AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
CONDUIT INVESTMENTS (PRIVATE) LIMITED
and
GIVEMORE CHIDHAKWA
and
PHILLEMON MACHANA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 8, 9, 10 & 14 February & 30 March 2017 & 14 March 2018

Civil Trial

T. Zhuwarara for the plaintiff
S. Simango for the defendant

ZHOU J: The plaintiff, a banking institution, is claiming payment of a sum of US$124 027.05, interest on that amount at the rate of 28 per cent per annum, collection commission and costs of suit on the legal practitioner and client scale. The plaintiff also seeks an order that a certain piece of land situate in the District of Salisbury called Stand 338 Greencroft Township 8 of Subdivision A of Subdivisions A and B of Mabelreign held under Deed of Transfer Number 5785/2010 be declared specially executable. The claim is in respect of money loaned and advanced to the first defendant by the plaintiff in terms of some banking facilities. The claims against the second and third defendants are founded upon deeds of suretyship which they executed in favour of the plaintiff as security for the first defendant's debts to the plaintiff. The plaintiff alleges that the second and third defendants bound themselves as co-principal debtors with the first defendant.

The defendants entered appearance to defend the claim. They further filed a plea and a claim in reconvention. In the plea the defendants deny owing the amount claimed by the plaintiff but admit to owing a sum of US$80 599.10 as at 16 January 2015. The defendants counterclaimed for a total sum of US$142 000.00. The plea filed makes averments which are irrelevant and should

have been contained in the defendants' claim in reconvention. The plea consists of six paragraphs which are all numbered as para 1 which purports to be an answer to para(s) 1-15 of the plaintiff's declaration. What is supposed to be the claim in reconvention consists of two paragraphs as follows:

> "1. For easy of reference the parties have been referred to as they appear in the plaintiff's papers (*sic*).
>
> 2. Defendant counterclaims for the expenses incurred in securing expensive loans from microfinance institutions and individuals."

The above two paragraphs are followed by a prayer which consists of four paragraphs. The kind of pleading displayed leaves a lot to be desired. When one considers that the plea and claim in reconvention were drafted by Mr *Simango*, a senior partner of the law firm representing the defendants, it is evident that the need for compulsory training even for those legal practitioners who are running their law firms is a necessity. The concern of this court is that if the senior partner cannot properly draft pleadings he cannot be expected to train the junior lawyers who will work in his law firm.

During the course of the trial Mr *Simango* for the defendants advised the court that the defendants were withdrawing the claim in reconvention.

The only issue for determination is thus of the amount that remains outstanding on the sums advanced to the first defendant by the plaintiff. The plaintiff led evidence from one witness, Daniel Simbarashe Muganiwa, who is a manager in the Special Corporations Department which deals with delinquent accounts. His evidence was that the plaintiff's claim arises from a global facility to the total amount of US$108 750.00 which was availed to the first defendant by the plaintiff. The facility consisted of Asset Finance in the sum of $33 750 and an overdraft facility of $75 000. The witness produced the facility letter duly signed on behalf of both parties, the deed of transfer for the property offered as security, as well as the *in duplum* schedule, among other documents.

The defendants relied on the evidence of Phillemon Machana who is the third defendant in this matter. He is the first defendant's Chief Executive Officer. His evidence was essentially that the defendants disputed the amount being claimed by the plaintiff. His evidence seemed to ignore the fact that the interest was compounded monthly and thus would become part of the capital for the purpose of attracting further interest. He also challenged the reference by the plaintiff's witness to the *in duplum* schedule as the Certificate of Indebtedness required in terms of the facility

agreement as *prima facie* evidence of the first defendant's debt on the ground that it was not signed by the General Manager of Director or the plaintiff. Nothing turns on that aspect. The fact is that the transactions reflected in the schedule have not been rebutted by evidence from the defendants.

Apart from seeking to impugn the *in duplum* schedule on the basis that the plaintiff ought to have produced the statements from which the information in that schedule was based and that it ought to have been signed by a General Manager or Director, the defendants did not lead evidence to rebut the transactions reflected on that schedule. The schedule outlines the capital figures and interest and other charges up to the time that the summons was issued. The *in duplum* schedule was discovered in July 2016. The defendants never challenged its validity. Further, if the defendants genuinely believed that statements contradicted the figures in the *in duplum* schedule they should have produced those statements to rebut the evidence in the schedule. As a client, the first defendant would have had its own copies of statements or would have been entitled to request for them from the plaintiff. At some point the defendants were promised money by another commercial bank, the CBZ Bank, but the release of that money was subject to the plaintiff releasing the immovable property mortgaged in its favour. The plaintiff, as it was entitled to do, refused. Nothing turns on that, as that refusal does not absolve the defendants of their liability to pay the debt owed to the plaintiff.

The letter dated 16 January 2015 which the defendants seek to rely upon as proof of the amount which they owe was addressed to CBZ Bank. It does not purport to state the full extent of the defendants' indebtedness to the plaintiff. After all it was written some nine months before the summons was issued. The defendant's witness has not explained by reference to either the *in duplum* schedule or any other basis how the amount of US$80 599.10 would represent the full extent of the defendants' indebtedness to the plaintiff. More significantly, if the defendants genuinely believed that they owed that amount and not more than it then they would have paid it by now. They have not paid it, which is evidence of the *mala fides* of business persons and entities who borrow money from financial institutions only to set up spurious defences to either avoid or delay settling their indebtedness.

The plaintiff has proved its case against the defendants on a balance of probabilities.

In the result, judgment is given in favour of the plaintiff against all the defendants jointly and severally the one paying the others to be absolved for:

1. Payment of the sum of US$124 027.05 together with interest thereon at the rate of 28% per annum calculated from 1 September 2015 to the date of payment in full;
2. An order that a certain piece of land situate in the District of Salisbury called Stand 338 Greencroft Township 8 of Subdivision A of Subdivisions A and B of Mabelreign held under Deed of Transfer Number 5785/2010 be and is hereby declared to be specially executable;
3. Payment of costs of suit on the legal practitioner and client scale and collection commission in terms of the Law Society of Zimbabwe By-Laws.

Mawere Sibanda, plaintiff's legal practitioners
Nyikadzino, Simango & Associates, defendants' legal practitioners