TRUST BANK CORPORATION LIMITED
(In Liquidation herein represented by
JOHN MAFUNGA CHIKURA of the Deposit Protection
Corporation the Appointed Liquidator)
versus
EDWARD INVESTMENTS (PRIVATE) LIMITED
and
EDWARD NHIRA MBERI
and
LOVEMORE MUKONO
and
JOHN MUNEMIWA MBERI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14, 15, 18 and 19 September 2017 & 22 September 2017

**Civil Trial**

*T K Mudzimbasekwa*, for the plaintiff
*W Jiti*, for the defendants

ZHOU J: The plaintiff claims against all the defendants jointly and severally the one paying the others to be absolved, payment of a total sum of US$72 181.15, together with interest thereon at the prescribed rate calculated from the date of issue of the summons to the date of payment in full, and costs of suit on the attorney-client-scale. The plaintiff further prays for an order declaring the property known as Stand 332 Marlborough Township Extension 4 of Marlborough Central held under Deed of Transfer Number 3886/89 and all the movable property of the first defendant to be specially executable. The claim is opposed by all the defendants. In addition to the defence

set out in the plea, the first defendant also filed a counterclaim in which it claimed certain sums of money from the plaintiff. This court heard argument on the point of prescription of the counterclaim raised by the plaintiff at the commencement of the trial. After hearing argument the court upheld the objection that the first defendant's claim as pleaded in the counterclaim had prescribed. The counterclaim was accordingly dismissed with costs. Full reasons for the dismissal of the counterclaim were given.

In respect of the main claim the facts which are common cause from the pleadings and evidence led are as follows. On or about 9 October 2012 the plaintiff and first defendant entered into a banking facility agreement under which the plaintiff was to provide banking facilities to the first defendant. Pursuant to that agreement on 1 November 2012 the plaintiff credited the first defendant's account with a sum of US$50 000. The first defendant made draw-downs on the facility money up to a sum of US$40 813-01. In respect of the balance of US$9186-99 the plaintiff failed to give the first defendant the cash due to liquidity challenges. The second, third and fourth defendants each executed deeds of suretyship in favour of the plaintiff for the performance by the first defendant of its obligations to the plaintiff in terms of the facility agreement.

The defendants contest the plaintiff's claim on the basis that the plaintiff failed to release the full amount of $50 000 in terms of the facility agreement. They argue that until the remaining sum of US$9 186-99 is released the debt does not become due. The defendants deny that the first defendant consented to the restructuring of the facility, and aver that they refused to sign the document in terms of which the restructuring was to be effected. The defendants further argue that the plaintiff is not entitled to recover penalty interest because of its breach of the contract.

It is common cause that the defendants did not sign the document which contained the terms of the restructured facility. The plaintiff sought to rely on clause 16 of the facility letter to bind the first defendant to the terms of the proposed restructured facility. That clause only allows the plaintiff to review and/or withdraw the facilities offered but not to withhold a payment where the sum of money availed in terms of a facility has been credited into the account of the beneficiary of the facility. The plaintiff was clearly aware that it could not unilaterally vary the terms of the contract other than in accordance with Clause 25 of the facility agreement. The variation could only be valid if it was in writing and duly signed for by both parties. That is the reason why the plaintiff presented the proposed restructuring to the first defendant for its signature. Once the first

defendant refused to sign it the restructuring did not become effective, let alone binding on the parties. This means that the parties remained bound by the terms of the facility agreement signed on 9 October 2012.

The defendants cannot contest the obligation to repay the funds which they withdrew in terms of that facility for the simple reason that the facility expired on 31 December 2014 which, according to Clause 6, was the date when the last repayment under the facility was to be made. By the time that the summons was issued on 14 December 2015 the facility had long expired. The failure by the defendants to enforce payment of the $9 186-99 during the currency of the facility is not a ground for them to escape liability for repaying the funds which they withdrew.

As for the rate of interest as well as when that interest became due, regard must be had to Clause 5 of the agreement and whether the defendant defaulted in such a way that should justify demand for penalty interest. The agreed rate in terms of Clause 5.1 of the facility agreement is 7.5% per annum. Clause 5.2 provides for penalty interest in respect of any balance outstanding in the operative account following the expiry of payments due dates of the facility or any unauthorised balance. The penalty interest is prescribed as 15% per annum above the Minimum Lending Rate. Clause 5.3 provides that the loan is to be repaid in twenty-one equal monthly instalments of US$2 548-04, which amount is to cover both interest and capital. The same clause provides that the loan repayments will be effected after six months from the date of drawing on the facility. In terms of the facility agreement the repayment of the first instalment would have been due in or about May 2012 if the funds due under the facility had been availed to the first defendant. The evidence produced in this court shows that the last draw down on the facility was in March 2013. After that the parties were engaged in negotiations in an attempt to deal with the failure by the plaintiff to release to the first defendant the sum of US$9 186-99 as well as the first defendant's failure to service the facility. The plaintiff is partly to blame for the failure of the first defendant's intended project by its failure to release the full amount in terms of the facility. Nothing turns on whether or not the agreement was to provide a line of credit because the plaintiff credited the full sum of US$50 000 into the account of the first defendant. Its failure to release part of that money constituted a breach of the agreement.

Given the misunderstanding which ensued from the failure to release the full amount of the money credited into the account of the first defendant, it would be unfair to permit the plaintiff to

recover penalty interest in this case. Also, any interest due should only be after the date that the facility was due to expire, which was 31 December 2014. That interest should be at the agreed rate of 7.5% per annum.

Clause 19.3 of the facility agreement entitles the plaintiff to recover costs of suit on the legal practitioner and client scale. The defendants have not contested the applicability of that scale of costs in the instant case.

In the result, It is ordered that:

1. Judgment be and is hereby granted in favour of the plaintiff against all the defendants jointly and severally the one paying the others to be absolved for:
   (a) payment of the sum of US$40 813-01.
   (b) payment of interest on the sum of US$40 813-01 at the rate of 7.5% per annum from 1 January 2015 to the date of full payment.
   (c) costs of suit on the legal practitioner and client scale.
2. Stand 332 Marlborough Township Extension of 4 of Marlborough Central, Held under Deed of Transfer No. 3886/89 be and is hereby declared specially executable.
3. All the movable property of the first defendant be and is hereby declared to be specially executable.

*Sawyer & Mkushi,* plaintiff's legal practitioners
*Musendekwa – Mtisi,* defendants' legal practitioners