INTERFIN BANK CORPORATION LIMITED t/a INTERFIN
(Represented herein by Peter L. Bailey in his capacity as Curator)
versus
NATIVE TIMBERS (PVT) LIMITED
and
NESBERT CHINHAMU
and
JOSEPH CHINHAMU

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 May 2016 & 25 January 2017

Civil Trial

D Halimani, for the plaintiff
R Mahuni, for the defendants

MUREMBA J: The plaintiff issued summons against the defendants claiming payment of US$32 501-28 and interest at the rate of 6% *per* month calculated monthly in advance and compounded monthly in arrears reckoned from 1 December 2012 to date of full and final payment together with collection commission and legal costs on an attorney and client scale. The plaintiff also wants an order that a property called Stand 1927 Chadcombe Township of Stand 1257 Chadcombe Township measuring 485 square metres held under Deed of Transfer dated 5 March 2002 (Reg No. 1748/2002) be specially executable.

The claim is a consequence of a credit facility which was granted to the first defendant by the now defunct CFX Bank Limited which was succeeded in rights, title and interest by the plaintiff. In its pleadings which I found very confusing the plaintiff averred that on 8 March 2010 CFX Bank Limited and the first defendant being represented by the second and third defendants who are its directors entered into a "composite banking facility agreement comprising of Bankers' Acceptance and/or overdraft" for the purpose of financing the first defendant's working capital requirements. The total amount offered to the first defendant under the facility was

limited to US$25 000-00. The facility had terms and conditions which regulated issues such as interest rates and security.

The second and third defendants bound themselves as sureties and co-principal debtors of the plaintiff for the payment of all amounts due and any debt arising in terms of the facility. As additional security for the repayment of the debt, the second defendant registered a mortgage bond in favour of the plaintiff to the value of US$37 500-00 in respect of stand No. 1927 Chadcombe Township.

The plaintiff further averred that the first defendant failed to service its loan. During the material time the plaintiff was offered an offshore line of credit by PTA Bank for on-lending to its (plaintiff's) clients. The plaintiff chose the defendant as one of its key clients to access that facility. The facility was to run from 1 December 2010 to 31 May 2011, a period of 180 days. This resulted in the crediting of the first defendant's account with the loan amount of US$25 000-00 by the plaintiff which came from the PTA offshore facility. The plaintiff averred that this credit did not however mean that the first defendant had paid up its loan. It only meant that the balance of the loan was now sitting in another account under the PTA offshore Finance Loan facility and the first defendant still had to repay the loan on maturity on 31 May 2011. On 31 May 2011 the first defendant failed and or neglected to repay the loan in full and as a result the loan was transferred back to its (first defendant's) account, namely 1729615503-180. The plaintiff averred that the offshore finance facility that was extended to the defendant was offered under the main composite facility of 8 March 2010, and when the first defendant failed to repay the loan on maturity on 31 May 2011, the PTA offshore facility fell away and its account was debited with the total amount that was outstanding. In other words, the first defendant's loan reverted to its overdraft account. The plaintiff averred that the agreement that binds the parties is the composite banking facility agreement they signed on 8 March 2010 and not the PTA Offshore Facility the parties signed on 10 January 2011.

The plaintiff averred that as at the time of issuing summons the first defendant was owing US$32 501-28. It was averred that the capital amount advanced to the first defendant was US$30 890-00. Aggregate interest charges amounted to $17 230-64 as at 1 December 2012. The rate of interest varied from time to time and since 1 August 2012 the debt had been accruing interest at the rate of 20% *per annum*. Bank charges were US$177-20 as at 1 December 2012. As

at 1 December 2012 the first defendant's account had been credited with deposits in the sum of US$14 629-62. The plaintiff averred that the amount of US$32 501-28 was made up of :

Cumulative unpaid capital US$18 113-12

Cumulative unpaid charges US$100-10

Cumulative unpaid interest US14 288-06

In their plea the defendants averred the following. When the first defendant first applied for the loan the bank was still known as CFX Bank Limited. At the time the plaintiff took over from CFX Bank Limited the first defendant's loan had been changed from the Composite Banking Facility comprising of Bankers Acceptance and/or overdraft reflected in the loan agreement of 8 March 2010 to one with PTA Bank. The initial loan of 8 March 2010 was settled in full when CFX Bank Limited offered the first defendant a loan agreement under the Distressed Companies Loan arrangement provided by PTA Bank. The new loan facility had better terms and conditions. It charged less interest than the usurious interest rate of 60% *per annum* charged by CFX Bank Limited. They further averred that CFX Bank Limited advised them that the old loan facility would be fully paid up when they received the PTA bank loan facility. They averred that the new loan facility under PTA Bank was advanced in April 2011 when the initial loan facility under CFX Bank limited had expired. They further averred that US$25 000-00 was advanced under the PTA loan facility on or about 23 April 2011.

The defendants further averred that under the initial loan US$25 000-00 was advanced to the first defendant under different terms and conditions from those that applied in respect of the new or second loan that was advanced under the PTA loan facility. The defendants admitted that they have an amount of the loan that is still outstanding, but they averred that the loan agreement that is relevant for that outstanding amount is the PTA loan agreement, and not the original loan agreement that the parties signed on 8 March 2010. They said that one expired in 2011. The defendants averred that the interest rate under the new PTA loan agreement was not as usurious as the 5% *per* month that they were paying under the first agreement. The defendants averred that the plaintiff was overcharging it on interest and there was no agreement to pay such interest. The defendants averred that the interest is excessive and unjustified. They further averred that they failed to service the loan because of the excessive interest charges. The defendants made a

prayer that there be an order that the outstanding loan amount be repaid in terms of the PTA offshore facility. They also challenged the costs the plaintiff is claiming.

In its replication the plaintiff averred that the loan was not changed as alleged by the defendants, but averred that it is only the source of funding for the loan which was changed. The plaintiff averred that instead of the loan being housed as an overdraft, the loan was now housed as an offshore finance loan with well-defined terms. The plaintiff averred that however, the loan reverted to the initial overdraft account when the first defendant failed to repay the loan on maturity of the PTA offshore facility on 31 May 2011. The plaintiff averred that the interest claimed is not excessive or unjustified as it is based on terms actually agreed by and between the parties. The plaintiff further averred that the issue of costs that the defendants were also challenging is as stipulated under clause 15.3 of the composite facility agreement which the parties signed on 8 March 2010.

At the pre-trial conference the parties agreed on the following issues for trial.

1. How much funds were provided by the plaintiff to the first defendant and under which agreement were the funds provided to the first defendant?
2. Whether or not the interest charged by the plaintiff has any lawful basis or justification.
3. What repayments, if any, did the defendants make to the plaintiff in the period of receiving funding from the plaintiff to the period of issue of summons?
4. Consequently what balance, if any, is outstanding on the account of the first defendant?
5. Did the defendants default on any obligation regarding payment to the plaintiff?

During trial the plaintiff led evidence from one witness Lewis Tendai Bususu (Mr. Bususu). The defendants also led evidence from one witness Nesbert Chinhamu, the second defendant.

The plaintiff's evidence

Lewis Tendai Bususu's evidence was as follows. He is working under the supervision of the liquidator since the plaintiff is now under liquidation. Before Liquidation Mr. Bususu was an account relationship manager in the Asset Finance Department of the plaintiff.

Mr. Bususu said that the first defendant was extended a working capital facility for a duration of one year from 8 March 2010. The facility could be renewed based on the performance of the first defendant. In terms of the facility agreement that the plaintiff and the first defendant entered into which was produced as exh 1 which was signed on 8 March 2010, the first defendant's borrowing limit was $25 000-00. However, the first defendant withdrew a total of US$30 000-00 instead of $25 000-00 because the account had not been marked so that when withdrawals from the account reached $25 000-00 the first defendant would not withdraw from the account.

Mr. Bususu also produced the *in duplum* schedule as exh 2. It shows total withdrawals that were made from the account, total interest charged, bank charges, deposits made by the first defendant, cumulative unpaid charges, unpaid capital, unpaid interest and balance owing at the time of handing the matter to the lawyers as at November 2012. The witness explained that with the *in duplum* schedule, the bank amalgamates all the transactions that would have been done in a month by the client in respect of the borrowed sum of money.

The witness said that in terms of the composite facility agreement the parties had agreed on the interest rate of 5% *per* month. He explained that, however, in the banking institution the cost of money is determined by the Reserve Bank of Zimbabwe regulations and prevailing market conditions such that at the time the first defendant actually accessed the loan, he was charged interest at the rate of 25% *per annum* which rate was far less than the rate of interest which was agreed upon in the facility letter.

The witness also produced the first defendant's statement of account as exh 3. It is a record showing all transactions which happened which are withdrawals, deposits, bank charges and the loan advanced. It shows that an amount of $25 000-00 was credited into the first defendant's account. Subsequent to that, the first defendant then made withdrawals of up to US$30 000-00 from the account. The witness further said that the plaintiff got security for the loan in the form of a mortgage bond which was passed by the second defendant. It also got personal guarantees from the second and third defendants as additional security.

The witness said that as banks operate on the basis of sourcing funds to pour into the economy, at the material time the plaintiff managed to source or borrow funds from PTA Bank for on-lending to its clients. These funds had less onerous terms of repayment. For example, the

interest rate was 17% *per annum.* In order to assist its clients who at that stage were struggling to repay their loans, the bank opted to extend the PTA facility to such clients and the first defendant was one of them. Mr. Bususu said that the PTA facility had a duration of 180 days. In that regard, the bank extended US$25 000-00 to the first defendant on the understanding that the money would be repaid within 180 days. The bank then gave the first defendant a document which is called a 'term sheet' which the first defendant signed in acceptance. The witness explained that a 'term sheet' gives the terms of a particular agreed transaction stating the source of funding, the amount that is being given to the client, the period the transaction is going to run, the interest rate, the penalty fees and the security required.

The witness said that this new facility, however, did not extinguish the old loan facility. It was just a cheaper source of funding which enabled the bank to apply a lower interest rate as per the term sheet. He said that this means that the money had to be housed elsewhere and not in the first defendant's account. For that to be done, the first defendant's account under the composite agreement had to be credited with US$25 000-00 from the PTA facility and its debt would then be transferred to another account under the PTA facility for 180 days. He said that, therefore, the understanding between the parties at the time of signing the term sheet was that before the expiry of 180 days all the outstanding amount would have been paid by the first defendant.

The witness said that at the start of the PTA loan facility on 1 December 2010 the first defendant's account was credited with US$25 000-00 and since it had an outstanding balance of US 28 340-52, a debit balance of US$3 340-52 remained in the account. He said that this balance of US$3 340-52 continued to accrue interest at the rate of 25% *per annum* as it was still under the composite facility. Mr. Bususu said that on the date of maturity of the PTA loan facility on 31 May 2011, the first defendant had not paid anything towards the loan. As such all the terms and conditions of the PTA facility fell away. He said that as a consequence the capital amount of US$25 000-00 which was now under the PTA facility and interest that had been accruing on that amount at the rate of 17% *per annum* was debited back into the first defendant's account under the composite facility. This amount added on to the US3 340-52 which had remained in the account and which had been accruing interest at the rate of 25% *per annum* as has already been stated above. He said that this resulted in a total outstanding balance of US$31 693-96.The

witness said that from then onwards the plaintiff continued to charge interest on this amount on the terms of the original composite facility that the parties agreed on on 8 March 2010, and not on the basis of the PTA facility that had expired. He said that initially from 1 June 2011, the interest was being charged at the rate of 25% *per annum,* but from 1 August 2011 it was reduced to 20% *per annum* and this is the interest rate that was still applicable when the summons was issued.

It was the witness' evidence that from 1 June 2011 up to the time the summons was issued the first defendant only made two payments. The first one was an amount $7 200-00 on 9 July 2011 which reduced the debt to US$25 073-33. The second one was US$1 472-00 which was made on 28 December 2011 leading to a balance of US$27 071-04. From then onwards the first defendant made no payments and interest continued to accrue until the summons was issued. He said that by November 2012 when the plaintiff decided to institute legal proceedings the account had a debit balance of US$32 501-28. The witness explained that interest that was accruing was capitalized monthly as the parties had agreed on compound interest.

The witness stated that all in all, from the time the loan facility was extended to the first defendant on 8 March 2010 up to the time the summons was issued, the first defendant made deposits totaling US$14 629-62 towards repayment of the loan. He said that this is not an amount which was deposited at one instance, but over a period of time. He said that there were periods or months when the first defendant would not deposit anything at all or would deposit very little amounts. The witness said that during these periods interest was accruing, and in line with banking practice, any deposits or payments that were subsequently made would be first allocated to interest and then capital.

The witness said that since the first defendant was defaulting in its payments, the plaintiff then wrote a final letter of demand following numerous requests for payment. The letter was written on 3 November 2011 asking for the settling of the sum of US$27 376-43 being the outstanding amount on the composite facility. The letter was produced as exh 8. The reply to this letter was produced as exh 9. It was requesting for more time until end of December 2011 to clear the whole balance. He said that payment plans were entered into but they were not met. Correspondence in respect of the payment plans that were being offered by the first defendant

was produced by consent as exh 10. The witness said that despite that, the first defendant failed to pay the debt.

During cross examination Mr. Bususu was asked to explain the interest rate of 25% *per annum* which the plaintiff was charging on the first defendant in respect of the composite facility of 8 March 2010. He explained that according to clause 8.2.1 of the agreement the parties had agreed on the interest rate of 5% *per* month. He said that despite that the first defendant was being charged 25% *per annum* as it would have been unfair to the first defendant to be charged 5% *per* month which is an equivalent of 60 % *per annum* given that by the time the first defendant accessed the money for the loan there had been a decline in interest rates in the market. He said that the decline was beneficial to the first defendant. The witness said that the bank made the decision to reduce the interest rate unilaterally. He explained that the interest rate of 5 % *per* month is the maximum that the bank can charge and as such it cannot be penalised for charging less. He said that the Reserve Bank regulates how interest rates should be applied and banks are given a framework within which to work and charge. He said that the rate of 25 % *per annum* the bank charged the first defendant was within the parameters of the framework. Furthermore he said that the bank was at liberty to vary the interest rate in terms of clause 9 of the agreement the parties signed.

The witness further clarified that although the PTA loan facility was extended to the first defendant on 10 January 2011, the credit facility of 8 March 2010 remained in force and the facility letter thereof is the one that binds the parties. He said that the term sheet of 10 January 2011 in respect of the PTA offshore facility that the parties signed simply stated the terms and conditions of the PTA facility. He said that it was not a credit facility letter. He said that interest at the rate of 17 % *per annum* which was charged under the PTA off shore facility, from 1 December 2010 to 30 May 2011 was US$2 124-99 as reflected in the first defendant's statement of account (exh 3). The witness said that after the expiry of 180 days of the PTA offshore facility, it was up to the bank to decide what would happen to the first defendant's loan facility. The bank had the discretion to decide depending on the performance of the first defendant. He said that in this case because the client had not performed, roll over of the PTA offshore facility for another 180 days was not possible. It was made to revert to the ordinary overdraft. He said that the bank chose not to continue with the PTA facility and charge a penalty

fee of 5 % above the cost of funds for failure to repay by the agreed maturity date as is stated in the term sheet (exh 7). He said that the PTA facility cannot be read without referring to the original composite facility agreement which was signed on 8 March 2010.

Mr. Bususu said that the defendants knew what would transpire at the expiry of the 180 days of the PTA facility if they failed to perform. He said that they knew that they would revert to the composite facility. He said that they knew this because before the term sheet in respect of the PTA facility was signed, the parties had held discussions about it. He said that this is why on 29 May 2011 the first defendant wrote to the plaintiff requesting its indulgence for a rollover of the PTA facility for another 6 months (180 days). The letter was produced as part of exh 10. He said that the bank declined this request because the first defendant was not performing. Mr. Bususu said that the interest rate of 6% *per* month that the plaintiff is claiming in the summons is as per the composite agreement of 8 March 2010 under clause 15.2 which says that the penalty interest shall be 6 %.

The defendants' evidence

Nesbert Chinhamu, the second defendant testified as follows. In 2010 the first defendant applied for a loan from the plaintiff. It struggled to pay the loan until it was offered a loan facility from PTA Bank through the plaintiff. US$25 000-00 from PTA Bank was credited to its account thereby leaving a balance of US$3 000-00 from an outstanding balance of US$28 000-00. He said that this was a separate loan agreement from the original loan agreement and it also meant that the defendants were now indebted to PTA Bank and not to the plaintiff. He said that the first defendant's debt to the plaintiff was paid off by the loan which came from PTA Bank. He said that at the time the summons was issued, from an amount of $28 000-00 that was owing the first defendant had paid $14 000-00 which means that the amount owing should have been reflected in the summons as $28 000-00 less $14 000-00 plus interest at the rate of 17 % *per annum* as per PTA off shore facility. He said that using this method of calculation at the time the summons was issued, the plaintiff was entitled to claim US$23 000-00 plus interest at the rate of 17 % *per annum*.

The witness said that after the expiry of the 180 days of the PTA offshore facility their loan should not have reverted to the original loan since the original had been paid off. He said

that the PTA offshore facility had different terms and conditions from that of the composite facility except for the issue of security only whereby the parties agreed that it remained as agreed in the composite facility of 8 March 2010.

He disputed all the figures in the *in duplum* schedule produced by the plaintiff saying that the figures were incorrect because the bank was mixing figures of two loans. As at 24 May 2016, when the second defendant was testifying he said that the amount which was due to the plaintiff was about US$35 000-00.

Under cross examination the second defendant said that the plaintiff was just the administrator of the PTA Offshore facility. He however admitted that the first defendant never signed an agreement with PTA Bank. He said that although he was saying about $35 000-00 should be due to the plaintiff at the time of giving evidence, he did not have any schedule to show how the defendants had made the calculations which resulted in that figure. He admitted that the US$14 000-00 the first defendant repaid to the plaintiff was not paid all at once. He also admitted that interest was compound. He also admitted that the bank was calculating interest every 24th of each month and debiting the first defendant. He said that he did not challenge the plaintiff's *locus standi* to institute the present proceedings as it is the administrator of the PTA offshore facility. He admitted that the first defendant failed to repay the PTA offshore loan facility before the expiration of 180 days.

The second defendant admitted that the first defendant did not contest or dispute the amount of US$27 376-43 which was demanded by the plaintiff in its final letter of demand of 3 November 2011 (exh 8). He said that the defendants were disputing the amount of US$32 501-28 being claimed in the summons on the basis that the interest rate had not been charged at the PTA facility rate of 17 % *per annum*, but 25 % *per annum* under the composite facility. He said that the PTA facility interest rate of 17 % *per annum* should have been charged. When it was put to him that since the defendants were in default of payment in terms of the PTA facility, the plaintiff was entitled to charge a penalty fee of 5 % *per annum* over and above the 17 % *per annum*, he admitted that that was correct. This would therefore mean a total interest rate of 22 % *per annum* under the PTA facility.

Analysis of evidence

The first issue that needs to be resolved is under which agreement were the funds provided to the first defendant by the plaintiff? From the evidence led by the parties I am satisfied by the evidence which was given by the plaintiff's witness Mr. Bususu. He explained clearly and in chronology how the parties entered into the composite facility on 8 March 2010 and what resulted in them signing the PTA offshore facility on 10 January 2011. He also explained clearly how the parties reverted to the composite facility. Most importantly he said that the PTA offshore facility was for a limited period of 180 days and that the first defendant was expected to repay the debt in full within that period. This facility was less onerous but the first defendant did not pay a cent towards the liquidation of the debt during that period. He said that the plaintiff used its discretion in reverting to the composite facility terms and conditions. I understood Mr. Bususu to mean that the credit facility agreement was only one and this is the one that was signed on 8 March 2010. This agreement was a composite facility which enabled the plaintiff to offer the first defendant different facilities and it is on this basis that it offered the first defendant the PTA offshore facility upon realising that it was struggling to repay its loan under the composite facility as the interest rate was higher. Mr. Bususu's explanation that there were no two loans left me convinced. He said that all that changed were the terms and conditions of the loan and the source of funds. He said that this was evidenced by the fact that there was only one credit facility letter of 8 March 2010. No other facility letter pertaining to the PTA offshore facility was written to the first defendant. No meaningful challenge was made by the defendants to the explanation that was given by Mr. Bususu. I am thus persuaded to accept that the plaintiff did not err by reverting to the composite facility terms and conditions after the expiry of the offshore facility, the first defendant having failed to perform at all. There is nothing which barred the plaintiff from exercising that discretion, after all it had offered the PTA offshore facility at its own discretion.

There is a letter dated 29 May 2011 which was written by the first defendant to the plaintiff asking for its indulgence to roll over the PTA facility for another 6 months. This letter alone shows that the defendants were aware that it was not automatic that the PTA offshore facility would be rolled over for another 180 days (6 months) on its expiry on 31 May 2011. The

defendants knew that the plaintiff was at liberty to exercise its discretion as to which course to take. It is therefore my conclusion that the funds were provided to the first defendant in terms of the loan agreement of 8 March 2010, and not in terms of the term sheet of 10 January 2011.

How much funds were provided to the first defendant?

Mr. Bususu took us through the first defendants' statement of account and the in *duplum* schedule from the time the loan agreement was signed on 8 March 2010 right up to November 2012 when the plaintiff handed over the matter to its lawyers for institution of legal proceedings. He took us through the figures and I must say even under cross examination he remained steadfast and unshaken. In summary, he said that the first defendant had a limit of US$25 000-00 but withdrew $30 000-00. This was not disputed. It struggled to repay the loan whose maturity date was 22 July 2010. By 1 December 2010 its account had a balance of US$28 340-52 because it had made a few payments. When US$25 000-00 from PTA offshore facility was credited to its account there remained a balance of $3 340-52 in that account which continued to accrue interest at the rate of 25 % *per annum*. Again this amount was not disputed by the defendants. On the other hand the US$25 000-00 from the PTA offshore facility which was housed under the PTA Bank sinking fund also began to accrue interest at the rate of 17 % *per annum* from I December 2010 for 180 days up to 31 May 2010. This was also undisputed. Having failed to pay a cent during the period of the PTA facility the loan reverted to the composite facility on 1 June 2011. The amount was now $3 340-52 plus interest of 25 % *per annum* and US$25 000-00 plus interest of 17 % *per annum* giving a total of US$31 693-96. The amount continued to accrue interest with the first defendant only managing to make 2 instalments up to the time the summons was issued. It was agreed by the parties that all in all from the time the credit facility was extended to the first defendant it only managed to make a repayment of a total of US$14 629-62 over a period of time. Mr. Bususu said this amount having been taken into account the first defendant had an outstanding balance of US$32 501-28 as at the time of issuing of summons. This amount included interest and bank charges. He further said that the interest rate had been reduced from 25% *per annum* to 20% *per annum* starting from 1 August 2012. His evidence was impressive and straightforward. It remained uncontroverted by the defendants.

On the other hand the second defendant failed dismally to demonstrate how the defendants arrived at the figure of US$35 000-00 which they said was owing at the time of the trial in May 2016. The second defendant did not have any prepared schedule showing the calculations which made them arrive at US$35 000-00. Moreover he said that the amount was about $35 000-00, so he was not sure about the exact amount. The defendants cannot just make bald assertions with regards to what is owing. They should have substantiated the figures they were giving and challenged the accuracy of the schedule presented by the plaintiff. I can do no better than quote what was said by MATHONSI J in *BancABC* v *PWC Motors (Pvt) Ltd & Ors* HH 123-2013.

> "The respondents do not even begin to satisfy the criteria set out above. All that they have done in the opposing affidavit of the second respondent, is place in issue, without more, the actual amount claimed and indeed the penalty fees. Yet all the claims have been supported by documentation including the facility documents and the in *duplum* schedule showing how the amount claimed is arrived at."

This shows that the defendants ought to have done more in challenging the plaintiff's in *duplum* schedule and statement of account.

Whether or not the interest charged by the plaintiff has any lawful basis or justification.

The interest rate that was agreed upon in terms of the loan agreement of 8 March 2010 was 5% *per* month - see clause 8.2.1. However, Mr. Bususu indicated that despite that agreed interest rate of 5% *per* month the first defendant was charged 25% *per annum* since interest rates had declined. This was well below the interest rate the parties had agreed upon in the agreement. Between 1 December 2010 and 30 May 2011 the rate of interest that the parties agreed upon was 17% *per annum* in accordance with the PTA Offshore facility. The plaintiff reverted to 25% *per annum* on the expiry of the PTA Offshore facility until 1 August 2012. After 1 August 2012 the plaintiff reduced the interest rate to 20% *per annum* and this continued up to the time of the summons. The plaintiff was given the right to charge any rate as it deemed appropriate as necessitated by market conditions in clause 9 of the loan agreement. The plaintiff stuck to the interest rates that were agreed upon and in some instances actually charged a lower interest rate than what the parties agreed upon for the benefit of the defendants. During cross examination Mr. *Mahuni* put to task Mr. Bususu as to why the plaintiff had charged the first defendant with a

lower interest rate than the interest rate the parties had agreed upon. As was correctly submitted by Mr. *Halimani* this was an abrogation of common sense. Who would, in their right senses, argue that the interest that was charged is unlawful and unjustified when in fact the rates were reduced for their benefit?

It is also pertinent to note that when the final letter of demand was written by the plaintiff on 3 November 2011 demanding an amount of US$27 376-43 this amount included interest which had been calculated using the above stated interest rates. In response the defendants never disputed the amount, but offered payment plans and extensions of time to repay. In *Deweras Farm (Pvt) Ltd* v *Zimbank Corp* 1997 (2) ZLR 47 (H) GILLESPIE J at 59 B said,

> "*Prima facie*, it would appear, the regular charging of interest on an overdraft at rates within the bank's discretion is permissible: the failure to challenge any such action despite regular statements being rendered is significant. This *prima facie* position of the bank is such that it would perhaps take rather more than the superficial challenge by the applicants to displace it."

In *Barclays Bank of Zimbabwe Limited* v *Arrow Zip Fasteners (Pvt) Ltd* 1999 (2) ZLR 441 (H) SMITH J held that in a loan agreement the lender is entitled to recover interests at the rate specified in the agreement signed by the parties. MATHONSI J in *BancABC* v *PWC Motors (Pvt) Ltd & Ors* HH 123-2013 said,

> The respondents signed an agreement allowing the applicants to charge the interest that is being claimed. Without disputing the terms of the instrument of debt, the respondents want the interest rate to be referred to trial. They do not show they should not be bound by what they agreed. These are the same respondents who wrote two letters acknowledging the debt and asking for time to pay. In my view no defence was whatsoever has been shown by the respondents."

These cases show that it is lawful or permissible for banks to charge interest rates within their discretion and that if a client agrees to those interest rates they should be bound. There is therefore no reason why the plaintiff should not be entitled to charge interest as per the loan agreement which the first defendant consented to. In any case all the while as the demand for payment for the outstanding amount was being made by the plaintiff, the defendants never challenged the interest rates, instead they offered payment plans and asked for extension of time within which to repay the debt. The challenge only started when the plaintiff issued summons. This shows that the defence on interest was not made in good faith.

I have already made a finding that it was proper for the plaintiff to revert to the interest rates under the composite facility signed on 8 March 2010 after the expiration of the PTA facility. So the variation of the interest rate from 17 % *per annum* to 25 % *per annum* and then to 20% *per annum* was lawful and justified.

The defendants did not dispute that the plaintiff was charging compound interest in terms of the agreement. Despite this, the second defendant averred that the total amount of US$14 629-62 it repaid over a period of time should have been deducted from US28 340-52 which it owed when the summons was issued. This method of calculation does not apply to compound interest, but to simple interest. In a similar scenario in the case of *Barclays Bank of Zimbabwe Limited* v *Arrow Zip Fasteners (Pvt) Limited 1999 (2) ZLR 441(H)supra* at p 445-6 SMITH J distinguished simple interest from compound interest as follows.

> "It is accepted that interest levied on any amount due never loses its character and remains interest, whether or not it has been capitalized - see *Standard Bank of S A Ltd* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 H and the Commercial Bank case, supra. However, there is nothing in the law to prevent a lender charging interest on interest. That, in fact, is the difference between simple interest and compound interest. With the former, interest is not charged on interest, whereas with the latter it is. It seems to me that the fallacy in the advice given by Mr Eastwood is that he accepts that the commercial banks are entitled to charge compound interest but then he wants the interest to be so calculated that it in effect equates to simple interest. That cannot be. If compound interest is chargeable, then it means that the interest that is not paid at the end of the month is capitalised and interest is then charged on the capital plus the accrued interest. The principle of charging compound interest is not in issue, as the principle has been settled…….
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> If one accepted the argument raised by Mr Eastwood, it would mean that at the end of the day, the lender who charged compound interest at, say, 14% *per annum*, would be paid the same amount in interest as the lender who charged simple interest at 14% *per annum.* Such an outcome would be nonsensical."

So with compound interest, interest is capitalised at the end of the month resulting in interest being charged on interest. It is therefore not correct for the defendants to simply deduct the total amount of money the first defendant repaid from the amount of the debt. This shows a total disregard of the interest that accrued during the periods the first defendant did not pay anything. There were instances when the first defendant would go for months without paying anything. The first defendant was not servicing its debt regularly and consistently. It is during those periods that interest that would accrue would be capitalised and accrue further interest. And when the defendants made repayments irregularly those little amounts would then be first

appropriated towards accrued interest. In light of the foregoing I make a finding that the interest that was charged by the plaintiff has a lawful basis and justification.

What repayments did the defendant make, if any

It is agreed by the parties that the first defendant repaid a total of US $14 629-62. The parties only differed on the allocation of these payments towards reducing the debt. The misunderstanding arose as a result of the defendants' misunderstanding of the calculation of compound interest.

What balance is owing, if any

The defendants have not disputed that they defaulted on their obligation regarding payment to the plaintiff. The evidence by Mr. Bususu clearly explained that indeed US$35 501-28 is owing to the plaintiff by the defendants. As I have already said above, the defendants were unable to mount a serious challenge to both the in *duplum* schedule and the statement of account presented by the plaintiff. There was no evidence to challenge these two documents. I have already dismissed the defendants' challenge to the interest that the plaintiff charged. The second defendant demonstrated that the method the defendants were employing in calculating it was wrong. Over and above the failure to provide documentary evidence challenging the amount being claimed, the defendants never disputed the amounts when letters of demand were being written by the plaintiff.

Disposition

In view of the foregoing I am satisfied that the plaintiff managed to prove its claim against the defendants. In terms of clause 15.2 of the loan agreement the parties agreed that in the event of the borrower failing to repay the loan the default interest shall be 6% *per* month. I will grant that rate of interest as agreed by the parties. In terms of clause 15.3 of the loan agreement the parties also agreed that if the plaintiff was to institute legal proceedings for the recovery of its money, the first defendant would pay costs on a legal practitioner-client scale and collection commission. I will award the costs as claimed. I will however not award collection commission to the plaintiff despite the first defendant having agreed to pay such in the

agreement because the debt is now going to be paid by the defendants as a result of the judgment of this court, and not as a result of a collection by the plaintiff's legal practitioners. See *Unified Africa Technologies (Pvt) Limited* v *Twenty Third Century Systems (Pvt) Limited* HH 118/16

In the result, I order that the defendants pay to the plaintiff jointly and severally, the one paying, the others to be absolved:

1 a) The sum of US$32 501-28.

b) Interest on the above sum at the default rate of 6% *per* month calculated monthly in advance and compounded monthly in arrears reckoned from 1 December 2012 to the date of full and final payment.

c) Legal costs on an attorney and client scale.

2. I further order that a property called stand 1927 Chadcombe Township of Stand 1257 Chadcombe Township, measuring 485 square metres held under Deed of Transfer dated 5 March 2002 (Reg No. 1748/2002) is specially executable.

Wintertons, plaintiff's legal practitioners
Mahuni & Mutatu Attorneys, defendants' legal practitioners