

TETRAD INVESTMENT BANK LIMITED  
versus  
WEST PROPERTY COMPANY (PRIVATE) LIMITED  
and  
DOOREX PROPERTIES (PRIVATE) LIMITED  
and  
MARTIN DZVITI  
and  
KENNETH RAYDON SHARPE  
and  
MICHAEL JOHN VAN BLERK

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 20 March 2017 & 19 July 2017

**Opposed motion: Special Plea: Prescription Act**

*K Kadzere*, for the plaintiff  
*T Magwaliba*, for the defendants

MUSHORE J: The plaintiff is claiming the payment of US\$55,908,185-52 together with interest calculated at the rate of 22% from the date of judgment to the date of payment from all the defendants; jointly and severally: with the qualification that fourth and fifth defendant's liability be limited to US\$500,000-00 each. (fourth and fifth defendants provided limited guarantees).

The plaintiff's claim has arisen from a written agreement entered into between plaintiff and the first defendant, wherein plaintiff agreed to provide first defendant with a loan facility in the amount of US\$3,000,000-00. The said agreement was entered into on the 23<sup>rd</sup> November 2012. The purpose of the agreement was for plaintiff to provide the first defendant with '*working capital finance requirements*'. As security for the loan the second and third defendants executed unlimited liabilities binding themselves as sureties; and second defendant caused its immovable property to be secured by a mortgage bond (Surety Mortgage Bond Number 2721/2012). The mortgaged property is described as being Stand

19672 Harare Township of Salisbury Township Lands held under Deed 2274/2009. The facility expired on the 30<sup>th</sup> November 2012 and payment under the facility became due.

In its declaration, the plaintiff is seeking payment of the entire sum loaned due to 1<sup>st</sup> defendant's failure to repay the loan facility on or before the 30<sup>th</sup> November 2012.

Having received further particulars to the claim by plaintiff, defendants filed a Special plea claiming that plaintiff's failure to file suit to recover the sum due within three years after the due date of payment (30<sup>th</sup> November 2012), meant that by the time that plaintiff instituted action on the 20<sup>th</sup> July 2016, its claim had prescribed. However, plaintiff contends that because the debt is secured by a mortgage bond, the applicable prescriptive period is 30 years. In response to plaintiff's contention, the defendants have advanced their quarrel with the position taken by the plaintiff by stating further that the mortgage bond was executed to secure a prior loan on the 5<sup>th</sup> March 2012; and that in the circumstances the mortgage bond does not secure the facility of the 23<sup>rd</sup> November 2012; which is the subject matter of the suit. They also emphasised that the mortgage was registered on the 2<sup>nd</sup> August 2012 and thus could not have secured any loans taken after the 2<sup>nd</sup> August 2012.

In trying to shape the intention of the parties when the 30<sup>th</sup> November 2012 agreement, I have examined the conduct of the parties in negotiating the contracts; and the language used in the agreements. From that exercise, I take judicial notice of the following:-

- (a) The 1<sup>st</sup> defendant mortgaged the same property as security for both loan facilities on the 23<sup>rd</sup> November 2012 and on the 5<sup>th</sup> March 2012.
- (b) Both agreements were entered into in order to advance '*working capital finance*' to the first defendant.
- (c) The '*in duplum*' schedule (record p 49) illustrates that the 23<sup>rd</sup> November 2012 agreement was merely a continuation of the 5<sup>th</sup> March 2012 agreement, in that the twelfth column of the schedule, the cumulative capital is shown to be continuous throughout the period covering the 5<sup>th</sup> March 2012 to the 30<sup>th</sup> November 2012, and beyond.
- (d) The nature of the financial agreements disclose the exact same arrangement, save for the varying balance due to the plaintiff, by the first defendant
- (e) The terms and conditions are not materially and substantively different in both agreements.
- (f) The first defendant agreed to a set off in clause 18 of the loan facility agreement (clause 18 of the agreement) which reads:-

“In the event of default by the borrower in any repayment due, or non-compliance with any of the terms and conditions of the Facility, all amounts due to the Bank shall immediately become due and payable and the Bank shall be entitled to combine all or any of the accounts opened with the Bank, whether current, loan, deposit or otherwise, and in whatever currency denominated by setting-off credit balances on any such accounts against any amounts due and owing on any other accounts, and accordingly, in the event of such default or non-compliance, the Borrower’s acceptance of this condition as signified by its signature on the Facility Letter will serve as due notice of bank’s intention to combine its accounts and apply set-off” (my emphasis)

Thus by accepting that the bank had a right to off-set past, present and future debts against any credit balances, defendants acknowledged fully and accepted the contractually agreed terms and conditions of any pre-existing loan.

- (g) First defendant has not renounced its pledge of its security mortgage up until the present day, thus making it clear that the 1<sup>st</sup> defendant acknowledges that plaintiff is still entitled to hold the mortgage bond as continuing security for its indebtedness to plaintiff, present and future.
- (h) The loan agreement of the 23<sup>rd</sup> November 2012 was specifically secured by the mortgage bond and the first, third, fourth and fifth defendants’ guarantees (*clause 10 agreement, record p 13*)

It therefore stands to reason that the loan facility extended to the second defendant on the 23<sup>rd</sup> November 2012, is secured by a mortgage bond. Because of that, the plaintiff is correct in contending that the debt would only prescribe after the elapse of 30 years. Therefore the defendants’ special plea is unsustainable and accordingly I find that the Special Plea taken by the defendants is wholly lacking in merit

Plaintiff is seeking a special order as to costs on the basis that the Special Plea taken was designed to delay the proceedings in this case.

I have made the following observations to determine if the Special Plea taken was indeed designed to delay matters:-

- (i) At the commencement of these proceedings and up to and including the date the defendants filed and argued their Special Plea, the defendants knew that the plaintiff was still holding onto the mortgage bond as security.
- (ii) They were also well aware that the nature of the continuous nature of the loan facility gave the plaintiff the rights to setting off all or any parts of their

indebtedness at any time, including loan facilities which the defendant admits were secured by the mortgage bond.

(iii) The further particulars sought were not necessary for the purposes of the defendants' filing their pleas and thus were clearly meant to delay matters. For example, defendants boldly requested plaintiff to clarify issues which were patently evident to the defendants and not at all contentious such as "*Did the defendants sign the agreement (sic)?*" and "*where and when were the agreements signed(sic)?*". There is no doubt in my mind that the Special Plea is frivolous and vexatious and was taken to delay matters, the result of which has been that the plaintiff has been unnecessarily put out of pocket in the present matter. I am satisfied that plaintiff has made out a case for a special award of costs. See: *Levisohn Meat Products (Edms) Bpk v Addisionelle Landdros, Keimoes* 1981 (2) SA 562 (NC); *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C).

I therefore order as follows:

- “1. Defendant's special plea is dismissed.
2. Defendants are ordered to plead over to the merits
3. Defendants are ordered to meet the plaintiff's costs on a legal practitioner and client scale, jointly and severally, with the one paying and the others to be absolved”

*Mawere & Sibanda Commercial Lawyers*, plaintiff's legal practitioners  
*Costa & Madzonga*, defendant's legal practitioners