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Judgment No. S.C. 105/2000
Civil Appeal No. 140/99

ELIUD SPENCER NHARI v COMMERCIAL BANK OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & EBRAHIM JA
HARARE, OCTOBER 10, 2000

R M Fitches, for the appellant

F Girach, for the respondent

McNALLY JA: We dismissed this appeal with costs at the hearing. I will refer to the parties as "Mr Nhari" and "the Bank" respectively in setting out briefly our reasons for the dismissal.

The Bank sued Mr Nhari in November 1995 for two amounts, $793 110.98 and $477 795.27, in each case with interest and costs. In further particulars these amounts were reduced, by reference to the *in duplum* rule, to $509 109.86 and $400 000.00 respectively. Mr Nhari was barred, and default judgment was given against him as prayed on 17 July 1998.

He then applied for rescission of judgment. His reasons, both for the delay in his application and on the merits, were so spurious that the court had no hesitation in dismissing it with costs. He then appealed to this Court.

In these difficult economic times there are inevitably more cases in which debtors are unable to pay their debts. But, as I remarked recently in

Herringswell Investments (Pvt) Ltd & Anor v Parity Capital Ventures Ltd S-100-2000, an appeal is an improper tactic when its only purpose is to delay the inevitable. (Compare *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260).

In this case, as I have said, the defences were spurious. A bald allegation was made that some of the money was due by a company, when the debtor himself wrote a letter in his own handwriting headed "Overdraft facilities. Personal A/c No. 0/037412" to the Bank. The letter enclosed a guarantee by the company. Why, as Mr *Girach* pointed out, would a company guarantee its own overdraft?

He also raised a vague defence based on the *in duplum* rule. Yet the Bank amended and reduced its claim when the *in duplum* rule was first enunciated, and particularised its claims in detail. Mr Nhari should have pointed to specific miscalculations if he expected the court to take him seriously. See *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86 and *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 at 212 B-H.

We were not asked to award costs in the higher scale – see the remarks of EBRAHIM JA on *Gambiza v Edgars Stores Ltd & Anor* S-32-99 *in fine*.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners