TRUST BANK CORPORATION LIMITED IN LIQUIDATION
(Represented herein by John Mafungei Chikura in his capacity as the Liquidator)
versus
DICK PARADZAI UTSIWEGOTA N.O (In his capacity as Executor Dative of
The Estate Late Tobias Utsiwegota)

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 28 June 2017 & 30 August 2017

Stated Case

S Musapatika, for the plaintiff
C T Manyani, for the defendant

MUREMBA J: The facts of this matter being common cause the counsels agreed to proceed by way of a stated case. The statement of agreed facts outlines the facts as follows. By written agreement dated the 15th of February 2012, the plaintiff extended a credit facility in the sum of US$50 000.00 to Moonrock Services (Pvt) Ltd. The late Tobias Utsiwegota stood as surety and co-principal debtor for the due fulfilment of all the obligations of Moonrock Services (Pvt) Ltd in relation to its indebtedness to the plaintiff, including payment of legal practitioners' collection commission and costs of suit on the legal practitioner and client scale, renouncing the benefits of excussion and division.

As security for the due payment of the debt, the late Tobias Utsiwegota passed two surety mortgage bonds for US$66 000.00 and US$9 000.00 in favour of the plaintiff hypothecating certain piece of land situate in the district of Salisbury called Stand 14273 Salisbury Township of Salisbury Township Lands measuring 3 440 square metres in extent and held by him under deed of Transfer No. 4999/1995 dated 26th July 1995.

Moonrock Services (Pvt) Ltd breached the agreement by failing to repay the debt and as at 1st September 2013, the total balance outstanding stood at US$59 583.96.

In terms of the agreement between the plaintiff and Moonrock Services (Pvt) ltd, the balance outstanding would accrue default interest at the rate of 46.16% per annum.

The plaintiff instituted action proceedings in this court under HC 8778/13 against Moonrock Services (Pvt) Ltd, Tobias Utsiwegota and Valentine Utsiwegota, claiming the sum of US$59 583.96, interest thereon at the rate of 46.16% per annum from the 1st October 2013 to the date of payment and an order declaring the property of the Late Tobias Utsiwegota held as security by the plaintiff executable. Before the pre-trial conference of the matter, the parties entered into a deed of settlement. Moonrock Services (Pvt) ltd, the late Tobias Utsiwegota and Valetine Utsiwegota later failed to make payments as agreed in the deed of settlement. Tobias Utsiwegota passed away on the 2nd of May 2014 before the debt was paid. Clause 4.3 of the aforesaid deed of settlement provides that in the event of a default, the plaintiff would be entitled, without further notice to the defendants, to proceed and execute upon the consent order for the recovery of the full amount outstanding on the debt as at the date of default together with interest and costs. However, no consent order was filed by the parties.

The plaintiff applied for the registration of the deed of settlement as a court order and on the 8th of April 2015, this court being unaware of the death of Tobias Utsiwegota granted the order against Moonrock Services (Pvt) ltd, Tobias Utsiwegota and Valentine Utsiwegota. The plaintiff filed a notice of withdrawal of the application for a judgment against the late Tobias Utsiwegota on the 10th of April 2015 as he was deceased but it was too late as this court had already granted judgment on the 8th of April 2015.

The plaintiff later commenced the present action against the defendant who is the Executor Dative of Estate Late Tobias Utsiwegota under HC 1379/16, claiming payment of the sum of US$59 583.96, interest at the rate of 46.16% per annum from the 1st of October 2013, and an order declaring the property hypothecated by the late Tobias Utsiwegota in favour of the plaintiff executable, collection commission and costs of suit on the legal practitioner and client scale.

The defendant contested the claim in respect to the liability to pay interest at the rate of 46.16%.

By written memorandum dated 12 July 2016, the parties agreed to have the immovable property of the Late Tobias Utsiwegota sold by the defendant and that the sum of US$123 167.92 be deposited into the plaintiff's legal practitioner's account, which amount was so deposited. The said sum is the amount claimed by the plaintiff in its summons and includes interest at 46.16% per annum and the provision for collection commission in the sum of US$3 999.97.

The parties agreed that the sum of US$65 982.45 being the undisputed capital and interest on the debt at the rate of 5% per annum be released to the plaintiff, which amount was so released. Parties further agreed that the balance in the sum of US$53 185.47 be held in trust by the plaintiff's legal practitioners pending finalization of the interest dispute and that the said sum shall be released to the successful party in the present proceedings under Case No. HC 1379/16. The sum of US$53 185.47 is the interest at the rate of 41.16% being the difference of the rate claimed by the plaintiff of 46.16% and the rate already paid by the defendant at 5%.

In light of the above facts, the sole issue for determination by the court is whether or not the plaintiff is entitled to the US$53 185.47.

The counsels went on to file their heads of argument. The defendant's counsel in his heads of argument sought to introduce a new issue about the matter being *res judicata*. To begin with, the issue of *res judicata* is not one of the issues that the parties agreed that I should deal with in their statement of agreed facts.

Secondly, *res judicata* is a special plea which should be raised in terms of order 21 of the rules of this court, High Court Rules, 1971. A litigant is not at liberty to raise it in any other way. In *National Employment Council for the Construction Industry* v *Zimbabwe Nantong International (Pvt) Ltd* SC 59/15 at p 11 para 2 PATEL JA said,

> "On the other hand where the point taken constitutes a special defence, such as absence of jurisdiction, *res judicata* or prescription (cf. the pleas referred to above, as discussed by *Herbstein & Van Winsen, loc cit)* the procedure to be followed is by way of special plea."

Order 21 r 137 (2) stipulates that a plea in bar or abatement, of which *res judicata* is a plea in bar, "shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis--"* Rule 137 (1) goes on to regulate the procedure to be followed in raising exceptions or special pleas. This makes it clear that the plea of *res judicata* was raised by the defendant in this case in an irregular manner. Furthermore, in filing his plea to the plaintiff's summons and declaration, the defendant never raised *res judicata* as a special plea. *Res*

judicata is not even in the issues that were referred to trial in the joint pre-trial conference minute the parties prepared. On these grounds, I am not entitled to consider this issue.

However, it is apparent that there is a court order which was granted in HC2822/15 wherein the late Tobias Utsiwegota is cited as the second respondent and judgment was granted in favour of the plaintiff for the payment of US59 586.96. Tobias Utsiwegota was ordered to pay this amount jointly and severally with Moonrock Services (Pvt) ltd and Valentine Utsiwegota, the one paying, the other to be absolved. Although this court order is in existence, in as far as it relates to the late Tobias Utsiwegota it is a nullity and unenforceable. It is a nullity because it was granted on 8 April 2015 long after Tobias Utsiwegota had passed away on 2 May 2014. It had not been brought to the court's attention that Tobias Utsiwegota was no more. A judgment cannot be granted against a person who is deceased. Such a judgment is a nullity. A special plea of *res judicata* cannot even be raised in respect of such a judgment, yet this is what the defendant sought to do in the present matter. Since the judgment or court order in HC 2822/15 is a nullity in respect of the late Tobias Utsiwegota, I will proceed to determine the issue that the parties asked me to determine in their statement of agreed facts.

The issue is whether the defendant is liable to pay interest at the rate of 46.16% or at the rate of 5% per annum.

Mr *Musapatika* submitted that the defendant is liable to pay interest at the rate of 46.16% in terms of the loan agreement as well as the deed of settlement that the parties signed. He further submitted that in signing the deed of settlement, the plaintiff had waived payment of interest on the understanding that the defendants would be motivated to settle the debt early. He said that the waiver was conditional upon the defendants paying the debt in terms of the deed of settlement which should have commenced in April 2014 and ended in November 2015.On the other hand, Mr *Manyani* submitted that the defendant should pay interest at the rate of 5%, his argument being that the deed of settlement in clause 4.3 is silent on the rate of interest. Mr *Manyani* submitted that since the deed of settlement is silent on the rate of interest, the applicable rate is as prescribed in s 4 of the Prescribed rate of Interest Act [*Chapter 8:10*] which reads,

> "4 **Interest on certain debts to be calculated at prescribed rate**
> If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise."

Mr Manyani further submitted that by entering into a deed of settlement, the parties entered into a compromise agreement which resulted in the plaintiff agreeing on the principal debt which was outstanding and how it would be paid. He said that this resulted in the plaintiff not insisting on interest at the original rate of 46.16% per annum.

To resolve the dispute I will refer to the Deed of Settlement that the parties signed. They agreed as follows.

> "Whereas the parties hereto were involved in litigation arising from an action which was commenced by the plaintiff on the 21st of October 2013.
>
> And whereas the plaintiff has agreed to the payment proposal put forward by the said defendants
>
> And whereas the parties to this agreement have agreed to reduce their agreement to writing,
>
> Now therefore, these presents witnesseth that:

1. <u>Parties</u>

1.1. Trust Bank Corporation Limited	(the plaintiff)
1.2. Moonrock Services (Pvt) Ltd	("the 1st defendant")
1.3.Tobias Utsiwegota	("the 2nd defendant")
1.4. Valentine Utsiwegota	("the 3rd defendant")

2. ----------

3. <u>Introduction</u>

3.1 The plaintiff issued summons against the defendants on the 21st of October 2013 in case number HC 8778/13 claiming:

a) Payment of the sum of US$59 583.93 being the balance outstanding from a loan facility which was extended to the 1st defendant by the plaintiff on the 15th February 2012 of June which amount despite demand defendants has (sic) failed, neglected / or refuses to pay;
b) **Interest at the rate of 46.16% per annum from the 1st October 2013 to date of full payment**; and
c) Costs of suit.

And whereas the plaintiff and the defendants have agreed to settle their dispute on the following terms and conditions;

4. <u>Settlement</u>

4.1. In full and final settlement of the plaintiff's claim, the defendants shall pay to the plaintiff the sum of fifty nine thousand five hundred and eighty three dollars ninety six cents (US$59 583.96) as follows:

a……

t……

4.2. Payment of collection commission in terms of the by-laws of the Law Society of Zimbabwe and costs of suit.

4.3. **Should the defendants fail to make any payment on the due date then the plaintiff shall be entitled, without further notice to the defendants, to proceed to execute upon the order by consent for the recovery of the full amount outstanding on the debt as at the date of default and together with interest and costs.**

5. General

> 5.1. The parties hereby acknowledge and agree that:-
> 5.1.2 This agreement constitutes the entire settlement between them relating to the subject matter thereof and that no provisions, terms, conditions, stipulations, warranties or representations of whatsoever nature, whether express or implied, have been made by any of the parties or on their behalf except as may be recorded herein.
> 5.1.3 No alteration, variation, amendment or purported consensual cancellation of this agreement or any deletion therefrom shall be of any force or effect unless reduced to writing and signed by or on behalf of the parties hereto."

It is common cause from the Deed of Settlement that the defendant tendered a settlement in response to a summons which was claiming interest at the rate of $46.16 % per annum. However, in signing the Deed of Settlement the issue of payment of interest if the defendants were going to make payment in terms of Clause 4.1 was left out, but in terms of Clause 4.3 which is the default clause ,it is stated that should the defendants fail to make payment as agreed in Clause 4.1, the plaintiff shall be entitled to recover the full amount outstanding on the debt together with interest and costs. This shows that when the parties drafted the deed of settlement they were alive to the issue of interest. Its exclusion in clauses 4.1 and 4.2 shows that it had been waived on the condition that the terms of those clauses were met. In the event of default of payment interest was going to be payable.

Clause 3 which is the introduction states in Clause 3.1 (a) & (b) that the plaintiff issued summons claiming payment of US$59 583.96 together with interest at the rate of 46.16% per annum. When the defendant tendered settlement, he was aware of the amount which was being claimed and the rate of interest. It is therefore only logical to say that when clause 4.3 of the deed of settlement says that in the event of a default, the defendants will be liable to pay the debt together with interest, it can only mean that the interest is payable at the rate of 46.16% and not at the rate of 5%. The rate of interest had been stated in Clause 3.1 (b) and it was therefore already common cause between the parties. For the avoidance of doubt it was necessary for the parties to repeat it in Clause 4.3. However, the silence cannot be taken to mean that the interest rate of 46.16% was abandoned and was no longer applicable. Clause 4.3 cannot be read in isolation from the rest of the Deed of Settlement. It must be read in context of the whole document. There are no facts to support the inference that in the event of the defendants defaulting payment as per the terms of the deed of settlement, the plaintiff would abandon the interest rate which it was claiming in the summons. Such an interpretation is illogical, absurd and without foundation.

In the result, I make a finding that the defendant is liable to pay interest at the rate of 46.16 % per annum. That the plaintiff did not claim interest in the court order that it obtained

against Moonrock Services (Pvt) Ltd and Valentine Utsiwegota in HC 2822/15 is of no consequence.

In the result, it be and is hereby ordered that the defendant pays to the plaintiff:

1. US$53 185.47 in respect of the interest at the rate of 46.16% per annum.
2. Costs of suit.

Danziger & Partners, plaintiff's legal practitioners
T H Chitapi & Associates, defendant's legal practitioners