

INTERFIN BANK LIMITED (IN LIQUIDATION)  
versus  
BARTIM LAKE NURSERIES (PRIVATE) LIMITED  
and  
TIMOTHY NATHAN CHIGANZE  
and  
BARBARA CHIGANZE  
and  
TARUBINGA INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 6 November 2017

### **Absolution from instance**

*F Siyakurima*, for the plaintiff  
*T Tpofo*, for the defendants

ZHOU J: The plaintiff, a commercial bank which is in liquidation, instituted an action against the defendants claiming payment of the following:

- “(a) US\$983149-19 being capital.
- (b) US\$124 432-12 being interest
- (c) interest on the sum of US\$983 149-19 at the penalty rate of 10% per annum over and above the rate of interest applicable to the first defendant’s overdraft from time to time from the 20<sup>th</sup> of May 2015 to date of full payment.”

The claim arises from money availed to and accessed by the first defendant in terms of a credit facility agreement. The other defendants are being sued on the basis of deeds of suretyship which they executed in favour of the plaintiff for the performance by the first defendant of its obligations under the credit facility agreement. The defendants entered appearance to defend and filed a plea and claim reconvention. Mr *Mpofu* for the defendants advised that the defendants were abandoning their claim in reconvention. In respect of the main claim the defendants admitted to the existence of the credit facility agreement and the fact that certain monies were accessed pursuant thereto. They, however, put in issue the amount outstanding on the basis that the amounts claimed by the plaintiff to have been accessed by the defendant are inaccurate.

The plaintiff led evidence from one witness-Lewis Tendai Bususu- and closed its case. After the plaintiff had closed its case the defendants made the instant application for absolution from the instance on the basis that the evidence led did not warrant the placement of the defendants on their defence.

The only witness who testified on the plaintiff's behalf is employed by the plaintiff as Recoveries Officer. He had held the post since 2016. He was not personally involved in the transactions upon which the claim is founded. His evidence was that the payments made by the defendants did not extinguish the debt owed by the first defendant. He relied mainly on the *in duplum* schedule which was produced as part of the plaintiff's bundle of documents, exh 1. He did not claim to be the author of that schedule and, apart from the balance due, he did not speak to the various transactions recorded in the schedule. He also referred to the documents from pp 45 of exh 1 which he said are withdrawal slips, as well as documents from pp 188 to 340 which he referred to as Bankers' Acceptances. No effort was made by this witness to speak to the contents of those documents in order to relate them to the amounts being claimed.

The law applicable to an application for absolution from the instance are settled in his jurisdiction. The leading statement on the applicable principles is in the case of *Gascoyne v Paul and Hunter* 1972 TPD170 at p 173:-

“At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, ‘Is there such evidence upon which the court.... ought to give judgment in favour of the plaintiff’.”

See also *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR (A); *Taunton Enterprises (Pvt) Ltd and Anor v Marais* 1996 (2) ZLR 303 (H) at 313A-F. The above and many other authorities state that an application for absolution from the instance is akin to and stands on much the same footing as an application for the discharge of an accused at the close of the case for the prosecution in criminal proceedings. A plaintiff will successfully withstand such an application at the close of his or her case “if there is evidence upon which a court could or might (not should or ought to) find for him”. *United Air Charters v Jarman* 1994 (2) ZLR 341 (S) at 343 B-C; *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S).

The plaintiff's witness did nothing to relate to the disputed issue of whether the defendant still owes the plaintiff any monies advanced under the facility. It is not enough to just bundle together copies of withdrawal slip. Those do not prove the amount which remains

outstanding especially in the face of the admission that an amount in excess of US\$1.4 million dollars was paid to the plaintiff by the defendant. Some of the withdrawal slips related to different accounts. The plaintiff's witness was confronted with a letter written on its behalf in which it is stated that proceeds from the sale of certain properties were used to clear the amounts owed to it. The author of that letter Ngoni Kudenga was not called to testify although the plaintiff was given notice of that letter when it was produced during the cross-examination of the plaintiff's witness.

The *in duplum* schedule produced on behalf of the plaintiff did not help at all, as it on the face of it related to not just the first defendant's account but also that of Bartim Trading. Also, the plaintiff's witness conceded that that schedule has serious inaccuracies as it refers to loans allegedly given to the defendants after the plaintiff had ceased operation.

While the court should lean in favour of continuing with a case instead of disposing of it at this stage, in the present case no real purpose would be served by proceeding to the defendants' case as there is no evidence upon which the court might or could find for the plaintiff. See *Standard Chartered Finance Zimbabwe Ltd v Georgias and Anor* 1998 (2) ZLR 547 (H).

In the result, IT IS ORDERED THAT:

1. The defendants' application for absolution from the instance is hereby granted.
2. The plaintiff shall pay the defendants' costs.

*Sawyer & Mkushi*, plaintiff's legal practitioners  
*Chiminya & Associates*, defendant's legal practitioners