TIME BANK OF ZIMBABWE LIMITED
versus
CULROY FARM (PRIVATE) LIMITED
and
LOURENS ABRAHAM DU PREEZ
and
WILHELMINA KARLA OOSTINDIEN

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 29 May, 2002and 12 November, 2003

Mr *Mafusire* for applicant
Mr *Musariri* for respondents

Opposed Application

PARADZA J: This matter came before me on 29th May, 2002 on the Opposed Roll. I heard both Counsel and granted an order for Summary Judgment on following lines -

"It is ordered:-

1. That the application for Summary Judgment is hereby granted.
2. That the Respondents shall pay the Applicant the sum of $54 463 957,85 (Fifty four million four hundred and sixty three thousand nine hundred and fifty seven dollars and eighty five cents) together with interest thereon at the prescribed rate, currently 30% *per annum* from the date of this order to the date of payment.
3. That the respondents' liability to pay the aforesaid amount is joint and several, the one paying the others to be absolved.
4. That the costs of this application and of the main action shall be paid by the respondents, jointly and severally."

I indicated that should any of parties wish to appeal against my judgment, I will be happy to provide my reasons in full. A Notice of Appeal was filed with the Registrar of the Supreme Court and High Court on 19th June, 2002. The record was subsequently brought back to me in April 2003 with a request from the Registrar for me to provide the reasons for judgment. These are my reasons.

This application concerns a claim by the applicant against the respondents in the sum of $54 463 957,85. The claim arises out of a banking facility made available by

applicant to the respondents in support of the respondents' three different farming operations. Prior to respondents' dealing with the applicant bank a similar facility seems to have existed between respondents and the bank that went into liquidation sometime ago called United Merchant Bank Limited. It was the intention of the parties that applicant bank would take over whatever facility the respondent had with the United Merchant Bank Limited amounting to the sum of $20 million. Nothing was concluded in that regard and the claim by the applicants as amended excludes any liability which applicant could possibly have at that time towards the United Merchant Bank Limited.

In support of the application applicant relied on a number of documents one of which was an acknowledgement of debt signed by the first and second respondents. In particular my attention was drawn to Clause 2 and Clause 4 which read as follows -

> "2. I/We, agreed to pay interest on the Capital sum on a compound basis at the creditor's lending rate ------
> 4. I/We, renounce the benefits of the legal exceptions "*non causa debiti*' '*non numeratae pecuniae' 'de erori calculi'* revision of accounts. No value received, and any other exception which might or could be taken to the payment of my indebtedness to the creditor, with the full meaning and effect of which I hereby declare myself to be fully acquainted".

The applicant also relied on certain documents signed by the second and third respondents whereby they guaranteed payment in respect of all monies payable by first respondent. The relevant paragraph of the guarantee document reads as follows -

> "In consideration of Time Bank Limited ('the Bank') allowing Culroy Farm (Pvt) Limited trading as Dream Orchard ('the Debtor') certain bank facilities, subject to the conditions hereinafter mentioned, I the undersigned ……. do hereby guarantee and bind myself as surety and co-principal debtor for the repayment on demand of all sum or sums of money which the debtor may now or from time to time hereafter call or be indebted to the Bank, its successors or assigns whether such indebtedness be incurred by the debtor in the Debtor's own name or the name of any firm in which the debtor may be trading either solely or jointly with others in partnership or otherwise, and whether such indebtedness arises from money already advanced or hereafter to be advanced, or from Promissory Notes or Bills of Exchange already or hereafter to be made, accepted or endorsed, or from guarantees

> given or to be given by the debtor to the Bank on behalf of third parties or guarantees given by the Bank on behalf of the Debtor, or otherwise whosoever, including interest, discount, commission, legal costs on a legal practitioner/client basis, stamps and or all other necessary charges or usual expenses."

My attention was also drawn to a schedule describing the movement of the Bank Loan Account in respects of the respondents' Dream Orchard between the period 28 November, 1998 and 13 November, 2000. Another schedule showed the respondents' Happy Planters Account as it was between 28 November, 1998 and 31st December, 2000. All it shows is that the respondents operated three accounts each of which financed different sections of their farm. As stated above the schedules covering the three accounts, namely, Dream Orchard, Happy Planters Number 1 and Happy Planters Number 2 showed a month by month analysis of the capital drawings, interest and bank charges and the various deposits made by the respondents during the period of operating the accounts.

Respondents sought to oppose this application on the basis that the respondents were no longer indebted to the applicant as claimed. Instead, the respondents say they were owed an amount of $793 127,11 together with interest thereon at the then prescribed rate of 30% *per annum*. Unfortunately for the respondents they did not seek to attach any document upon which the court could be convinced that indeed there is a triable issue and that Summary Judgment should not be granted.

In the matter of *Maharay* v *Barclays National Bank Ltd* 1976(1) SA 418 (A) CORBETT JA stated as follows -

> "The principle is that, in deciding whether to grant somebody Summary Judgment , the court looks at the matter at the end of the day on all documents which are properly before it. "

Applicant gave me detailed schedules of the movement of the account which formed the basis of their claim. I have no reason to doubt their authenticity. In any case the respondents have not challenged the authenticity of those documents in their opposing

papers. As in all applications for Summary Judgment I have to formulate a belief whether I take the view that the defence is not *bona fide*, and that it has been raised solely for purposes of delay. Without any document forming the basis upon which the defence by the respondents is based I am bound to believe that their defence is not *bona fide*. Bold statements with unsubstantiated figures lean towards an attempt to cloud the issues that have been well documented and supported by the applicant in its Founding Affidavit.

In the matter of *Majoni* v *Minister of Local Government and National Housing* 2001 (1) ZLR 143 (S) EBRAHIM JA dealing with an application for Summary Judgment stated as follows as p 144 -

> "The quintessence of this drastic remedy is that the plaintiff, whose belief it is that the defence is not *bona fide* and entered solely for dilatory purposes should be granted immediate relief without the expenses and the delay of trial…."

I am not suggesting in any way that respondents should have placed evidence before the Court which clearly shows that the applicant's argument can be put to meaningful test when the matter is brought to trial. The law is very clear, namely, that all the respondents have to do is to raise a *prima facie* defence. It has been stated in our law, that all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is a mere possibility of his success or that he has a plausible case or that there is a triable issue or that there is a reasonable possibility that an injustice may be done if summary judgment is granted. (See the cases of *Davis* v *Terry* 1957(4) SA 98 (SR); *Rex* v *Rhodien Investments Trust (Pvt) Ltd* 1948(4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd* v *Kassim and Another* 1964(1) SA 651 (SR); *Shingadia* v *Shingadia* 1966(3) SA 24 (SR) *Webb* v *Shell Zimbabwe (Pvt) Ltd* 1982 (1) ZLR 102; and *Jemma* v *Nechipote* 1986(1) ZLR 29 (SC).

I was concerned in reading paragraphs 3.5 to 3.10 of the Opposing Affidavit of the respondents. Those paragraphs were adequately covered in the Applicant's Supplementary Affidavit. The figures relied upon by the respondents do not seem to find support from anywhere. In any case applicant vigorously disputes those figures and says clearly that all those figures are merely to buy time. Furthermore, although the respondents indicate that they are owed money by the applicants no such demand, or correspondence, or communication was ever made available to the Court or to the applicant itself before the matter came to Court. As far as applicant is concerned the figures provided by the respondents do not make any sense. It is my view that when figures are given they should make sense and they should have a basis so that the Court is in a better position to decide whether or not to refuse an order for Summary Judgment. Bold allegations and figures should be discouraged in such applications. I was therefore satisfied that this was a proper case to grant the relief sought. I accordingly issued an order in terms of the draft which was annexed to the main application.

Scanlen & Holderness, legal practitioners for applicant
Chihambakwe, Mutizwa & Partners, legal practitioners for respondents