TIME BANK OF ZIMBABWE LIMITED
vs
VERBAS MATAMISA
and
THEOPHILUS P GAMBE
and
MOSES S CHINYENZE
and
CHRISTOPHER NDLOVU

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 25 June and 3 July, 2002

Mr *J M Mafusire* for plaintiff
Ms *E Chipendo* for 2nd respondent
Mr *M S Chinyenze* for 3rd respondent

SMITH J: This is an application for summary judgment by the applicant (hereinafter referred to as "Time Bank") against the 2nd and 3rd respondents (hereinafter referred to as "Gambe" and "Chinyenze" respectively) who are both registered legal practitioners. In 1999 they were partners with the 4th respondent (hereinafter referred to as "Ndlovu") and carried on a legal practice with offices in Harare and Mutare, under the name Gambe Chinyenze and Associates (hereinafter referred to as [illegible] overdraft facilities he required if he could provide some security. At the time he was in the process of selling some immovable property he owned in Rusape and the intending purchaser had given him a post-dated cheque which he had handed over to Ndlovu, who was his legal representative, to hold in trust. On ll March 1999 Ndlovu wrote a letter to Time Bank, using the letterhead of the Partnership. In that letter he advised that the firm was Matamisa's legal practitioners of record. He said that he understood that there had been extensive discussions between Time Bank and Matamisa concerning the latter's request for financial assistance not exceeding $l,5 million, and then went on to say -

> "We advise that should you be inclined to assist our client (which overture shall be appreciated) we hereby give irrevocable undertaking to pay you $l,5 million on 30th June 1999 together with interest at the prevailing bank rate from the monies we are holding on his behalf."

In the period 12 March 1999 to 7 December 1999 Time Bank lent Matamisa by way of overdraft facility $118 156,43. Interest was payable thereon at a rate of 68,5% *per annum* compounded monthly. On 7 May Time Bank lent Matamisa, by way of a loan facility, a further $555 941,48 with a similar rate of interest thereon.

On 19 January 2000 Time Bank issued summons claiming from the respondents, jointly and severally $674 097,51, with interest thereon at a rate of $68,5% *per annum* and costs. When an application for default judgment against Matamisa was made, BARTLETT J required that the summons be amended so as to clarify the claim. That was done and the claim for interest was amended so as to claim compound interest. Time Bank obtained default judgment against both Matamisa and Ndlovu. On l8 December 2000 Ndlovu paid Time Bank $100 000. The application for summary judgment against Gambe and Chinyenze is for the sum of $574 097,51, with interest on $674 097,51 from 30 November 1999 to l8 December 2000, and on $574 097,51 from l9 December 2000 to date of payment, at the rate of 68,5% *per annum*, such interest to be capitalised monthly on a daily debit balance.

Gambe and Chinyenze both oppose the application. Gambe submitted that it is for Matamisa and Ndlovu to resolve the matter since he does not know Matamisa and he knew nothing about the matter until the summons was served on him. The Partnership was dissolved on 31 March 1999. Ndlovu joined the legal firm he is presently with and took Matamisa's file with him. Matamisa had not paid Time Bank what he owed it by 30 June 1999 and the parties were not then called on to honour their guarantee. The second loan facility was offered to Matamisa on 30 September 1999 and accepted by him on 13 October. At that time Time Bank well knew that the Partnership had been dissolved.

Chinyenze disputed liability and claimed that Time Bank was not entitled to summary judgment for a number of reasons. Firstly, the letter of guarantee was prepared by a junior partner and the Partnership was not holding money in trust for Matamisa as alleged.

Secondly, Time Bank never sought confirmation from the other two members of the Partnership. Thirdly, Time Bank did not rely on the letter of undertaking when it granted Matamisa the overdraft facility. Fourthly, Ndlovu took the file with him when he joined another law firm.

Mr *Mafusire* conceded that summary judgment is a drastic remedy which is not lightly granted and that it will be refused if the respondent raises a *prima facie* defence to the action or, as it is put, a triable issue. He submitted, however, that the summary judgment procedure is designed to dispose summarily of bogus defences that are patently bad in law and to spare a plaintiff, who has an unassailable case the delays and expenses of a trial. He went on to argue that the defences raised by Gambe and Chinyenze were completely irrelevant and some of them were not based on any solid evidence. He referred the Court to *Bain* v *Barclays Bank (D C & O) Ltd* 1937 SR 191 in which it was held that the basis of a partnership is that each partner is the agent of the other; the acts of a partner are binding, not only on himself but also on every other partner. All that Time Bank has to prove, in order to establish liability on the part of Gambe and Chinyenze, are that a partnership existed between all the parties sought to be liable; that the partner whose deeds were relied on acted within the scope of his authority; that he acted in his capacity as a partner. All those three elements are present in this case.

Ms *Chipendo* submitted that the application should be refused because Gambe had raised a triable issue, which is that Time Bank was well aware, when it granted the overdraft facility to Matamisa, that the Partnership had been dissolved, and therefore could not have been holding any monies in trust for Matamisa. Therefore the issuing of the letter of undertaking by Ndlovu was fraudulent. Ndlovu did not issue the letter in the ordinary course of business. Furthermore, Time Bank should have insisted that the letter was signed by all the partners.

Mr *Chinyenze* argued that he had a good *prima facie* defence. Time Bank was well aware that the letter of undertaking was based on a post-dated cheque, and therefore was worthless unless the cheque was later honoured. Time Bank did not rely on the letter of

undertaking when it advanced the overdraft facility to Matamisa. There may have been a conspiracy between the manger of Time Bank, Matamisa and Ndlovu because the balance in the trust account of the Partnership at the time was far less than $l,5 million. Even if the letter of undertaking was valid, it was not proper for Time Bank to seek to recover money advanced to Matamisa in terms of an agreement concluded after 30 June 1999.

In *Chrismar (Pvt) Ltd* v *Stutchbury & Anor* 1973 (4) SA 123 (Z); 1973 (1) RLR 277 at 279 D BECK J said -

> "it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact ad in law, that this drastic relief will be afforded to a plaintiff".

The sentiments so expressed were cited with approval by MCNALLY JA in *Dube* v *Medical Services International Ltd* 1989 (2) ZLR 280 (SC) at 286. I accept that summary judgment must not be given lightly - see *Shingadia* v *Shingadia* 1966 RLR 285.

It seems to me that the following facts cannot be disputed. Ndlovu wrote the letter of undertaking in his capacity as a partner in the Partnership. Therefore the undertaking given in that letter is binding on Gambe and Chinyenze, since they were partners in the Partnership at the time the letter was written. The fact that they did not know Matamisa or that the letter had been written without their knowledge and had not been signed by both of them is irrelevant. Even if Ndlovu and Matamisa had colluded in writing the letter, that would not affect the liability of Gambe and Chinyenze to Time Bank. As was held in *Spark* v *Palte (Pvt) Ltd* 1956 R & N 236; 1956 (3) SA 27 (R & N), the act of one partner is binding on his fellow partners. The Partnership was in existence on ll March 1999. It is obvious from the letter of undertaking that Ndlovu was acting in his capacity as a partner and within the scope of his authority. He was acting on behalf of a client of the Partnership.

All that needs to be finally determined is the effect of the letter that Ndlovu wrote to Time Bank. In the letter Ndlovu said that if Time Bank assisted their client Matamisa with a loan or overdraft facilities, the Partnership gave an irrevocable undertaking to pay Time Bank $l,5 million on 30 June 1999, together with interest, from the monies that the Partnership was holding on his behalf. The letter is not very happily worded. Clearly, if Time Bank lent

Matamisa $100 000 it would not expect the Partnership to pay it $l,5 million, plus interest on the loan of $100 000. However the letter does, in my opinion, make the following points (a) it gives an irrevocable undertaking (b) to pay a maximum of $l,5 million plus interest (c) on 30 June 1999 (d) from monies the Partnership is holding on behalf of Matamisa. It is obvious that the date of 30 June 1999 is of significance. That must be for two reasons. Firstly, even if the loan was for $l,5 million and the interest rate was 68,5% *per annum*, the interest due would not amount to very much in respect of the period from ll March, when the letter was written, to 30 June. Secondly, it was made clear that the money would be paid to Time Bank from the monies that the Partnership was holding on behalf of Matamisa. Clearly what Ndlovu was saying was that the Partnership would hold Matamisa's money until 30 June 1999 but not necessarily thereafter.

I consider that the letter cannot be construed as an irrevocable undertaking to pay Time Bank all monies which were due by Matamisa long after 30 June 1999, including interest which had accrued over a period of some 3 years, instead of the 3½ months contemplated in the letter. Compound interest at the rate of 68,5% accrued over 3 years would be significantly more than the capital of $l,5 million. Even in relation to the monies that were owed by Matamisa to Time Bank on 30 June 1999, the letter of undertaking does not commit the Partnership to paying them a year or two later. What Ndlovu does undertake in the letter, and commit the Partnership to do, is to pay Time Bank on 30 June 1999 whatever capital is owed by Matamisa on that date (subject to a maximum of $l,5 million) together with interest due thereon as at that date. The insertion of the date 30 June 1999 in the letter cannot be ignored. It must have been inserted for a reason. It must be given some effect. Clearly the reason was because Ndlovu did not expect that the Partnership would still be holding monies on behalf of Matamisa in trust after that date.

In view of the wording of the letter of undertaking, I consider that Gambe and Chinyenze have raised a triable issue and that they have raised a defence which has good prospects of success.

The application is dismissed with costs.

Scanlen & Holderness, legal practitioners for applicant
Gambe & Associates, legal practitioners for 2nd respondent
V Nyemba & Associates, legal practitioners for 3rd respondent