CBZ BANK LIMITED
versus
CHELSY AUTO (PVT) LIMITED
and
MILVERTON INVESTMENTS (PVT) LIMITED
and
GODFREY FRANCIS CHINAMASA
and
DOREEN KATOYA CHINAMASA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 12 & 27 January 2016

CIVIL TRIAL – SPECIAL CASE

N.M. Phiri, for plaintiff
M. Moyo, for the defendants

TAGU J: This case was brought in terms of Order 29 r 199 of the High Court Rules 1971 as a special case by consent of all the parties. The background was that the plaintiff extended to the first defendant certain Banking Facilities. The second, third and fourth defendants guaranteed the facility. Security on the facility by way of a mortgage bond was registered against immovable property known as stand 114 Borrowdale Brook Township of Stand 91 Borrowdale Brook Township registered in the name of Milverton Investments (Private) Limited. As fate would have it the first defendant failed to make payments as extended and was in default. The plaintiff is now claiming against all the defendants jointly and severally and the one paying the others to be absolved a sum of US$855 487.51 together with interest at the rate of 28% per annum calculated daily in advance and compounded monthly in arrears from 24 October 2014 to date of full payment. The plaintiff is also seeking an order declaring the hypothecated immovable property known as Stand 114 Borrowdale Brook Township of Stand 91 Borrowdale Brook Township registered in the name of the second defendant especially executable. Further, plaintiff also claims collection commission as calculated in terms of the By- Laws of the Law Society of Zimbabwe and costs on client and attorney scale.

The parties appeared at the Pre-trial Conference before BERE J and agreed by consent to refer the matter to trial as a stated case. This resulted in a statement of agreed facts being drawn in the following terms-

> **"STATEMENT OF AGREED FACTS**
> The parties hereby state that the agreed facts are:-
> 1. A facility was extended from the Plaintiff to the 1st Defendant in terms of a facility letter which provided for the following:-
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> . The Plaintiff would provide the 1st Defendant with a banking facility, namely an overdraft not exceeding US$678 000 to be used to finance working capital requirements as articulated in Clause 3 of the Agreement marked Annexure "A" hereinafter referred to as " the agreement".
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> . Plaintiff would charge and debit the 1st Defendant's account with interest compounded monthly and this interest would vary from time to time in accordance with fluctuations in interest rates. This was mutually assented to by the parties in terms of Clause 7 of the Agreement.
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> . If the Plaintiff had to consult legal practitioners to recover money from the 1st Defendant, the 1st Defendant would be liable to pay collection commission and costs on an attorney client scale as provided for under Clause 18 of the Agreement.
> 2. Parties are in agreement that the 1st Defendant is indebted to the Plaintiff.
> 3. Parties are also agreed that the 2nd, 3rd and 4th Defendants are jointly and severally liable to the debt with the one paying the other to be absolved.
> 4. The issues for determination at trial are:-
>
> . Whether or not the Plaintiff's calculation of interest is legally permissible?
>
> . Whether the Plaintiff's legal practitioners are entitled to costs on an attorney –client scale together with collection commission."

Most of the facts in this case are not in dispute. In terms of the statement of agreed facts only two legal issues lie for determination. The first issue is whether or not the plaintiff's calculation of interest is legally permissible. The second legal issue is whether the plaintiff's legal practitioners are entitled to both collection commission and costs on an attorney-client scale.

IS PLAINTIFF'S CALCULATION OF INTEREST LEGALLY PERMISSIBLE?

Mr *Phiri* submitted that the plaintiff has calculated interest due and payable as provided for in the agreement. He referred the court to the Induplum Schedule which shows how the interest was calculated. According to him all payments paid were firstly appropriated to interest and then later to repayment of the debt. He said this was provided for in terms of Clause 7.1.3 of the agreement. The said clause says-

> "Deposits to the account and or repayments of the overdraft/loan will first be appropriated to the payment of outstanding accrued interest and charges and then the repayment of the capital element of the debt."

Further, Mr *Phiri* relied on clause 7.2.3 of the agreement for the argument that interest would be compounded on a month to month basis. Meaning that the agreement meant that the defendant would make monthly payments which would be appropriated accordingly and this had the effect of affecting the balance, interest and the capital sum. The clause in question reads as follows-

> "….All interest payable in terms of any credit facility provided by the Bank to the Borrower will be calculated on the balance outstanding each day, at the close of business, and the interest outstanding at the end of each calendar month shall be capitalised and interest thereafter shall be charged on such increased capital"

In support of his arguments Mr *Phiri* referred the court to a number of cases. In *Intercontinental Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) the court explicitly stated that-

> "Businessman beware. If you fail to honour your contracts then do not start crying if……,the other party comes to court and obtains an order compelling you to perform what you undertook to do under the contract"

Mr *Phiri* said the above line of argument was supported by Makoni J in *African Banking Corporation of Zimbabwe Ltd* v *Sunjet Development Holdings (Pvt) Ltd* HH 190/14 where it was noted that there is a growing trend among business people to borrow huge sums of money from financial institutions and when the time to pay comes, to pay as little as possible or nothing at all. In that case the court stated that a party should not question an interest rate they assent to only when the money becomes due and payable. A debtor must not cry foul that an interest rate is prejudicial, unfair and oppressive when summons are served yet he was mum when the parties signed the agreement. In his view the defendants in their plea did not dispute how the plaintiff arrived at its computation and did not even saw it prudent to fortify its defence with calculations to show the figure they admit owing. Theirs was a bare denial hence must be taken to have admitted the calculations. This position was stated in the case of *Loveness Sengeredo* v *Eric Cable N.O.* HH 32/08 where Makarau JP, as she then was at p 2 stated that-

> "In my view, the purpose of an answering affidavit is akin to that of a replication in an action. It is filed not merely for the form but to specifically meet and traverse all the averments made in the opposing affidavit that have the effect of defeating the applicant's claim. Like in any pleading filed with the Court, all issues that are not specifically denied and traversed in the answering affidavit are to be taken as if they have been admitted… It is my further view that answering affidavits, like all other affidavits, must be drafted with precision and must meet the sting of the defence being raised in the opposing affidavit"

In casu, it was submitted that the defendants did not challenge the calculations at any stage and cannot do so now. He further submitted that it is trite and emulated in the Latin *maxim pacta sunt servanda* which was succinctly defined in *Barkhuizen* v *Napier* 2007 (5) SA 323 (CC) as meaning that parties to a contract have the freedom to contract and assent to whichever terms they wish to and the courts should only intervene and oversee when such a contract contravenes another set of legal rights. In short Mr *Phiri* submitted that the plaintiff and the first defendant freely and voluntarily entered into an overdraft facility agreement after having come to an understanding with all the terms in the agreement. Hence the first defendant cannot renege on a term they explicitly agreed to when the issue is now in the eleventh hour and before a court of law. On the basis of the above authorities he submitted that the plaintiff's calculation of interest is well within what is permitted in terms of the law and as such the defendants should satisfy the debt and the interest. See *ZB Bank* v *Eric Rosen (Pvt) Ltd* HH 183/15.

Mr *Moyo* submitted on behalf of the defendants that there is no legal basis for the plaintiff to capitalise interest outstanding at the end of each day and then charge interest daily on the increased capital sum owing to capitalization of interest. To him it is legally untenable as it allowed the plaintiff to charge interest on interest. He argued that this position was aptly summarized by Gillespie J in *Commercial Bank of Zimbabwe Ltd* v *MM Builders and Suppliers (Pvt) Ltd and Others* 1996 (1) ZLR 414 (H) at 433 as follows-

> "The traditional form in which banks account to their customers is merely the convenient business- like manner of reflecting the charging of compound interest; that capitalised interest does not lose its character as interest by being capitalised; and that capitalisation in its narrow literal sense involves a fiction which lost its significance and utility after 1854 and to which the Courts have never since been willing to give substantial effect…Capitalisation means no more than interest which continues to be interest shall be treated together with the capital sum due as itself interest –bearing but does not alter its quality as interest."

Mr *Moyo* further submitted that the parties may have agreed otherwise but are not free to contract outside the law. For this proposition he relied on the cases of *Schierhout* v *Minister of Justice* 1926 AD 99 at 109 and *Metro Western Cape (Pty) Ltd* v *Ross* 1986 (3) SA 181 (AD) at 188-189.

Finally Mr *Moyo* denied the suggestion by the plaintiff that the defendant made bare denial in its plea since an amount of US $354 759.28 has been paid and acknowledged. To him it is alien to charge interest on interest in our jurisdiction.

In casu the parties signed their loan agreement on the 20th September 2012. Clause 7 of the agreement deals specifically with the issue of interest and other charges. In particular clauses 7.1.3 and 7.2.3 detail how the deposits and interests were to be dealt with. Clause 7.1.3 says that the "deposits to the account and or repayments of the overdraft will first be appropriated to the payment of outstanding accrued interest and charges and then the payments of the capital element of the debt". Further clause 7.2.3 says among other things that "all interest payable in terms of any credit facilities provided by the Bank to the Borrower will be calculated on the balance outstanding each day, at the close of business, and the interest outstanding at the end of each calendar month shall be capitalised and interest thereafter shall be charged on such increased capital."

A close examination of the Induplum Schedule prepared by the plaintiff shows that the computations of interest and other charges was done in terms of the terms of the agreement. The question to be asked is whether this was legal or not. Having examined the authorities cited by both counsels I noted that latest authorities are of the view that the courts should in normal circumstances enforce the terms of the agreement between the parties. In *Intercontinental Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd supra* it was held among other things that whilst the court retained a wide discretion to withhold the grant of specific performance, a wronged party to a contract had a right to select his remedy, and the court would enforce that right unless there were compelling circumstances to refuse the remedy and award damages only. It was further held that the onus was on the party seeking to avoid specific performance to establish the facts and circumstances which the court should consider in the exercise of its discretion to refuse specific performance. In the result it was held that it would not be a proper exercise of discretion to refuse specific performance and thus the defendant to avoid its contractual obligations. The same reasoning was followed in the latest case of *African Banking Corporation of Zimbabwe Ltd supra*.

In my view the respondents have failed to advance any facts and specific circumstances which compelled this court to exercise its discretion in favour of respondents in order to deny the plaintiff the remedy it is seeking. The plaintiff's calculation of interest is legally permissible as it was done in accordance with the terms of the agreement.

ENTITLEMENT TO COSTS ON AN ATTORNEY –CLIENT SCALE AND COLLECTION COMMISSION

The defendants do not challenge the award of costs to the plaintiff on an attorney-client scale for the simple reason that they contested the claim. What they are challenging is the validity of the award of collection commission over and above the award of costs on an attorney-client scale. The plaintiff insisted on collection commission as provided for in terms of Clause 18 of the agreement. Clause 18 of the loan agreement provides that-

> "All costs and other charges incurred by the Bank and arising out of, or by reason of the grant or the recovery of the facilities, including legal costs on a legal practitioner scale and collection charges which the Bank may incur in taking action for the recovery of any amounts due to it will be recoverable by the Bank, on demand, from the Borrower. All charges incurred by the Bank in the registration or maintenance of any security required in terms of these facilities shall be borne by the Borrower."

Both counsels were in agreement that in terms of the law, such clauses like clause 18 of the agreement supra are referred to as penalty clauses in terms of common law, and are prima facie unenforceable. See *Tselentis House (Pvt) Ltd* v *Southern African P&P House (Pvt) Ltd* 1995 (1) ZLR 56 (H) whereby the court stated that a clause that expects a party to pay both attorney client costs and collection commission is classified as a penalty clause which is meant to discourage defaulting and in terms of the common law cannot be enforced. This notion finds support in *Texas Co. SA Ltd* v *Cape Town Municipality* 1926 AD 467 at 485.

However, Mr *Phiri* submitted that the common law position on penalty clauses was varied by the inception of the Contractual Penalties Act [*Chapter 8.04*]. Section 4 (1) of the Contractual Penalties Act states that penalty clauses can be enforceable before any competent court subject to the court's discretion to grant a just and fair relief. Section 4 says-

> **"Penalty stipulations enforceable**
>
> (1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.(my emphasis)
> (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 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 right interest which may be affected by the act, omission or withdrawal in question."

It is therefore clear that penalty stipulations are enforceable provided that the penalty is not out of proportion to the prejudice suffered by the creditor. In his heads of argument Mr *Phiri* submitted that in *Zimbabwe Development Bank* v *Naga Salons & Ors* HH 43/ 06 Kudya J reiterated that parties are free to include attorney client costs together with collection commission provided that such a clause is specifically and unambiguously stated in the agreement. He further relied on what was opined in *Scotfin Ltd* v *Ngomahuru Pvt Ltd* 1997 (2) ZLR 567 that a party's legal practitioner cannot ordinarily claim both costs at an attorney client scale together with collection commission unless it can be proven that the Defendant specifically agreed to it. It was his contention therefore, that *in casu* the parties agreed and the court should hold freedom of contract in high esteem and where parties have agreed, as in the present case that the parties must be governed by set principles in full knowledge of all terms and conditions, they should be held to those terms. More -over no prejudice would be occasioned to the debtor.

Mr *Moyo*, however, submitted that in terms of the decision made in the case of *SEDCO* v *Guvheya* 1994 (2) ZLR 311 (H) both collection commission and costs are not enforceable. He argued further, that the common law position was not altered by section 4 of the Contractual Penalties Act. Further, he relied on the latest case of *FBC Bank* v *Dunleth Enterprises (Pvt) Ltd & Others* HH 568/14 where ZHOU J noted as follows-

> "The plaintiff claims both attorney –client costs and collection commission. It is important for the principle to be reiterated that collection commission is a charge that is levied by an attorney or agent when payment of a debt has been recovered through his services prior to judgment. See *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H) at 569 B-570B; *UDC Rhodesia Ltd* v *Ushewokunze* 1972 (2) RLR 97 (G) at 100F. In other words, the commission is for collecting the payment other than through a judgment. Where the payment is recovered in terms of a judgment in terms of which judgment creditor has been awarded costs on an attorney –client scale there can be no legal justification for claiming collection commission in addition to such costs. The rationale is that attorney –client costs compensate the judgment creditor in full for the costs paid to the legal practitioner representing him. Accordingly, it seems to me that there is no justification *in casu* for the plaintiff to recover both attorney –client costs and collection commission."

After considering the authorities cited by both counsels I am of the view that where parties have agreed on certain terms the court should not readily interfere with that, unless there is a good cause shown why the court should interfere. This is the whole basis of sanctity

of contracts. This position was recognised as far back as the year 1899 in the case of *E. Underwood &Sons Ltd* v *B. Baker*1899 (1) CH 305 where the court held that –

"To allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations that he has undertaken, prima facie at all events, its contrary to the interest of any and every country." See also Innocent Maja –*The Law of Contract in Zimbabwe* 2015 at pp 24-25.

In another case I noted that collection commission and costs were awarded in the case of *Chidza Chikomo* v *Yisrael Yehudah* HH 29/12 by Mavangira J (as she then was) after judgment was granted. The costs were not awarded on the legal practitioner and client scale because the acknowledgment of debt signed by the respondent did not stipulate so. It only spoke of costs of suit. In essence the *Chiedza Chikomo* v *Yisrael Yehudah supra* demonstrated that collection commission and costs are enforceable after judgment where the parties agreed that they be recoverable. I am persuaded to follow the decision in the *Chiedza Chikomo* case *supra* in holding that the penalty provision is enforceable where parties to a contract agreed in light of the provisions of the Contractual Penalties Act [*Chapter 8:04*].

In casu, it appears to me that the respondents have failed to demonstrate to the court any impediment to the granting of the order sought by the plaintiff. It is therefore ordered as follows:

IT IS ORDERED

1. That the defendants shall pay to the plaintiff jointly and severally, the one paying the other to be absolved the sum of US$855 487. 51 together with interest at the rate of 28% per annum calculated daily in advance and compounded monthly in arrears reckoned from the 24th of October 2014 to date of full payment; and
2. Collection Commission calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982; and
3. Costs of suit on legal practitioner and client scale and
4. An order declaring the hypothecated immovable property known as Stand 114 Borrowdale Brook Township of Stand 91 Borrowdale Brook Township registered in the name of Milverton Investments (Pvt) Ltd executable.

Muvingi & Mugadza, plaintiff's legal practitioners
Dube-Banda Nzarayapenga & partners, defendants' legal practitioners