DEPOSIT PROTECTION CORPORATION
(representing AFRASIA BANK LIMITED under liquidation)
versus
DRUMMOND RANCHING (PRIVATE) LIMITED
and
CHIKASHA INVESTMENTS (PRIVATE) LIMITED
and
BIG S (PRIVATE) LIMITED
and
BUBIANA DEVELOPMENT (PRIVATE) LIMITED
and
JENTEAM HOLDINGS (PRIVATE) LIMITED
and
MIKEDI (PRIVATE) LIMITED
and
KENNETH DAVID DRUMMOND
and
DIANNE MARGARET DRUMMOND

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 & 4 April & 28 July & 9 & 10 October 2017 & 5 June 2019

Civil Trial

S. M. Hashiti, for the plaintiff
T. Zhuwarara, for the defendants

ZHOU J: The plaintiff claims payment of a sum of US$2 506 132.86, together with interest thereon at the rate of 3% above the LIBOR calculated from 24 May 2014 to the date of payment in full, collection commission, and costs of suit on the attorney-client scale. The claim is against all the defendants jointly and severally the one paying the others to be absolved. The defendants contest the plaintiff's claim.

The claim is in respect of the balance owing in terms of a global finance facility availed to the first defendant by the plaintiff. The second to eighth defendants acted as sureties and/or provided security in the form of the mortgage bonds registered over the various properties described in the summons by which the action was commenced. The defendants, in their plea,

state that three facilities were indeed extended to the first defendant by the plaintiff. They deny that the facilities expired on the date alleged by the plaintiff and aver that the expiry date was February 2018. They admit that the second to eighth defendants stood as sureties and co-principal debtors and/or provided security for the facility. In the plea the defendants complain that the plaintiff failed to honour instruments drawn on the facility by the first defendant even when there were funds standing to the credit of the first defendant and, also, that the plaintiff failed to avail the agreed overdraft amounts resulting in the first defendant suffering some losses. The precise amount of loss suffered is not stated; neither is it claimed. The defendants further state that the amount is based on an interest rate which was not agreed upon. There is an alternative averment in the plea to the effect that the parties agreed that the defendants' liability would be assumed by one Dr Gideon Gono and defendants would be released and held harmless against all liability arising out of the causes pleaded.

At the commencement of the trial the pleadings were amended by substituting Afrasia Bank Limited with the Deposit Protection Corporation as the plaintiff on account of the bank having been placed under liquidation. The plaintiff led evidence from one witness, Michael Macheka. His evidence was that the first defendant accessed money from the plaintiff in terms of a facility. The witness referred to the duly signed copy of the facility letter in terms of which the first defendant was entitled to and did access a sum of US$1 800 000 as detailed in the letter dated 19 April 2012. The first defendant through its representative duly signed the facility agreement. At the time that summons was issued the amount had increased to US$2 506 132.86 because of interest and charges. Clause 8.1 of the facility agreement provided, *inter alia*, that: "The initial applicable rate (of interest) shall be 18% above LIBOR and the rate may be amended by Kingdom Bank Limited from time to time". The facility document was produced in evidence. The witness also gave evidence on the securities provided for in the agreement including the mortgage bonds and the unlimited guarantee executed by the second defendant to secure the debt. The witness explained the *in duplum* schedule which sets out how the amount being claimed was arrived at. According to the agreement between the parties a certificate of indebtedness signed on behalf of the plaintiff constitutes "sufficient evidence" of the amount owed by the defendants. He testified that in accordance with clause 4.1 of the facility agreement, the facility expired on 30 April 2014.

Kenneth David Drummond, the seventh defendant, gave evidence on behalf of all the defendants. He is a director of first, second, third, fourth, fifth and sixth defendant. The eighth defendant is also a director of these companies. He blamed the plaintiff for the failure of his businesses which according to him resulted from the plaintiff's liquidity challenges and its collapse. His evidence was that the facility was not a loan but that his company was entitled to access the funds for working capital as and when the need arose. The plaintiff failed to give value to transfers applied for by the first defendant even though there would be a credit balance, resulting in many of the defendant's creditors failing to receive payments. Documents to prove these assertions were produced in evidence. He denied that the mortgage bonds registered on the properties the subject of this matter were executed to secure the debt involved in this matter. According to him some of the mortgages were executed to secure a facility for $2.2 million which never came to being because the plaintiff collapsed before it could be executed. He singled out the mortgage bonds executed by fifth and sixth defendants as having nothing to do with the facility upon which the claim *in casu* is founded. He pointed to the different figures which the plaintiff recorded as due in its documents in order to show that the plaintiff's figures could not be relied upon. According to him the first defendant accessed not more than one million dollars. He was non-committal about the exact figure that the first defendant drew down on the facility.

In their plea the second to eighth defendants pleaded that they "stood as sureties to 1st defendant's indebtedness from time to time and their liability is dependent on and accessory to the liability of the first defendant such that the defences pleaded are available to the 2nd – 8th defendants and are pleaded seriatim by the 2nd – 8th defendants". The effect of the above averment is that once the first defendant is found liable then the second to eighth defendants would be liable to the extent of the sureties which they provided. The court must therefore examine firstly whether the plaintiff has proved its claims on a balance of probabilities and, if it has done so, whether the first defendant has tendered any defence to that claim. It is noted that the alternative defence which was pleaded – namely – that the first defendant's liability was to be assumed by one Dr Gideon Gono, appears to have been abandoned as no evidence was led on it.

From the pleadings filed there is no dispute that the first defendant accessed money availed by the plaintiff. There is a dispute as to the number of facilities involved. First defendant alleges that there were three facilities, not one. This is not really a material issue, hence it was not referred to

trial. After all, the facility letter referred to above clearly superseded all other agreement. The unchallenged evidence of the plaintiff's witness is that the debt recorded in the facility letter included monies which were already owed to the plaintiff by the first defendant from previous agreements. The facility letter and the evidence of the plaintiff's witness show that the first defendant was availed the sum of USD1.8 million. The plaintiff's case is that the first defendant withdrew the full amount. Nowhere in the defendants' plea is there a denial that the full amount of the facility was accessed. Instead, in the plea (paras 3 – 5) the defendants dispute the maturity or expiry date of the facility and make an allegation that the plaintiff breached the agreement by failing to honour some instruments drawn by the first defendant. But the expiry dates are clearly stated in clause 4.1 of the facility letter which states the following: "Unless previously withdrawn in writing by Kingdom, the existing loan will expire on 30 April 2014, Overdraft will expire on 15 February 2013 and additional overdraft will expire on 30 April 2013 . . ." The defendants have not shown the basis for stating that the facilities expired in February 2018. There is a further statement by the defendants that the plaintiff failed to avail the agreed loan amounts thereby causing loss to the first defendant's business, income and reputation. There is no claim for loss by the first defendant. The correspondence from the defendants shows that first defendant never denied its indebtedness to the plaintiff. Even in his evidence before this court the seventh defendant admitted that the first defendant did access money under the facility which he estimated to be about one million dollars. He did not produce evidence to support his figures. The issue that has to be determined is therefore of the amount owed.

The plaintiff's claim is based on that which was withdrawn as detailed in the *in duplum* schedule and the certificate of indebtedness. The sum of USD2 506 132.86 which is being claimed by the plaintiff appears only in the summons. None of the other documents which have been produced proves that amount. The *in duplum* schedule which shows the various transactions and figures contains a balance of $2 170 873.42 as at May 2014. The summons *in casu* was issued on 29 May 2014. The plaintiff's witness made reference to penalty interest accounting for the difference in the figures but gave no evidence of the calculations by reference to that penalty interest and how it relates to the sum being claimed. For this reason I find that the only proved amount is as per the *in duplum* schedule.

There was debate on the interest to be charged. The plaintiff claims interest at the default rate as provided for in Clause 9 of the facility letter. The defendants dispute this rate on the basis that the plaintiff contributed to the default. There is indeed evidence of the plaintiff breaching the obligation to honour instruments drawn by the first defendant. Exh. 2, pages 1-7 contains evidence of some transactions which were not processed. It is common cause, too that the plaintiff had liquidity challenges which apparently explain its inability to honour some of the transactions initiated by the first defendant. It is unacceptable for the plaintiff to justify its breach by reference to the terms of the facility letter. Such an interpretation negates the very basis of the contract and is unconscionable. This case calls for a serious rethinking of the banking laws of this country. Banking business is sensitive to the economy of a country and must be reserved for those who can properly run such institutions. The Legislature must seriously consider imposing strict liability upon those responsible for managing banks and other financial institutions which go into liquidation and in the process also liquidate their clients. The personal liability of the directors of financial institutions, both criminally and delictually, will ensure that only those who are professionally competent accept or take up management positions in financial institutions. In the present case, it seems to me to be unfair that the plaintiff should recover penalty interest in circumstances where it contributed to the failure of the first defendant to sustain its business operations. In the premises, interest should be recovered at a rate which was applicable in terms of clause 8.1 of the facility letter.

I do not believe that the plaintiff should recover both Collection Commission and Attorney-Client costs unless the judgment debt is recovered by way of collection by the legal practitioners rather than through the process of execution. Attorney-client costs fully reimburse the plaintiff all the legal costs incurred in prosecuting its claim. Collection Commission, even where there is agreement to pay it, would be justified where the debt is "collected" other than through the process of execution of a judgment of court.

In the result, the following order is made:

1. The defendants, jointly and severally the one paying the others to be absolved, be and are hereby ordered to pay to the plaintiff the sum of $2 170 873.42 together with interest thereon per annum at the rate of 18% above LIBOR from 28 May 2014 to the date of payment in full.

2. The defendants, jointly and severally the one paying the others to be absolved, shall pay Collection Commission calculated in terms of By Law 70(2) of the Law Society By-Laws, 1982 or costs of suit on the attorney-client scale, whichever of the two the plaintiff chooses to recover.

Mambosasa Legal Practitioners, plaintiff's legal practitioners
GN Mlotshwa & Co, defendants' legal practitioners