KINGDOM BANK AFRICA LIMITED

versus

NOTRAUGHT TRADING (PRIVATE) LIMITED

And

AWINDALE INVESTMENTS (PRIVATE) LIMITED

And

WALTER MADIRO

And

JUSTICE MUDZANA

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 14, 15 and 21 November 2012

**CIVIL TRIAL**

*F. Siyakurima*, for the plaintiff

*H. Mukonoweshuro*, for the defendants

 MATHONSI J: The plaintiff, a banking institution registered in Botswana, instituted proceedings against the four defendants for payment of a total sum of US$777 380-05 being money advanced to the first defendant as a loan sometime in 2009, together with interest. The plaintiff also sought costs of suit on the scale of legal practitioner and client as well as collection commission.

 The plaintiff averred that on 14 September 2009 it provided the first defendant with a credit facility of US$425 000-00 which was to expire in two months time by which time all the amounts outstanding including any other charges immediately became due an payable. On 11 September 2009, the second defendant bound itself as surety *in solidium* and co-principal debtor with the first defendant and executed a surety bond in favour of the plaintiff hypothecating its property being stand 17 Winchedon Township of Lot D of Borrowdale Estate, Harare, held under Deed of Transfer No. 6629/10.

 The third and fourth defendants also executed deeds of guarantees on 14 September 2009 in terms of which they bound themselves as guarantors and co-principal debtors with the first defendant for the payment of all monies due under the credit facility.

 The plaintiff further averred that on 30 November 2009 it approved and granted to the first defendant a bridging finance facility of US$75 000-00. On 31 January 2010 the plaintiff granted the first defendant a rollover facility on the US$425 000-00 effectively extending the loan repayment period to 31 January 2011.

 As the first defendant failed to perform in terms of the agreement the plaintiff sought judgment in the total sum of US$777 380.05, interest on that amount, a declaration that the hypothecated property is executable, collection commission and costs of suit on a legal practitioner and client scale aforesaid.

 All the defendants contested the action. In their joint plea they averred that the first defendant had concluded the agreement with the plaintiff in order to finance the production of 10 000 tonnes of chrome to fulfil the supply of an order it had secured from China. The first defendant could not supply the chrome order to China owing to a supervening impossibility in the form of a government ban on all exports of chrome from Zimbabwe, which rendered the contract impossible to perform.

 The defendants averred that they are liable to refund only the capital amount received from the plaintiff. However they did not tender payment of that amount. Nowhere in their plea did the defendants contest the rate of interest levied, collection commission or attorney and client costs which were challenged by their counsel at the trial.

 At the pre-trial conference held before a judge, the parties identified the issues for trial as:

1. Whether or not the defendants jointly and severally, one paying the others to be absolved are indebted to the plaintiff and if so the extent of such indebtedness and whether such amounts are due and payable.
2. Whether or not it became impossible for the defendants to comply with the agreement and if so the effect thereof.

At the commencement of trial the plaintiff applied to amend para 8 of its declaration which appeared to limit its claim against the second defendant to only the capital of US$425 000-00. It sought to amend that to read that the second defendant was liable “for all and any monies” due by the first defendant as surety and co-principal debtor. The application was opposed by Mr *Mukonowoshuro*, who could only say that it was pre judicial to the second defendant without showing how.

Generally a party is entitled to amend its pleadings in order to enable the court to determine the real dispute between the parties. The court will ordinarily grant an application for an amendment unless it can be shown that doing so will cause prejudice to the other party which cannot be rectified by an order for costs. See rule 132 of the High Court of Zimbabwe Rules, 1971..

Looking at the defendants’ plea it is a blanket denial of liability over and above the capital sum advanced. Such plea would not change at all even after the amendment sought by the plaintiff. In my view no prejudice whatsoever would be suffered by the second defendant as a result of the amendment because the plaintiff still bears the onus to prove its claim “for all and any monies” due to it. It was for these reasons that I granted the amendment.

The plaintiff further amended its claim with the consent of the defendants. In the prayer it split its claim to US$498 648-78 being capital and US$278 731.27 being interest on the capital amount only.

It was brought to my attention at the outset that the first defendant had been placed under judicial management by order of this court dated 12 September 2012. Mr *Siyakurima* for the plaintiff promptly indicated that he was not longer proceeding against the first defendant, which proceedings would be stayed for now but against the other 3 defendants.

The plaintiff led evidence from Humphrey Machukuche, its Business Development Executive whose job is to assess proposals for funding from clients, to conduct diligent searches on proposed funding projects and to recommend loan investments. He testified that in mid 2009 the first defendant had approached the plaintiff seeking capital expenditure funding as well as a working capital of US$425 000-00. In conducting due diligence on the project they were furnished with an order from China for 10 000 tonnes of chrome that was to be supplied by the first defendant before the end of November 2009. The order was secured by a letter of credit for US$1,7 million issued by a Chinese bank.

The plaintiff duly granted a credit facility the terms of which are contained in the agreement dated 14 September 2009 which was produced as an exhibit. A sum of US$425 000-00 was advanced to the first defendant under that facility which was to expire 2 months from the date of first draw down when all amounts drawn, interest and charges became due (clause 4.1). Clause 7 (iii) provided that part of the security for the debt would be a First mortgage bond on stand 17Winchedon Township of Lot D of Borrowdale Estate, Harare. The interest applicable was 48% per annum.

Machukuche started that when they monitored on the funded project in early November 2009 they discovered that the first defendant had not performed. When they engaged the first defendant, worried that the letter of credit would expire before performance, the first defendant cited unreliable power supply or load shedding as a challenge and sought a bridging finance facility to purchase a generator. This resulted in the agreement of 30 November 2009, which was also produced as an exhibit. A sum of US$75 000.00 was advanced to the first defendant and in terms of clause 7 (ii) the same property belonging to the second defendant secured that further advance. The facility was to expire on 30 December 2009.

By December 2009 the first defendant had still not performed. It then approached the plaintiff seeking a roll over facility of the monies advanced. He explained that a roll over facility is an extension of the credit facility to give the customer more time to pay, albeit, with interest. The plaintiff acceded to the request and granted a roll over facility that was to expire on 31 January 2011. The witness made reference to the agreement of 31 January 2010 signed between the plaintiff and first defendant also produced as an exhibit. He produced the deeds of guarantee signed by third and forth defendants and the *in duplum* schedule showing how the amount claimed is arrived at.

On the defendants’ defence of a government ban on the export of chrome, Muchukuche stated that in terms of all the agreements entered into between the parties, the first defendant was required to perform its part of the bargain well before the ban on export was effected. In terms of the agreement of 14 September 2009, payment was due by 14 November 2009. In terms of the bridging finance facility payment was due by 30 December 2009 and even the roll over facility provided for performance by the defendants by 31 January 2011. He stated, and in fact it is common cause, that the government only imposed a ban on chrome exports in April 2011 months after the defendants should have paid. For that reason the ban was not a supervening impossibility at all.

Humphrey Machukuche gave his evidence very well, in a dignified manner, was not shaken at all under cross-examination and was ably assisted by documentation which set out the plaintiff’s case beyond any reproach. I have no hesitation in accepting his evidence which was truthful.

Walter Madiro testified on behalf of all the defendants in his personal capacity as third defendant, in his capacity as managing director of second defendant and by virtue of authority granted to him by the fourth defendant. Madiro generally accepted the evidence presented on behalf of the plaintiff including all the exhibits I have alluded to. He confirmed that after the loan was granted, second defendant executed a surety bond encumbering its property, that he also signed a deed of guarantee in his personal capacity and that the fourth defendant also did the same.

Although he tried in his evidence in chief to allege that the surety bond was only for a sum of US$425 000-00 and not the interest, he was quick to abandon that line of argument under cross-examination and readily conceded that the surety bond also covered interest and other obligations.

While he stated in his evidence in chief that the second defendant was not liable to pay collection commission and attorney and client costs, when it was drawn to his attention under cross-examination that by virtue of being surety and guarantors the second, third and forth defendants were liable for all the charges due by the first defendant.

On the issue of the government ban, Madiro confirmed that it was only effected in April 2011 long after all monies due in terms of the agreements between the parties should have been paid. In fact Madiro seemed to suggest that the main reason the defendants failed to perform was because the processing plants were being constructed. The ban must have been an after thought.

At the conclusion of the defendants’ case one is left wondering what it is that they were contesting. Their witness virtually accepted the entire case for the plaintiff. Although Mr *Mukonoweshuro* tried very hard to conjure some kind of a defence against the claim for interest, collection commission and attorney and client costs his was always a difficult case because none of that was pleaded.

It is trite that a party is bound by its pleadings and stands or falls on those pleadings. The only defence pleaded by all the defendants is impossibility of performance by virtue of a supervening impossibility, the government ban on exportation of chrome.

In any situation where a person seeks to escape liability it is for that person to prove that there was no fault on their part. It is a principle of our law that a debtor will only be released from liability where it is shown that failure to perform was not due to a fault or negligence on their part: *Grobler N.O Bush* 1964 (3) SA 691.

The learned author RH Christe, *Business Law in Zimbabwe*, second Ed, Juta & Co Ltd p 112 also makes the important point that:

“Impossibility resulting from the act of one of the parties will also not be taken into account, but illness disabling a person from performing a contract that must be performed in person is treated as supervening impossibility; *Fairclough* v *Buckland* 1913 SR 186.”

 The defendants may have found themselves faced with a government ban on the export of chrome but that clearly had nothing to do with their liability in terms of the agreement of the parties. They should have repaid the loan at the very least, 3 months before the ban was imposed. They did not. Their failure to pay was therefore not as a result of a supervening impossibility (the ban did not supervene), it was as a result of their own fault. For that reason that defence is not available to them.

 I am satisfied that the plaintiff has proved its case on a preponderance of probabilities. What remains is to determine the issue of costs and collection commission. Mr *Mukonoweshuro* submitted that the plaintiff cannot claim both collection commission and attorney and client costs in a case which has come all the way to trial.

 Mr S*iyakurima* for the plaintiff then submitted that the plaintiff was abandoning the claim for attorney and client costs in favour of collection commission. I am in agreement with the words of DAVIES J in *UDC Rhodesia Ltd v Ushewokunze* 1972 (2) ZLR 97 (G) at 100-1 which were quoted with approval by SMITH J in *Sedco* v *Guvheya* 1994 (2) ZLR 311 (H) 315 C-H;

“It seems to me that, applying what is there stated, the proper interpretation of clause 9 (e) (iii) of this particular agreement is that collection commission is not intended to cover any costs which might be recoverable by the plaintiff’s attorneys from the plaintiff after judgment has been obtained. Collection commission is essentially a charge made by an attorney or a commission agent when payments have been obtained through his services prior to judgment. If the matter has to proceed to judgment, then what is recovered is not recovered as a result of a collection by the attorney, but as a result of the judgment of the court and the process that follows thereafter.”

SMITH J went on to make the following formulation at 316 C which I respectfully agree with:

“To sum up, therefore, once summons has been issued for any debt, the legal practitioner is entitled to claim his costs but not collection commission unless subsequent to the service of the summons the debtor has agreed to pay collection commission. Collection commission can only be charged on moneys actually collected by the legal practitioner.”

 The plaintiff is therefore not entitled to collection commission. Although Mr *Siyakurima*, obviously with his eyes glued on the potential collection commission he wanted, appeared to abandon the claim for punitive costs without even conferring with his client, I am appalled by the lack of *bona fides* in the defendants’ case. This litigation was contested all the way to the wire even as it was obvious none of the defendants had an inkling of a defence. Only for Mr Madiro to concede the entire claim of the plaintiff in cross-examination. In my view this is a serious abuse of process which must indeed come heavy on the pocket.

 In the exercise of my discretion, I will award costs against the defendants on an enhanced scale as a seal of my disapproval of litigation which should have been avoided.

 Accordingly, judgment is granted for the plaintiff against the second, third and forth defendants jointly and severally, the one paying the others to be absolved in the sums of;

1. US$498 648-78 being the capital
2. US$278 731-27 being interest on the capital
3. Interest on the sum of US$498 648-78, at the rate of 30% per annum from 12 March 2011 to date of payment in full.
4. The immovable property being stand 17 Winchedon Township of Lot D of Borrowdale Estate held under Deed of Transfer No. 6628/2000 is hereby declared executable.
5. Costs of suit on a legal practitioner and client scale.

*Sawyer & Mkushi*, plaintiff’s legal practitioners

*Mukonoweshuro & Partners,* defendants’ legal practitioners