ALSHAMS BUILDING MATERIAL t/a LLC
(a company incorporated in the United Arab Emirates)
versus
TAPERA WILLIAM NYEMBA
and
CHRISTOPHER PASIPANODYA GOROMONZI
and
JOSPHAT HAATENDI KELVIN SACHIKONYE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 27, 28 and 29 October, 11, 12 and 22 November 2010 and 1 June 2011

Civil Trial

EWW Morris, with *L Uriri*, for the plaintiff
MP Mahlangu, for the defendants

KUDYA J: The plaintiff company issued summons against the three defendants out of this court on 8 November 2005. It claimed for the payment of an outstanding debt of US$ 1 560 437.68, interest at the rate of 15% per annum, costs of suit on an attorney and client scale and collection commission at the Law Society tariff rate. The claim was based on the deeds of suretyship that each defendant signed in favour of the plaintiff. The defendants contested the action mainly on the ground that their personal guarantees offended against s 11 of the Exchange Control Regulations SI 109/1996 as they did not have exchange control authority to incur an obligation to pay in foreign currency outside Zimbabwe. In the alternative, they averred that on the date of settlement, the security adequately covered the debt. The third defendant further contested the action on the ground that when he appended his signature to the deed he did not actually know that he was signing a deed of suretyship.

The plaintiff called the evidence of two witnesses. These were Jayesh Shah (Shah) its executive mind and Bartholomew Mswaka (Mswaka) a stockbroker with Renaissance Securities Limited. In addition it produced seven documentary exhibits. Each defendant testified. In addition all three defendants called the evidence of Robert Mutakwa (Mutakwa), the divisional head of Central Scrip, a subsidiary of ZB Bank Limited and

Emmanuel Munyukwi (Munyukwi), the chief executive officer of the Zimbabwe Stock Exchange (ZSE or the local bourse). A total of four documentary exhibits were produced by the defendants.

Most of the facts were common cause. The plaintiff, a company incorporated in the United Arab Emirates, was at all material times represented by Shah. Shah was in charge of searching for investment opportunities and providing bridging finance for banks and discounting export receivables in Zimbabwe, Zambia, Malawi and South Africa. During the period 2003-2004 the plaintiff extended bridging finance denominated in United States dollars to many local players in the financial services sector, amongst who was Trust Bank Limited (Trust). In his dealings with Trust that commenced in 1999, Shah mostly interfaced with Goromonzi, the second defendant, an expert in structured finance. All the deals with Trust were a success. He came to know Nyemba, the first defendant and Chief Executive Officer of Trust Holdings Ltd, the holding company of Trust, but alleged that he met Sachikonye, the third defendant after summons was issued.

The three defendants were directors of Trust. Goromonzi appraised Shah of the existence of Barato Holdings Limited (Barato), a special purpose vehicle incorporated in Jersey, Channel Islands to hold 42 296 673 shares (the security) in a local public company, Ariston Holdings Limited. Barato was in turn a wholly owned subsidiary of Blantyre Investments Limited (Blantyre) often referred in documents and evidence by the parties as Blantyre Asset Management. The three defendants were the sole directors of both Barato and Blantyre. In his evidence and under cross examination Nyemba disclosed that Barato was purchased from Conafex SA of Luxembourg on 23 May 2003 for US$2 927 000.00 by Blantyre using funds appropriated for the purpose by Trust Holdings through Trust Bank. Apparently the nominal shareholder in Blantyre was the Caversham Trust, which acted on the sole instructions of the directors of Barato who in turn acted as nominees of the board of Trust Holdings. As a result of this corporate manoeuvering, Trust Holdings was entitled to three board representations in Ariston. Nyemba was appointed deputy chairperson of Ariston while two other nominees fulfilled the Trust Holdings board quota. These three were able to influence the policy formulation and strategic direction of Ariston to the extent that its share price appreciated with the result

that the value of the security increased to US$4 million. Nyemba was, however unable to prove the truthfulness of his assertions that both Blantyre and Barato were special purpose vehicles for Trust Holdings Limited. He did not proffer any satisfactory explanation on why if that were so, Goromonzi declined Shah's overtures for Trust Holdings Limited to stand as surety and co-principal debtor in place of the three defendants.

In December 2003, Goromonzi initiated negotiations with Shah for the advancement by the plaintiff of a loan in the sum of US$ 2 223 000.00 to Barato. The negotiations culminated in the loan agreement, exhibit 1 on 23 December 2003. Shah signed on behalf of the plaintiff while Nyemba and Goromonzi signed for Barato. The loan could only be disbursed after the three directors of Barato had executed personal guarantees in favour of the plaintiff. Sachikonye executed his personal guarantee exhibit 4 on 22 December, while Goromonzi executed exhibit 3 on 23 December and Nyemba executed exhibit 2 on 29 December 2003. In his testimony, Nyemba expressed his appreciation of the legal implications of the deed of suretyship at the time he executed it. He did not envisage that he would be called upon to meet the guarantee as at the time of execution he believed that the security adequately covered the loan.

Barato surrendered the share certificate for the Ariston shares in negotiable form together with the deeds of suretyship of the three defendants to the plaintiff before the plaintiff disbursed the loan amount on 29 December 2003 directly to the African Export Import (Afrexim) Bank, Egypt from its Geneva account. The loan was to be repaid in five installments on 15 February, 31 March, 30 June, 30 September and 30 December 2004. While no interest was charged, the parties, however, agreed on the payment upfront by the borrower of a flat fee of 15% of the loan amount. In addition, in the event of default, interest would accrue at a rate proportional to the flat rate. Shah stated that the flat rate was in line with the authorization of the Reserve Bank of Zimbabwe (central bank) to Trust to conduct six-month transactions at the discount rate of 14, 9625%. He further surmised from the authorization and the repayment terms of the loan agreement that the effective interest rate yield was 30% per annum.

Shah delved into his previous dealings with Goromonzi. He stated that Goromonzi used to borrow foreign currency denominated loans for his personal account secured by personal guarantees. He had repaid all the personal and Trust loans using offshore funds. It was Shah's uncontroverted testimony that he was advised by Goromonzi that the loan was to retire an Afrexim bank loan before Afrexim purchased the Ariston shares for US$4 million. However, in 2004 Afrexim declined to purchase the shares after Trust experienced financial woes with the central bank that culminated in its curatorship on 23 September 2004. Barato defaulted on the first installment and later on the other installments. The plaintiff did not call the loan after Goromonzi pleaded for more time to raise funds from other business deals and work they were involved in outside Zimbabwe. On 30 April 2004, Goromonzi wrote for Barato, to the plaintiff's erstwhile legal practitioners of record, *inter alia*, requesting "that the share disposal be delayed whilst the share price readjusts to the expected level." He promised to raise funds from other sources to service the debt while continuing to secure buyers of the security at the right price. At some point Goromonzi even indicated that he had found a buyer of the security in South Africa, but the deal fell through. In early 2004, in the aftermath of financial woes in Trust, Nyemba and Goromonzi ran away from the country. The loan was not repaid. On 27 July 2005 the plaintiff exercised its rights and placed the shares on the local bourse for sale. The shares were not purchased but the share price fell in local currency from $675.00 to $300.00. The plaintiff purchased the shares at $300.00 for $12 689 001 900.00. It incurred brokerage fees of $300 million. At the time the exchange rate was ZW $17 700: 1 USD. In addition the unreported case of *Alshams Global Inc v Ariston Holdings Limited* HC 5758/08, a judgment of Bhunu J delivered on 17 September 2008, confirmed Shah's testimony that the plaintiff received dividends due to Barato from Ariston in 2004 of US$30 856.38.

Further, the parties agreed that if Barato defaulted, the plaintiff had a wide discretion to deal with the security it held in negotiable form in any manner it saw fit and claim any shortfall from the defendants. Clause 9.3 reads:

> "It is recorded that in the event of any default by the borrower, the borrower hereby accepts and acknowledges that the security deposited by it shall be forfeited to the lender and the lender shall have the right to exercise the security

> and in the event of a shortfall claim from the borrower any such shortfall which may still be due to the lender under the terms of this agreement."

It was common cause that that the plaintiff could in the exercise of its discretion keep or sell the security and demand for any shortfall from the defendants.

Shah testified that the security was inadequate to meet the loan, hence the plaintiff's recourse against the defendants.

The disputed facts centered on the resolution and resignations of the directors of Blantyre Asset Management Company (Pvt) Ltd dated 29 October 2004 found in exhibit 7, which consists of four documents and page 3 of exhibit 5, a 10 page bundle of documents produced by the defendants. The dispute also centered on the valuation of the Ariston shares at the time of appropriation.

Under cross examination Shah denied procuring the resolution and resignations of the three defendants from the directorship of Blantyre. He acknowledged receiving the resolution and the three letters of resignations produced as exhibit 7 but denied receiving the other letter of resignation from Sachikonye recorded on page 3 of exhibit 5. The import of the resolution was that the three defendants acknowledged the inability of Barato to repay the loan and averred that the plaintiff desired to take cession of the shares and the concomitant board representation and dividend rights attached to them. The directors resolved to surrender to the plaintiff these rights and to resign from Blantyre to facilitate the transfer and to alert Ariston on possible changes on its board driven by the new shareholder.

The letter of resignation by Nyemba was dated 1 August 2004. It was addressed To Whom It May Concern. It was on Pivot Capital Partners of Bryanston South Africa letterhead and indicated that Nyemba was its managing director. He was resigning from Ariston, Barato and Blantyre with effect from 1 August 2004. He intimated that he was relinquishing all his rights and obligations in both Barato and Blantyre and that he had resigned from Ariston. He signed it in Johannesburg South Africa. In his testimony Nyemba did not recall what happened. He assumed that the resolution was done much later as an afterthought. Shah denied meeting Nyemba on the day he signed the letter of resignation contending that he was not in South Africa at the time. In his testimony,

Nyemba stated the he signed the resolution and prepared the resignation letter in South Africa at the instance of Goromonzi who was also in South Africa. Goromonzi advised him that he had been told by Sachikonye that Shah had sought these two documents. He assumed at the time that the security adequately covered the loan. He did not know whether Shah accepted or rejected the letter of resignation.

The letter of resignation by Goromonzi was typed but the date is written in ink. It bears a Harare address. He was resigning from Blantyre with immediate effect. He wished the company well into the future under its new shareholder.

Two letters of resignation were attributed to Sachikonye. The first had a Tafara Harare box number. It intimated his resignation from Blantyre Asset Management Co Pvt Ltd with immediate effect. He opined that he was relieved of all responsibilities and liabilities relating to Blantyre. The second letter also had the Tafara box address and the words Alshams Building Material t/a LLC in bold print. He indicated in that letter that he was resigning from Blantyre at the instance of the plaintiff. He further added that as a condition thereof he was "to be relieved of all the responsibilities and liabilities relating to this company and cancel without reservation my deed of surety issued in respect of the loan to Barato of US$2 223 000.00."

Shah admitted that he did not discuss with any of the defendants how they would individually pay up in the event of default by Barato. He stated that he was assured by Goromonzi that all three defendants were beneficial owners of Barato, had resources, assets, businesses and were consultants for other banks in the region. He stated that Goromonzi stated that all three could easily raise US$150 000.00 every second or third month and clear the debt by 31 December 2004, which information was confirmed by Nyemba, hence the repayment schedule in the agreement.

Clause 2.2 of the loan agreement showed that US$1 933 000.00 was the actual amount disbursed to Barato. The effect of paying the full loan amount when what had been disbursed was US$1 933 000.00 meant that Barato agreed to pay the difference between the loan amount and the disbursed amount represented by US$290 000.00 firstly in terms of clause 7.1 as the upfront flat fee on disbursement and secondly an equivalent

amount as interest on full repayment. Shah was therefore correct in averring that the effective yield on the loan was 30 per cent per annum.

Shah was taken to task on the value of the shares at disposal on 29 July 2005. He was adamant that the parties agreed to maintain the value of the shares at 1 ½ times cover precisely because they could not predict the price of the shares on disposal. The existence of the personal guarantees tended to confirm Shah's testimony that the parties were well aware of the uncertainties surrounding the value of the security on disposal. In his testimony Nyemba asserted that the value of shares was often affected by economic trends, the political environment and exchange rate policies. His view was confirmed by the failure to dispose the shares at US$ 4 million or any higher figure at any other time before or after the resignation of the three defendants as directors of Blantyre. The tone of the letter of Goromonzi of 30 April 2004 in which he pleaded with the plaintiff not to appropriate the shares until the share price had appreciated to levels around ZW$450.00 implicitly recognised that the share price was depressed. While Shah was reluctant to concede that in nominal terms the share price improved, the table on page 9 of exhibit 5 that was compiled by Interfin at the request of the parties erstwhile legal practitioners of record showed a nominal appreciation in value from ZW$174.00 in November 2004, a dip in December of $133.00 rising to $235.00 in January, $385.00 in February, $345.00 in March, $450.00 in April, $ 418.00 in May, $350.00 in June, $545.00 in July, $705.00 in August and $590.00 in September 2005. It is noteworthy that in his testimony, Nyemba misled the court that at the time that the defendants resigned from the board the share price stood at ZW$1 300.00 a share.

The table by Interfin has serious shortcomings. It provides the cross rate between the US$ and the local currency as having been constant at ZW$250:1 US$ for the period from November 2004 to July 2007. Yet, on page 10 of exhibit 5, the defendants produced an official Reserve Bank of Zimbabwe table that demonstrated that the foreign exchange auction rate was ZWD17 694.15 per USD. Shah's skepticism on the accuracy of the information was well founded. Again, Shah denied that at the time of executing the agreement, Barato expressed its intention to redeem the debt through dividend pay outs. His version is on firm ground. It was not disputed that the defendants hoped to redeem

the debt even before the due date once Afrexim bank purchased the shares for US$4 million. The use of dividends to repay only appears in the letter of 30 April 2004, at a time after Barato had defaulted on two installments. That letter also highlights the uncertainty of relying on externalized dividends to meet its repayment obligations.

The method of valuation of the shares is set out in clause 5.4 which reads:

> "In determining the value of the security at any time during the operation of this agreement, the lender shall consider the share price quoted by the Zimbabwe Stock Exchange and the cost of procuring United States dollars on the market as may be advised by the lender's bankers. A certificate signed by the lender's bankers in Zimbabwe determining the value of the security in terms of this clause shall be conclusive proof of the value of the pledged shares and /or security."

Shah testified that at the time there existed in Zimbabwe three exchange rates for procuring United States dollars. These were the official rate that was applicable to government transactions, the auction rate that was an interbank rate and the illegal parallel rate. In my view, because it referred to the rate provided by the local bankers of the plaintiff, clause 5.4 contemplated the use of the auction rate.

To arrive at the value of the shares in United States dollars, he referred to exhibit 6; a document compiled by Interfin Merchant Bank Limited at the request of the parties erstwhile legal practitioners. The legal practitioners supplied Interfin the four scenarios found in the document. The first was based on the special bargain price of ZWD300.00 per share. At the exchange rate of ZWD17 700.00 to the USD, less selling costs the security carried a value of USD695 342.48. The second scenario was based on the market price of ZWD675.00 per share and after accounting for selling costs the security was valued at USD1 564 574.95. The third scenario was based on the special bargain price of ZWD300.00 less both selling and buying costs. The value of the security was set at USD673 792.18. The last scenario was based on the market value of the shares at ZWD675.00 less both selling and buying costs, which placed the value of the security at USD1 516 141.18.

Shah was adamant that in terms of clause 6.2 of the agreement the plaintiff was not liable to pay any interest, fees, commissions or any other charges on the security provided by Barato. It, however, paid for both the selling and buying expenses and was

entitled to receive recompense from the defendants. He maintained that the third scenario rather than the fourth correctly captured the value of the security. It was this value plus the value of the one dividend that was received of US$30 856.38 that had to be deducted from the loan amount to arrive at the plaintiff's claim of USD1.560 437.68 million.

Mswaka confirmed the method that was used to dispose of the shares. He produced exhibit 8, the brokers' note for the sale of the shares. The brokerage fees he charged were confirmed by Interfin in exhibit 6. He stated that the number of shares placed on the market was beyond the capacity of the market to absorb. There were no takers above ZWD300.00 per share. He stated that while splitting could be done, it was cumbersome and did not guarantee a higher price.

The first and second defendants conceded that they voluntarily signed the deed of suretyship. Nyemba stated and Goromonzi confirmed that their strategy was to pay the first instalment within six weeks of the loan agreement from dividends declared to Barato by Ariston. Thereafter he expected the share price of Ariston to appreciate and with it the value of the security. The appreciation in the value would enable the defendants to sell the security and repay the plaintiff. If they failed to sell they would utilize long term financial arrangements of Trust Bank. In my view, these arrangements were very uncertain as they depended on the ability of Ariston to pay a dividend in local currency that could easily be converted into United States dollars. As seasoned bankers, it must have been in the contemplation of both Nyemba and Goromonzi that the conversion depended on the availability of sufficient and surplus United States dollars in the foreign currency account of Ariston. The strategy miserably failed because Ariston did not have the envisaged funds in its foreign currency account.

Sachikonye disputed knowingly signing the deed of suretyship. He averred that he was tricked by Goromonzi to sign the document on 22 December 2003, at a time when he was rushing for a board meeting. His story that he was tricked does not make sense. He admitted that before he signed the document in his office Goromonzi intimated to him that it concerned the transfer of Blantyre shares to its new shareholder. He stated that he had joined the board of Blantyre in 2002 and he believed that he was signing a round robin resolution. Under cross examination he alleged that Goromonzi intimated that he

was signing the share transfer form of the Ariston shares held by Barato. Goromonzi disputed tricking him. In any event the surety is a two paged document headed in bold print Deed of Suretyship. Sachikonye is a literate gentleman accountant who sits on the board of big corporates including some multinational companies. He knew the nature and purpose of the document he was signing. His foreknowledge is clearly spelt out in his second letter of resignation of 29 October 2004 addressed to Alshams in which he sought to be discharged from the suretyship. That letter also contradicted the assertion he made in his evidence in chief that he became aware of the existence of the loan agreement in his legal practitioner's office after the summons was served. He further contradicted himself on when he first saw Shah. In one vein he averred that he only saw him after the present case had commenced and in another vein he alleged that he first saw him on 29 October 2004 when he directed him to write the letter of resignation to a specific person.

Sachikonye further contradicted himself on whether his first letter of resignation was written at the instigation of Shah or not. In his main testimony he said he was requested by Shah to resign and he went on to advise his co-defendants. Under cross examination he stated that his co-defendants were the ones who requested him to write the first letter. In his plea and summary of evidence he averred that Shah assured him that his resignation discharged the surety, yet in his evidence in chief he stated that Shah simply indicated that he had noted the contents of his letter. The plethora of contradictions undermined his credibility. I am satisfied that he was an untruthful witness. It is because of these contradictions that where his testimony differs with that of Shah, I am inclined to accept the latter's testimony as a correct representation of what happened.

All three defendants averred that the security was adequate to meet the loan both on the date that they resigned and relinquished control of the security and on the settlement date chosen by the plaintiff. I understood their three letters and the resolution to be merely expressing the obvious position that on resignation, they ceased to be liable for the operations of the corporates from which they were resigning. The letters do not in any way free them from outstanding obligations which they entered into prior to the resignation such as the suretyship. It explains why both Nyemba and Goromonzi did not

aver in their joint plea that the resignation discharged the suretyships. Rather like Sachikonye they pleaded that the security carried a higher value than the loan agreement when they resigned and when the plaintiff exercised his rights of settlement.

The defendants called the evidence of Mutakwa to demonstrate that they utilized three dividend pay outs towards the reduction of the loan amount. Mutakwa produced exhibit 9, a schedule of the dividends paid to Barato Holdings Limited between 4 September 1998 and 9 June 2004 that were declared between 7 August 1998 and 19 December 2003. Five dividends, numbers 48 to 52 were declared between 18 January 2002 and 19 December 2003. For the dividend declared on 18 January 2002 a net amount of ZWD8 865 756.70 was paid out on 18 March 2004. The dividend declared on 14 June 2002 resulted in payment of a net amount of ZWD7 092 605.36 on 18 March 2004; that of 17 January 2003 resulted in payment of a net amount of ZWD46 101 934.84 on 18 March 2004; that of 20 June 2003 resulted in the payment of a net amount of ZWD359 521 720.50 on 18 March 2004 and lastly the dividend declared on 19 December 2003 resulted in the payment of ZWD 359 521 720.50 on 9 June 2004.

Mutakwa stated that the dividend payments moved from his dividend account with Ariston into the Barato account held with the Merchant Bank of Central Africa. Mutakwa as the transfer secretaries for Ariston issued dividend advice slips and cheques to the shareholder-Barato. Barato was a foreign company. Central Scrip did not have foreign currency to pay the dividend in foreign currency. It held the money until Ariston instructed it to remit the funds to the Merchant Bank of Central Africa. He did not know what happened to the funds thereafter. Under cross examination he revealed that he did not know if the last five payments were remitted to Barato or not. He was not aware whether the plaintiff ever received any dividends due to Barato.

Mutakwa did not confirm the defendants' assertions that three dividend pay outs were used to reduce the debt.

The defendants further called the evidence of Munyukwi to show that the method used by the plaintiff to dispose of the shares was opaque and unfair. The pith of their argument in this regard was best expressed by Sachikonye who described the sale of 27 July 2005 as a commercially impaired imagined sale without the dynamics of a willing

buyer and a willing seller. Munyukwi supplied the meanings of market price and special bargain in the stock exchange lexicon. He defined market price as the price at which a willing seller and a willing buyer concluded a share sale. He proceeded to define a special bargain by reference to a market price as the price reached by a willing buyer and a willing seller at either a discount or a premium to the market price. He stated that a foreign investor is legally required to conduct transactions on the market. The procedure often utilized before a special bargain is reached is that the seller's broker tests the market for willing buyers; if he fails to find them, he enters into a special bargain. A special bargain is usually preceded by off market negotiations between the buyer and the seller. The negotiations are underpinned by perceptions of the value of the share to the negotiators and considerations of control and saving costs to the buyer. He produced exhibit 10, a three page document of the schedule of special bargains transacted at the local bourse in 2009 and 2010. The document showed, amongst other transactions, that in 2009 Renaissance conducted a special bargain for 177 085 674 shares at a small premium above the market price. It further showed that in 2010, of the 26 special bargains 4 were below, 6 were at par and 16 were above the market price. The exhibit further showed that the margin of the discount or premium to the market price was small.

He further produced exhibit 11, the local bourse official record of trade on 29 July 2005. It recorded that a special bargain of 42 296 673 Ariston shares traded at ZWD300.00 per share. Buyers wanted to buy at ZWD650.00 while sellers offered to sell at ZWD680.00 but sales were recorded for 76 000 shares at ZWD675.00. He commented that the difference between the special bargain and the market price was very significant and rather unusual.

Under cross examination he stated that without checking the order trail of that day, he could not dispute Mswaka's testimony that he failed to find buyers at ZWD675.00. He conceded that the local bourse had approved the sale notwithstanding the unusual difference between the market price of ZWD675.00 and the special bargain price of ZWD300.00. He opined that the approval was granted because the transacting parties were both foreigners for whom the local bourse appreciated their desire to save on

transacting costs. He also conceded that an important consideration in special bargains was the availability of the funds to purchase the share.

Three factors undermined the probative value of Munyukwi's testimony. The first was that he conceded that exhibit 11 was at variance with the testimony of Mswaka on the transactions of 27 July 2005. The second was that both exhibit 10 and 11 were not canvassed with Mswaka. This would have assisted the court to properly assess the truth of what transpired during the sale. The third was that the economic environment in 2005 when the sale was concluded was different to the one in 2009 or 2010 from which the information in exhibit 10 refers. Munyukwi's testimony would have carried more weight had he produced documents of other special bargains conducted in 2005 by other foreign investors. It is for these reasons that I am compelled to accept Mswaka's testimony where it differs with that of Munyukwi.

Mr *Morris* urged me to find and Mr *Mahlangu* conceded that Shah gave his evidence well and was not shaken in cross examination. He urged me to believe him ahead of the three defendants. He also urged me to prefer the evidence of Goromonzi in place of his co-defendants who he criticized as poor witnesses.

Exhibit 7 painted all the defendants in bad light. The board resolution was on the face of it innocuous. The three co-defendants accepted Barato's inability to repay the loan and resolved to resign from Blantyre and facilitate surrender of Ariston shares to the new shareholder and alert Ariston of possible changes on its board. The first problem for the defendants was that they all purportedly appended their signatures on 29 October 2004. Nyemba and Goromonzi were in South Africa while Sachikonye was in Zimbabwe. They all admitted that they did not meet on that day. Nyemba went even further in misleading the court that his letter of resignation dated 1 August 2004 was precipitated by the resolution of 29 October. He had no explanation to proffer on how he came to resign two months before the board resolution. If indeed he had resigned from Blantyre, Barato and Ariston on 1 August 2004, he would not have signed the resolution of Barato of 29 October as he was no longer a director. All the defendants conceded that the plaintiff did not benefit from their resignations. They were not the shareholders but mere directors of Blantyre. On their resignation the shareholders, represented by the Caversham Trust, had

the obligation to appoint another set of directors. Their resignation did not open the way for Shah to take over the reigns of Blantyre. Shah did not behave in any way that demonstrated that he requested their resignation. He denied ever seeking their resignation. I find that all three were untruthful in their assertions that the resolution and their resignations were procured by the plaintiff.

I agree with Mr *Morris* that Shah and Mswaka told the truth of what transpired. I adopt their version wherever it differs with that of the defendants and their witnesses.

At the pre-trial conference held on 4 November 2009, the following issues were referred to trial:

1. whether the personal guarantees entered into by the defendants required exchange control permission and if so whether the guarantees are enforceable
2. whether defendants held out that Barato Holdings Limited had the ability to repay the principal debt
3. whether the principal debt was to be paid solely from dividend payments due to Barato Holdings Limited and Blantyre Asset Management and from the realization of security handed to plaintiff
4. whether defendants assured plaintiff that all necessary exchange control approval had been obtained prior to the furnishing of the personal guarantees
5. whether plaintiff has been repaid the principal debt in full
6. whether the third defendant is bound by his signature to the guarantee notwithstanding his averments firstly, that he did not know at the time he signed it that it was a guarantee and secondly, that it was discharged by the plaintiff when he agreed to resign his directorship in Blantyre.

Even though these six issues could be compressed into the three issues that I referred at the outset in this judgment, I proceed to determine each of them individually but not in the order that they appear. In my view issue 4 is related to issue 1 and the two will best be determined at the same time. The first issue to be determined will be issue number 2, followed by issue number 3, 6, 1 and 4 and 5.

Whether the defendants held out that Barato Holdings Limited had the ability to repay the principal debt

The evidence of Shah was that Goromonzi held out that Barato was able to pay the loan amount. He agreed to the security but because of the inherent volatility in the value of shares at any period that the plaintiff might be forced to exercise the security he demanded a loan cover of 1 ½ times the value of the security and personal guarantees from the three directors of Barato. He stated that the loan cover formed the basis for the disbursement of US$1, 9 million. He further stated that Goromonzi assured him that the three directors were personally involved in foreign ventures which would enable them to raise at least US$150 000.00 each month. When he was cross examined, these averments were not challenged. When Goromonzi testified, he was vague on the sources of payment. He was unsure of what he said to Shah. He was certain that in his own mind payment would be made in full before 30 December 2004 from the proceeds received from the sale of the security to Afrexim bank. He further believed that dividend pay outs would be used to reduce the debt and if the worst scenario happened the security would retire the debt. Nyemba's contribution on the first issue was that the agreement was a routine and standard one. Barato was prepared to provide more than three guarantees at the plaintiff's request. He was not personally involved in the negotiations but was aware of them. Sachikonye averred that he was not aware of the negotiations or the agreement. He however knew of the existence of Barato whose executive operations were in the hands of the other two defendants.

Goromonzi, by virtue of his intimate involvement in the negotiations leading to the agreement knew more than did the other co-defendants. The other co-defendants mandated him to conduct the negotiations. All three were directors of Barato. The agreement was in the name of Barato. Goromonzi stated that before Sachikonye signed the guarantee he briefed him on its essence. Sachikonye admitted that he signed without reading the document after Goromonzi advised him that it concerned Blantyre. Sachikonye referred to the existence of round robin resolutions which were circulated after the directors had discussed an issue. When Goromonzi stated that he discussed the essence of the guarantee with Sachikonye, there is no reason to doubt that he was being truthful. He was simply executing a principle of operation that was well known to the two directors. Goromonzi's testimony would be the most credible of the three defendants on

what was said in negotiating the agreement with Shah. Shah was more credible than Goromonzi in relating what Goromonzi said. Goromonzi used words such as I think, I cannot confirm, which indicated his uncertainty.

The agreement contains three features that confirm Shah as a truthful witness. The loan amount was not in the sum of US$3, 1 million that Barato sought. The loan amount did not constitute 1 ½ times cover of US$4 million that Goromonzi and Nyemba alleged was the value of the Ariston shares. The agreement contains a personal guarantee clause. Lastly it sets out the five installments that were to be paid to reduce the loan. The first was due on 15 February 2004 in the sum of USD433 000 and the remaining four were to be paid in four equal installments of USD447 500 on 31 March, 30 June, 30 September and 30 December 2004, respectively. By providing in the agreement for specific installments payable on specific dates, Barato was clearly holding out its ability to repay the loan.

I answer issue number 2 in the affirmative.

Whether the principal debt was to be paid solely from dividend payments due to Barato Holdings Limited and Blantyre Asset Management and from the realization of security handed to plaintiff

The answer to the third issue must be in the negative. Shah clearly stated that the question of retiring the debt solely from dividend payments was not discussed. Barato defaulted on the first instalment. This was in spite of the existence of the dividends declared on 18 January and 14 June 2002, 17 January and 20 June 2003 that were all paid out on 18 March 2004. Even the last dividend declared on 19 December 2003 that was paid out on 9 June 2004 did not find its way into the plaintiff's bank account during the currency of the loan agreement. When Goromonzi and the co-defendants averred that repayment was to be made solely from dividend payments they were being untruthful. The dividends that were declared were not used for this purpose. Neither was payment to be made solely from the security. If that was the position one would have expected the parties to state it in the agreement. By stating a timeline by which instalments would be made, Barato was undertaking to pay from other sources other than the security as is apparent in the letter written by Goromonzi of 30 April

2004 and in Nyemba's oblique reference to some financial arrangements that he failed to articulate. In any event, the purchase of the security from Conafex further points to the defendants' ability to tap financial resources from the other sources.

Whether the third defendant is bound by his signature to the guarantee notwithstanding his averments, firstly, that he did not know at the time he signed it that it was a guarantee and secondly, that it was discharged by the plaintiff when he agreed to resign his directorship in Blantyre

Sachikonye alleged in his pleadings and evidence that he did not know that he was signing a deed of suretyship. The suretyship was signed on 22 December 2003. In his evidence in chief he stated that he was rushing to a board meeting when was approached in his office by Goromonzi who asked him to append his signature on a document he said was for the transfer of shares in Blantyre Asset Management. He just signed it on the mention of Blantyre in the belief that it was an ordinary resolution since Trust Bank was in the habit of sending round robin resolutions to directors for approval. Under cross examination he betrayed his foreknowledge that the shares, the subject of the transfer, were Ariston shares that were held by Barato. He stated that Goromonzi told him that they were to be transferred to a new buyer. On the other hand Goromonzi stated that he sat and discussed the deed of suretyship with Sachikonye in Sachikonye's office. Thereafter Sachikonye signed it in the full knowledge of what the document entailed. Mr *Mahlangu* was in the invidious position of representing two clients whose versions in this respect were at cross purposes. In my view, he ought to have declined to represent both of them because of the conflict of interest that arose in such a situation. In his submissions, Mr *Mahlangu* agreed with Mr *Morris* that Goromonzi gave a more credible version of what transpired.

The deed of suretyship in question was signed by Sachikonye and witnessed by Goromonzi. Sachikonye, by stating that Goromonzi made mention of Blantyre, admitted that a discussion first ensued before he signed. It was not clear from his testimony why he believed that he was signing a round robin resolution concerning Trust Bank. He knew he was signing a document which concerned the transfer of shares in Blantyre. Blantyre was

the holding company of Barato. The deed concerned surety for Barato which had pledged its asset in the form of Ariston shares to the plaintiff. Sachikonye together with Goromonzi and Nyemba were the sole directors of these two entities. Sachikonye did not establish the link between Blantyre and round robin resolutions of Trust Bank. Neither Sachikonye nor any of his co-defendants established the link between Blantyre and Trust bank. His story that he signed a document concerning Blantyre in the belief that it was a bank round robin resolution was therefore false. While he alleged that he was rushing to a board meeting, he did not produce proof that there was indeed a board meeting on that day. In my view, Goromonzi told the truth that he explained the nature of the document to Sachikonye who understood what it entailed. Sachikonye did not give details concerning the identity of the transferee and the reasons for the transfer of the shares. His further version that he only knew of the existence of both the loan agreement and surety in October 2004 was in the light of Goromonzi's version, demonstrably false. He was to further complicate matters by averring that he only saw the deed for the first time after it was attached in the further particulars of 11 January 2006. He failed to satisfactorily explain his attempt in his letters of 29 October 2004 to cancel the deed that he was unaware until 11 January 2006.

I find against Sachikonye and hold that he knew on 22 December 2003 that he was appending his signature to the deed of suretyship. Indeed the deed itself consists of two pages. It is entitled Deed of Suretyship in bold print in capital letters. It is inconceivable that Sachikonye, even if he were in a hurry would have failed to scan the contents of the document and thereafter realize that he was signing a guarantee.

Sachikonye further averred in his pleadings that his suretyship was discharged by the plaintiff on his resignation from the directorship of Barato. In his evidence in chief and under cross examination he shifted from this firm position and was content to say Shah simply noted the contents of the letters. Shah denied requesting his resignation from Barato as a pre-condition for the discharge of the deed of suretyship. The other co-defendants stated that they did not speak to Shah but relied on what Sachikonye told them concerning the request for the board resolution and resignations. Like his co-defendants, Sachikonye was unable to explain why Shah would require their resignation when he held

a negotiable security. I do not accept that the board resolution and letters of resignation were instigated by Shah. The testimony of Sachikonye on the request is as difficult to follow as it is to believe. He alleged that he was the one who spoke to Shah on 29 October 2004 and relayed the message to his co-defendants who were based in South Africa. He further alleged that the letters of the co-defendants and his first letter without an addressee and the board resolution were collected by Shah on the same day. Again, on that same day Shah came back to him and demanded a letter of resignation specifically addressed to the plaintiff, hence the second letter that was more detailed and in which he gave as a condition of his resignation the discharge of the deed of suretyship. Shah accepted receiving the resolution and the first three letters, but did not disclose when he did so. He disputed any knowledge of Sachikonye's second letter. Sachikonye stated that he met Shah on 29 October 2004. He was being untruthful. It was not possible for all three defendants to sign the resolution and their respective letters of resignation on the same day that Shah allegedly requested them from Sachikonye. Time and distance separated them. In any event had Shah demanded that the letters be addressed to the plaintiff, it was inconceivable that Sachikonye would have failed to relay this information to his co-defendants. Sachikonye's second letter demonstrated beyond doubt that he had prior knowledge of the contents of his deed of suretyship. His attempts to explain that he knew of its existence on that day after Shah's visit was a vain attempt to escape from his earlier contradictory version made at the commencement of his evidence in chief that he only heard of Shah when the case arose as before that he had not been exposed to circumstances were the two would meet. It seems to me that the resolution and letters were made by the defendants of their own accord in recognition that once plaintiff exercised its rights in appropriating the security, they no longer had a basis for remaining as directors in an entity whose sole asset was the shares. The board resolution merely expresses the thinking of the three co-defendants as directors. Again their letters expressed their own beliefs that they were discharging their respective guarantees because the security carried a value higher than the outstanding loan. Off course, Shah was not bound by either the resolution or the letters of resignation, which did not proffer any advantage to the plaintiff. In my view they were merely informative in nature, hence

the climb down by Sachikonye that Shah did not discharge his guarantee but merely took note of the contents of the second letter.

I hold that the third defendant was bound by his deed of suretyship as he knowingly signed the document. Even though like his co-directors he believed that the security carried a value in excess of the loan amount, he was never discharged from the operation of his guarantee by the plaintiff.

Whether defendants assured plaintiff that all necessary exchange control approval had been obtained prior to the furnishing of the personal guarantees

The loan agreement answers this question. It will be recalled that it was signed by the Goromonzi and Nyemba on behalf of Barato. These two defendants were aware of the requirement for sureties, which they proceeded to provide. In the recitals, clause 1.1 of the agreement reads:

> "The borrower has represented to the lender that it has the capacity, authorization and necessary corporate and regulatory approvals to conclude and perform its obligations in terms of this agreement."

Under representations and warranties in clause 8.1.4 the borrower represented to the lender that:

> "all authorizations, approvals, consents, licenses, exemptions, filings, registrations and other matters official or otherwise, required or advisable in connection with the entry into, performance, validity and enforceability of this agreement and the transactions contemplated by this agreement have been obtained or effected and are in full force and effect and that the agreement is in proper form for its enforcement in the Courts of Zimbabwe."

In these two clauses the first and second defendants assured the plaintiff that the borrower had the ability to perform its obligations under the contract and that the contract was valid in Zimbabwe. One of the terms that they agreed to was that they would provide deeds of suretyship capable of enforcement in the courts of Zimbabwe. Sachikonye willingly signed his guarantee. The three defendants' guarantees made reference to the loan agreement of 23 December 2003. None expressed any incapacitation in executing the guarantees. All of them, by signing the guarantees in the full knowledge of the terms and conditions of the loan agreement led the plaintiff to believe that their guarantees were

capable of enforcement in Zimbabwe. Thus the individual act of each defendant in executing the deed of suretyship constituted an assurance to the plaintiff that all the necessary exchange control approvals had been obtained.

Whether the personal guarantees entered into by the defendants required exchange control permission and if so whether the guarantees are enforceable

The answer to this question lies in the testimony of Shah and Goromonzi concerning what the two agreed in regards to sureties. Shah stated that Goromonzi advised him that the loan was to retire a loan held with Afrexim bank, which bank would in turn purchase the security for USD4 million. In the event that the deal with Afrexim bank failed, Goromonzi assured him that the three defendants would be able to meet the instalments from other business deals and work they were involved in outside Zimbabwe. Under cross examination Shah stated that Goromonzi assured him that all three defendants were beneficial owners of Barato and each had resources, assets, businesses and acted as consultants for other banks in the region and in the worst case scenario would be able to put up their own resources. He assured him that they would be able to cumulatively raise USD150 000 every second or third month and clear the debt by 30 December 2004. He stated that the arrangement was confirmed by Nyemba, hence the repayment schedule in the loan agreement. In essence Shah averred that he was assured by Goromonzi and Nyemba that thy held free funds that they could utilize in meeting the suretyships.

This evidence was not contradicted by either Goromonzi or Nyemba. Sachikonye did not dispute that he had offshore assets; all he said was that he did not have amounts in the region of the loan amount.

I believed Shah for the reason that his story had the ring of truth and was confirmed by the probabilities. He stated that he had requested Trust Bank to guarantee the loan but was told that that would infringe central bank requirements against directors borrowing from their own bank. In addition the first and second defendants were high flying bankers, who when push came to shove left the country and set themselves abroad. The third defendant is a skilled accountant who was the managing director of the Zimbabwean subsidiary of a multinational corporation.

It was common cause that in terms of s 11 (2) of the Exchange Control Regulations SI 109 of 1996 as long as the defendants intended to meet the suretyship from free funds that were available to them at the time of the execution of the guarantees, they did not require exchange control approval. The guarantees in question would not at the time be met from local assets which could only be disposed of in local currency and not in United States dollars as required by clause 4 of each deed of suretyship.

I accordingly hold that the personal guarantees entered into by the defendants did not require exchange control permission and as such are enforceable in Zimbabwe.

Whether plaintiff has been repaid the principal debt in full

The plaintiff instructed Renaissance Stockbrokers (Pvt) Limited to sell the Ariston shares on the local bourse. It provided the stockbroker with the share certificate and a signed transfer form. Mswaka conducted the sale on 29 July 2005. He testified that he found no takers at the price of ZW$675.00 per share that prevailed on the previous day. It fell to ZW$300.00 per share. No other third party was interested in the shares. He then purchased the shares at a special bargain price of ZW$300.00 per share for the plaintiff. The special bargain required the approval of the local bourse in its capacity as the regulatory authority. The approval was granted and the sale was passed. Even though he passed both the seller's and buyer's note to Shah, he appeared oblivious to the fact that Shah acted as both the seller and buyer. The shares were priced in Zimbabwe dollars and after deducting both the seller's and buyer's selling and buying costs and applying the auction rate used by the central bank at the time, the value translated to USD 673 792.18. The value in United States dollars had the shares been valued at ZW$675.00 after deducting both the seller and buyer's costs would have amounted to USD 1 516 141.18.

Mswaka's testimony of the events that transpired on the market on 29 July was not put in issue when he was cross examined. Rather Mr *Mahlangu* suggested to him that the fairer value would have been the USD 1 516 141.18 rather than USD673 792.18.

Having allowed Mswaka's testimony to go unchallenged, Mr *Mahlangu* proceeded to call the evidence of the chief executive officer of the local bourse, Munyukwi. He produced exhibit 11, a document he alleged recorded the transaction that

took place on the local bourse on 29 July 2005. It showed firstly, that 76 000 Ariston shares were sold at a price of ZW$675.00 and secondly that a special bargain was transacted at ZW$300.00 on the day in question. In addition, he produced exh 10, documents capturing special bargains conducted in 2009 and 2010, in order to underscore the point that special bargains moved in a narrow range above or below the market price. He further underscored from these statistics that in the majority of the special bargains the price was above the market price. He surmised that the variance between the market price of ZW$675.00 and the special bargain price of ZW$300.00 was "rather unusual", yet his stock exchange approved the transaction because such off-market deals with such a variance were not uncommon on the local bourse. He stated that they were legal and were designed to save transaction costs. Munyukwi's testimony was undermined by two factors. The first was that his testimony was never canvassed with Mswaka and the second was that the operating economic environment in 2005 in which the special bargain sale was transacted was materially different from the one prevailing in both 2009 and 2010. The two periods are simply incomparable. Rather Munyukwi's comparisons would have been helpful had he provided documents of other special bargains that were conducted in 2005. Munyukwi conceded under cross examination that he could not dispute the testimony of Mswaka that the market price had fallen to ZW$300.00 on 29 July 2010 precisely because there were no buyers who were prepared to buy at a higher price. Mswaka's testimony was also confirmed by the probabilities. As a broker, he would have earned more fees had the sale been transacted at a higher price. He was to content with fees at the lower price because he failed to secure buyers at any price higher than ZW$300.00.

I find that the market price of the shares on 29 July 2010 was ZW$300.00 and not ZW$675.00 as suggested by the defendants. Accordingly, the Ariston shares were worth USD 673 792.18 on 29 July 2005.

The defendants further contended that the value of the shares should be calculated as at 29 October 2004, the date on which they resigned from Blantyre and effectively handed over the shares to the plaintiff. Clause 5.4 of the loan agreement gave a wide discretion to the plaintiff to appropriate the security once the borrower defaulted. It was

in recognition of this wide power that Goromonzi, on 30 April 2004, pleaded with the plaintiff not to exercise its rights. The tone of that letter indicated that the value of the Ariston shares was low. He sought the plaintiff's indulgence to wait until the price had firmed to ZW$450.00 without indicating what it was at the time. It is unlikely that he would have sought such an indulgence were the share price able to extinguish the loan amount. Clause 5.4 as read with clause 9.3 does not provide a time frame within which the lender was to redeem the security. As long as the plaintiff indulged the borrower's pleas for an extension, the loan agreement remained open. The continued existence of the loan agreement was not affected by the resignation of the defendants as directors of the borrower. In my view, as long as the lender did not exercise its rights over the security, the loan agreement would remain operational even beyond 30 December 2004. It would cease to operate once the plaintiff decided to exercise its rights. It was not within the power of the borrower or its directors to stampede the plaintiff into exercising those rights. Neither the borrower nor its directors had the power to force the plaintiff to exercise its rights through a board resolution or resignations. The contention that the date of surrender of the security was 29 October 2004 has no merit. The date chosen by the plaintiff in the exercise of its wide discretion was 29 July 2005.

The defendants further contended that the valuation of the shares should be based on the official rate of ZWD250.00 to 1USD. They relied on the rates of the local currency to the United States dollar supplied on page 9 of exh 5 by Interfin Research. The document shows that in November 2004 the share price of each Ariston share was ZWD174.00. The value of the security translated to USD 29 438 484.00 leaving a surplus due to Barato of USD 27 215 484.00. It further shows that in July 2005 each share carried a value of ZWD545.00 that translated to USD92 206 747.00 leaving a surplus of USD89 983 747.00 due to Barato. That this was a preposterous and disingenuous contention was demonstrated by the defendants' failure to counterclaim for the alleged excess value of the security. I, however, agree with the submission by Mr *Morris* that the rate of exchange contemplated by the valuation formula set out by the parties in clause 5.4 of the agreement contemplated the use of the auction rate rather than the official rate. The valuation formula provided for the conversion of the value of the

security quoted by the local bourse into United States dollars at the rate equivalent to the cost of procuring United States dollars on the market as provided by the plaintiff's local bankers. The parties contemplated that the local bankers of the plaintiff would state the value of the security in United States dollars in a signed valuation certificate. The envisaged certificate was not furnished by the plaintiff. I was satisfied by the information provided by the defendants from the Reserve Bank of Zimbabwe on p 10 of exh 5 that the exchange rate that the plaintiff's bank would have used on the date the plaintiff appropriated the security would have been the auction rate of ZWD17 700 to 1USD. The auction rate constituted the weighted average rate of the bids of the eighteen participating banks for the purchase of the United States dollars on auction at the time the security was appropriated.

The plaintiff purchased the security at the price of ZWD300.00 a share. The defendants contended that the method used to purchase the security at that price was unfair regard being had to the market value of ZWD675.00 a share. If the plaintiff's method of appropriating the security is upheld then the value of the security would be in the sum of US$673 792.18. The defendants contended that a fair value of the security at a market value of ZWD675.00 would be in the sum of USD 1 516 141.18. Shah's testimony on how the security was disposed of was confirmed to the hilt by Mswaka. The defendants relied on Munyukwi's testimony that the method of disposal was unfair in that it did not protect the interests of Barato. The defendants and Munyukwi averred that the sale was not conducted at arms length as in reality the party who sold the security turned out to be the purchaser.

I agree with the defendants that the plaintiff was the party who held the security and that it ended up as the purchaser of the security. Clause 5.4 of the loan agreement mandated the plaintiff to consider "the share price quoted by the Zimbabwe Stock Exchange." The plaintiff went to the Zimbabwe Stock Exchange for an assessment of the share price of the security. The uncontroverted testimony of Mswaka was that security was placed on the local bourse for sale. The price per share fell from ZWD680.00 to ZWD300.00 but there were no takers. The holder of the security then snapped all the shares at ZWD300.00 per share. While Munyukwi characterized the sale as unfair, he

failed to provide concrete suggestions that might have been used in the disposal of the security. One suggestion he proffered was in splitting the share certificate but he could not dispute Mswaka's testimony that splitting was not only cumbersome but did not guarantee a higher price for the shares. In any event splitting would pose further difficulties of having a multiplicity of possible dates of settlement of the security. The failure by Barato and its main mind Goromonzi to dispose of the security during the period from 23 December 2003 until the resignation of the defendants as directors on 29 October 2004 belied the belief propounded by the defendants and Munyukwi that the security had a high value because it was in high demand. That the security was not sought after by investors was further demonstrated by the fact that it found no takers even until 29 July 2005 when the plaintiff, as a last resort, purchased it.

Under cross examination by Mr *Morris*, both Nyemba and Goromonzi agreed that the plaintiff had acted properly in the way it disposed of the shares even though they would have done it differently. Apparently, until the shares were disposed of on the Zimbabwe Stock Exchange to the plaintiff, their different method of disposal had failed. I am unable to discern any unfairness in the method used by the plaintiff. It brought the shares onto the open market. It instructed an independent and experienced stock broker to sell to the highest bidder. It was in the financial interest of the stockbroker to secure sales at the highest possible price. The shares found no takers. The plaintiff purchased them. The sale was approved by the local bourse, in the full knowledge that the price had fallen from ZWD675.00 to ZWD300.00. The approval gave the transaction the stamp of fairness. There was no suggestion from the defendants that the plaintiff manipulated the bidding process or settlement price.

I am satisfied that the process used by the plaintiff in determining the value of the security of considering the share price quoted by the local bourse was fair and reasonable. It was in substantial compliance with clause 5.4 of the loan agreement.

The plaintiff averred that Barato repaid in local currency the value of the security equivalent to US$673 792.18 and a dividend in local currency equivalent to US$30 856.38. The defendants called Mutakwa in a bid to show that Barato paid three as opposed to one dividend to the plaintiff. Mutakwa's testimony failed to establish that any

of the dividends due to Barato was ever paid to the plaintiff. The onus lay on the defendants to show that the other two dividends were paid to the plaintiff. They failed to discharge this onus. They did not indicate the dates on which the payments were made. The dividends according to Mutakwa's schedule were all declared before the loan agreement was consummated but presented to Barato on 18 March and 9 June 2004 during the operation of the loan agreement. The plaintiff accepted receipt of the last dividend presented to Barato on 9 June 2004. The defendants failed to show that two other dividends due to Barato were paid out to the plaintiff.

I am thus satisfied that the plaintiff received the cumulative total of the value of the security and dividend payout in local currency equivalent to USD704 648.56. The defendants as co-principal debtors and guarantors owe the plaintiff the outstanding sum of USD 1 518 351.44.

The parties did not set out the rate of interest in the loan agreement but agreed on a penalty interest for default. They further agreed on the payment of an upfront flat fee of 15%. It transpired that Barato actually received the sum of US$1 933 000.00. The difference between the loan amount and the amount that was dispensed was US$290 000.00. This was the amount equivalent to the upfront fee of 15%. On 30 December 2004, Barato would have paid the loan amount of USD2 223 000.00 yet it received US$1 933 000.00. The difference of US290 000.00 represented the annual gain accruing to the plaintiff. It was equivalent to 15% per annum of the disbursed sum and 13% of the loan amount. Had Barato honoured the agreement, the plaintiff would have made a profit of US$580 000.00 representing a yield of 26% on the loan amount and 30% on the disbursed amount. When Shah stated in his testimony that the yield contemplated by the plaintiff was 30% per annum, he was correct.

However, the loan agreement was valid for one year. Clause 6.1 sets out the default interest due in the event the borrower failed to pay any amount due in terms of the agreement. It reads:

6.1 In the event of default in the payment of any amount due in terms of this agreement, then default interest shall accrue at a rate proportionate to the flat fee.

The rate proportionate to the flat fee set out in clause 7.1 of the loan agreement is 15% per annum. The rate of penalty interest is equivalent to 15% and not 30%. It commenced to run on 30 December 2004.

Accordingly, it is ordered that:

The first, second and third defendant shall pay to the plaintiff jointly and severally the one paying the others to be absolved:

1. The sum of US$ 1 518 351.44 together with interest at the rate of 15% per annum from 30 December 2004 to the date of payment in full;

2. Costs of suit on the scale of legal practitioner and client.

Atherstone & Cook, plaintiff's legal practitioners
Gill Godlonton & Gerrans, defendants' legal practitioners