(1) RANI INTERNATIONAL LIMITED
versus
BUBYE MINERALS (PVT) LTD AND ANOTHER
and
(2) RANI INTERNATIONAL LIMITED
versus
BUBYE MINERALS (PVT) LTD AND ANOTHER

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 16 February 2009, and 27 January 2010.

Civil Trial

Advocate *A P de Bourbon*, for the plaintiff
Advocate *E W W Morris*, for the respondents

UCHENA J: The plaintiff in both cases is a company incorporated in terms of the laws of the Channel Islands. The defendant in both cases is a company registered in terms of the laws of Zimbabwe. It between 1998 and 2004 mined diamonds at Riner Ranch Mine in Beitbridge. It had been authorised to do so in terms of a compromise agreement which enabled the plaintiff to come out of liquidation. The mine belongs to the plaintiff.

The plaintiff sued through two different actions for the repayment of loans it lent to the first defendant. The parties agreed to the joinder of the two cases as the same witnesses' were to testify on identical issues applicable to each case.

The plaintiff did not lead any *viva voce* evidence. It relied on documents it produced as exhibits 1 and 3. The defended called Mrs Adele Farquar, a director of the 1st defendant, as its only witness and relied on documentary evidence it produced as exhibit 2.

The evidence of Mrs Farquar was to the effect that the terms on which the loans were granted were discussed orally and the loans were not granted on the terms discussed. She said in the event of the condition precedent failing, the loans, were to be repaid, in Zimbabwe dollars. She agreed that the first defendant signed agreements which she called historical documents in the sense that they were signed after the loans had already been granted, at the instance of the plaintiff who threatened not to give further funding until the historical;

documents were signed. She does not dispute receiving the loans and the defendant's failure to repay them She admitted that the loans were deposited into the defendant's account in foreign currency, and that the loans were to enable first defendant to finance its mining operations. She however said she did not know into which account the loans were deposited. This tends to show that she did not want to give details for some unknown reasons. She said the first defendant did not repay the loans because its mining operations were affected by cyclone Elene. She under cross examination admitted that the first defendant sold some assets which enabled it to raise money, but still did not repay the loans. She said the first defendant repaid Z$20 000 000-00 of the US$1 000 000-00 loan which she said was a bank guarantee for the payment of the loans. She embellished her evidence when she said the Z$20 000 000-00 was paid to the Liquidator Mr Bailey, when it should have been paid to the plaintiff who had provided the guarantee through its bank. The evidence of Mrs Farquar is not convincing. Her evidence was not consistent. She at times alleged the loans were received in Zimbabwe dollars, but would on close examination concede it was paid into the first defendant's foreign currency account. She would not disclose the account into which the loans were deposited. I would therefore not rely on her evidence were it conflicts with documentary evidence.

It is common cause that the plaintiff was placed in liquidation in 1998, but was removed there from by order of this Court following a compromise agreement between the first defendant and Mr Bailey the liquidator. The first defendant required funds to enable it to conduct mining operations and to pay some of the Mines' creditors as per the compromise agreement. It sought funding from the plaintiff. The plaintiff granted it four loans under HC 846/06. Two of the loans were granted on 1 March 2000. The other two loans were granted on 1 October 2000, and 1 October 2001 respectively. Each loan was subject to a condition precedent which required the first defendant to obtain Exchange control authority before it incurred liability in foreign currency. The first defendant applied for Exchange control authority, but its application was turned down. That should have been the end of the agreements, but the parties agreed to go ahead with the loans in spite of the first defendant's failure to satisfy the condition precedent. The parties were obviously acting illegally. They both knew that the Reserve Bank had not granted the required authority. Under similar circumstances the plaintiff granted the first defendant another loan of US$30 000-00, in September 2001. The plaintiff sues for this loan under HC12117/04.

The first defendant does not deny receiving the above mentioned loans, but sought to rely on the following defences to avoid liability.

1. That the loans were advanced after the Reserve Bank had turned down the first defendant's application for Exchange control authority, therefore repayment of the loans in foreign currency would be illegal.
2. That plaintiff's claim for the repayment of the loans is prescribed
3. That plaintiff illegally took over the running of the mine thereby repaying itself of the owing loans.
4. In respect of the second defendant that the third agreement having fallen through due to the defendant's failure to obtain exchange control authority the guarantee attaching to it also fell away.

The claim against the second defendant in HC12117/04 was withdrawn. The claim against second defendant in HC 846/06 is dependant upon the effect of the Reserve Bank refusing to grant the first defendant Exchange control authority for the principal agreement. The agreement between the plaintiff and the second defendant was for the second defendant to guarantee the repayment of the loan under that agreement. That agreement did not come into effect because the condition precedent to which it was subject was not satisfied. The agreement to guarantee the loan agreement therefore also failed as there was nothing to guarantee. The plaintiff concedes that new oral agreements were entered into to facilitate the granting of the loans despite the absence of exchange control authority. This means there was need for the plaintiff and the second defendant to enter into another guarantee agreement in respect of the new agreement. In the result there was not guarantee agreement between the plaintiff and the second defendant. The plaintiff's claim against the second defendant in HC 846/06 is therefore dismissed.

Illegality of the agreements

The first defendant contents that it is illegal for it to repay the loans in foreign currency as they were granted without exchange control authority. The Courts do not enforce illegal agreements unless justice demands that they have to do justice between man and man. See the case of *Dube v Khumalo* 1986 (3) ZLR 103 SC @109-110. This issue was determined by HUNGWE J in HC 12117/04 in favour of doing justice between the parties. HC 12117/04 only came back to this court because the deponent of the plaintiff's (then applicant's) affidavit did not have capacity to depose that affidavit. I agree with HUNGWE J's reasoning on pages 2-3 of the cyclostyled judgment, where he summed up by saying,

> "The courts frown upon parties who engage in illegal activities and then seek the protection of the law when other parties to this activity demand justice."

In the present cases the loans were granted in identical circumstances. The reasoning of HUNGWE J therefore applies to each loan. In this case the relaxation of the in *par delictum* rule is compelling because of the demonitisation of the Zimbabwe dollar. There is now no other way the loans can be repaid other than in foreign currency.

Prescription

The first defendant claims that the plaintiff's claims are prescribed because the claims arise from loans whose repayment according to the agreements are being claimed after the lapse of the prescription period of three years. If the agreements were valid that argument would have succeeded. It was argued for the plaintiff that when the original agreements failed to come into effect because of the none fulfillment of the conditions precedent, they were replaced by tacit agreements which did not sate the date of repayments. On the other hand it was argued for the first defendant that the loans were granted on the conditions stipulated in the agreements except those relating to the conditions precedent. A condition precedent either enables an agreement to come into effect or prevents it from coming into effect. When it is not fulfilled the whole agreement fails, and no condition of the failed agreement can be relied on. The failed loan agreements in paragraph 30 provides as follows,

> "This agreement constitutes the entire agreement between the Parties and no variation, or addition to the provisions of this agreement shall be valid or binding unless reduced to writing and duly signed on behalf of both parties."

This means the agreements could not be varied other that in the prescribed manner. In this case there are no written and signed variation agreements to support the first defendant's contentions. This means by operation of law, and the agreement of the parties, the parties entered into new tacit agreements which did not provide the dates of repayment. Where there is no stipulated date of payment the debtor is placed in *mora* by the creditor's demand for payment. In terms of s 16 (1) of the Prescription Act [*Cap 8:11]*, prescription runs from the date when performance is due. Section 16 (1) provides as follows:

> "(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due."

It is the due date in the letter of demand which determines when the claim will be prescribed. The plaintiff said it made demands for repayments in 2004. The claims were then filed in 2004 and 2006, before the period of prescription had lapsed. The defence of prescription can therefore not succeed.

Take over of the mine by the plaintiff

The first defendant alleges that the plaintiff illegally took over the mine, thereby recovering the loaned sums through such take over. The plaintiff denies the first defendant's allegation. The first defendant is in fact raising the defence of set off. It is in short saying the plaintiff committed a delict against it when it illegally took over the mine therefore it is, owed money by the plaintiff in the form of damages, which extinguishes the loans it owes the plaintiff. Its defence could also be interpreted to mean that the plaintiff's illegal take over enabled it to run the mine for its own benefit and therefore benefited from the loans which had sustained the mine. Either way the defence is that of set off.

The plea of set off can only succeed if the two debts are liquid or easily ascertainable. (See the cases of *Schierhout v Union Government* 1926 AD 286, and *Kantor & Immerman v Chombo* 1999 (1) ZL 300 HC @ 303.) In this case the first defendant's claim for damages is neither liquid nor easily quantifiable. The plaintiff's claim is for the repayment of loans whose values are known. Its claim should not be delayed by a counter claim which is disputed and of an uncertain value. Even if the plaintiff were to be found to have illegally taken over the mine there would be the issue of the first defendant having benefited from the loans before the take over and the complicated assessment of the resultant damages or benefit to the plaintiff. In the result the first defendant's attempt to set off the loans against the disputed and uncertain damages can not succeed. It however remains entitled to institute separate action against the plaintiff.

In the result the plaintiff has proved its claims against the first defendant.

(1) It is ordered that the first defendant pay to the plaintiff the following, in respect of HC846/06

a) The sum of US$19764
b) The sum of US$1 000 000
c) The sum of US$10 000
d) The sum of US$30 000, and
e) The sum of US$ 30 000 in respect of HC12117/04 plus

(2) Costs of suit

(3) The plaintiff's claim against the second defendant in HC 846/06 is dismissed.

Costa & Madzonga, plaintiff's legal practitioners.
Hussein Ranchod & Co, defendant's legal practitioners.