applying receipts to amounts due priority is given to collection charges, invoice discount charges, other fees, interest and principal in that order until the debt is discharged."

It is apparent from the decision in Scotfin Ltd v Ngomahuru Pvt Ltd 1997(2) ZLR 567(H) that the plaintiff cannot recover collection commission, unless it demonstrates that the defendant agreed to pay it. It becomes doubly difficult to claim collection commission together with Attorney and Client costs without laying out proof that the collection commission was paid or incurred. Clause 5 in my view dealt with appropriation of funds paid in general. Collection commission was not covered in the agreement itself. The plaintiff did not show that the defendants agreed to pay it.

The plaintiff cannot resort to part IX of the Law Society Rules of 1982. They do not sanction collection commission for the payment of a debt secured through contested action.

It seems to me therefore that the plaintiff's claim for collection commission cannot succeed.

COSTS

The issues referred to trial have all been decided against the plaintiff. The trial was necessitated by the plaintiff's decision to pursue claims for which it has failed to prove. In the same token the defendants did not tender payment of the $500 million that they admitted owing. For that reason, even though they had succeeded, I will order them to pay the plaintiff's costs on the ordinary scale.

DISPOSITION

It is accordingly ordered that:

1. The defendants jointly and severally the one paying the others to be absolved shall pay to the plaintiff:
   (a) The sum of $500 000 000.00 together with interest thereon calculated at the rate of 1% per day from the date of judgment to the date of payment in full.
   (b) Bank charges in the sum of $8 750 000.00
   (c) Costs of suit.

Sawyer and Mkushi, the plaintiff's legal practitioners
TH Chitapi & Associates, the defendant's legal practitioners