

MICRO PLAN FINANCIAL SERVICES (PVT) LTD
versus
CHESETS TRADING (PVT) LTD
and
CHARITY MADYARA
and
JOHN MAXWELL CHISHAKWE
and
PORTIA NYAMUTSAMBA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 8 May 2015 and 10 June 2015

Chamber Application for default judgment

BHUNU J: This is an application for default judgment in terms of R 57 of the High Court Rules, 1971. The plaintiff's claim against the defendants is joint and severally the one paying and the others to be absolved couched in the following terms:

- “(a) Payment of the sum of US\$16 596, 78 made up of cumulative unpaid capital sum of US\$7 997, 64, cumulative unpaid interest of US\$7 997, 64 and the cumulative charges \$601, 50, due in respect of an unpaid loan facility;
- (b) Interest on the sum of US\$16 596, 78 at the agreed penalty rate from time to time, currently 10% per month, calculated on the daily balance and compounded on a monthly basis with effect from the date of payment in full.
- (c) An order declaring 3rd defendant's immovable property hypothecated by Deed of Hypothecation No. 2301, being an undivided 5, 75% Share, being Share No. 4, in certain piece of land situate in the District of Salisbury, called lot151J Block C Avondale, measuring 228 square metres, held under deed of transfer NO. 1155/2001 Dated 11 February, 2001, specially executable;
- (d) Collection commission thereon calculated in accordance of By-Law 70 of the Law Society of Zimbabwe By-Laws 1982; and
- (e) Costs of suit on the legal Practitioner and client scale.”

The rule entitles a plaintiff whose claim is for a debt or liquidated demand to apply for default judgment in chambers. It provides that:

“ORDER 9

JUDGMENT INDEFAULT

57. Claim for debt or liquidated demand only and no appearance entered

In cases where the plaintiff’s claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration.”

It is plain that the rule confers on the judge discretion to grant judgment according to what he considers to be the plaintiff’s entitlement in the summons.

In this case the applicant’s papers are in order in that:

1. The defendants were duly served with the summons.
2. They did not enter appearance to defend.
3. The time for entering such appearance has since expired.

Despite the applicant’s papers being in order I was unable to grant the default judgment off hand as claimed because I considered that the interests, costs and penalties being claimed are unconscionably usurious exploitative and extortionate. My rough estimate is that if I grant the order sought the defendants will end up paying in excess of US\$30 000 on an original debt of US\$7 997-64.

Considering that a judge’s function is to do justice between litigants and not to rubber stamp claims, I sought to direct counsel for the applicant to give notice to the other parties to enable me to hear both sides before proceeding in terms of s 4 of the Contractual Penalties Act [*Chapter 8:04*] which provides as follows:

PENALTY STIPULATIONS

“4 Penalty stipulations enforceable

- (1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.

- (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may—
- (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
 - (b) grant such other relief as the court considers will be fair and just to the parties.
- (3) Without derogation from its powers in terms of subsection (2), a court may—
- (a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or
 - (b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.
- (4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question."

My directive was however, met with stiff resistance with counsel for the applicant replying in the following vain in a letter addressed to the Registrar:

"Dear Sir

RE: MICRO PLAN FINANCIAL SERVICES (PRIVATE LIMITED – v – CHESETS TRADING (PVT) LTD & THREE OTHERS: CASE No. 3182/15.

Your letter dated 12 May 2015 refers.

We have noted the comments raised by the honourable Justice Bhunu in this matter. However, we submit that in terms of Clause 14. 2 as read with Clauses 8.3 and 13, penalty interest at an agreed rate of 10% per month to accrue automatically in the event of breach or failure by Defendant to pay any instalment due., in which case the full amount outstanding immediately becomes due and payable. As such, there is no obligation or requirement for Plaintiff to issue any notice to defendants in this regard.

We therefore should be pleased if you could place this minute and our chamber application before his Lordship for consideration.

Yours Faithfully

Signed

Costa & Mudzonga
Cc: Client"

I have no quarrel with counsel's interpretation of the contractual document. Counsel however misses the point. The question at hand has nothing to do with the interpretation of the contractual provisions but justice, equity and fairness among litigants.

In terms of s 4 of the Act once a Court is of the view that a contractual penalty is unjust, exploitative or unduly oppressive it is automatically conferred with an unfettered discretion to intervene by operation of law in the interest of the due administration of justice regardless of what the contract says. The object and purpose of the legislator in this regard was to protect gullible members of the public from unjust and oppressive contractual penalties as appears to be the case here.

In this case the penalty clause imposes a penalty of 10% per month which works out at 120% per annum. This kind of interest is undoubtedly usurious. Interest is being compounded and charged on interest among a host of other punitive penalties relating to costs and collection commission. The computation of interest appears to violate the well-known *in duplum* rule which provides that interest cannot exceed the capital amount. In other words, interest stops running once it equals unpaid capital. See *Commercial Bank of Zimbabwe v MM Builders & Suppliers (Pvt) Ltd and Others and Three Similar Cases* 1997 (2) SA 285. The rule is a legal instrument based on public policy meant to protect debtors against exploitation and usurious abuse by lenders. The rule is immutable, it cannot be waived or excluded by contractual provisions. See *Geogias & Anor v Standard Chartered Finance Zimbabwe* 1998 (2) ZLR 488.

Under the circumstances I felt quite strongly that failure to intervene according to law would amount to gross dereliction of duty and grave miscarriage of justice. Courts and judges are not slaves of the rules. For that reason the law does not require slavish adherence to the rules. Rule 4C allows a departure from the rules in order to do justice according to law. It reads:

“4C. Departures from rules and directions as to procedure

The court or a judge may, in relation to any particular case before it or him, as the case may be—

- (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
- (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient”

From the fore going it is plain that I was within my rights when I directed that notice be served on the defendants so that I could make a fair and just determination from an informed position in terms of s 4 of the Contractual Penalties Act, Now that the applicant is uncomfortable with having the defendants heard on the pertinent issue of the appropriate interest and penalties applicable, it is only fair that I proceed to determine this issue on the papers without hearing the applicant as well.

Having perused the papers, it is my considered view that in the circumstances of this case it is fair and just that the applicant be entitled to no more than the maximum allowable interest according to *the in duplum* rule plus costs at the ordinary scale. The defendants are not liable to costs at the higher punitive scale because they did not defend or oppose plaintiff's claim.

The applicant is not entitled to both his costs and collection commission. In the case of *SEDCO v Guveya* 1994 (2) ZLR 311, it was held that:

"It was not appropriate to order that collection commission be paid as well as costs. A contractual provision to that effect would be penal in nature. Collection commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, not collection commission, unless subsequent to the issue of summons the debtor has agreed to pay collection commission."

I have disallowed the claim for collection commission because there is no evidence that subsequent to the issue of summons the defendants agreed to pay collection commission.

The bald unsubstantiated claim of US\$601-50 is disallowed.

In the result it is accordingly ordered that default judgment be and is hereby entered against all the four defendants jointly and severally one paying and the others to be absolved in the following terms:

1. That the defendants be and are hereby ordered to pay plaintiff the sum of US\$16 696-78 being loan capital amount together with total cumulative interest.
2. That the third defendant's immovable property hypothecated by Deed of Hypothecation No. 2301, being an undivided 5, 75% Share, being Share No. 4, in certain piece of land situate in the District of Salisbury, called lot151J Block C Avondale, measuring ^228 square metres, held under deed of transfer NO. 1155/2001 Dated 11 February, 2001, be declared specially executable;
3. Costs of suit at the ordinary scale.

Costa & Mudzonga, the applicant's legal practitioners