COMMERCIAL BANK OF ZIMBABWE
versus
WATERGATE (PVT) LTD

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 30th June and 6 October 2004

Opposed Application

Mr Colegrave, for the applicant
Mr Phillips, for the applicant

BHUNU J: The applicant is a commercial bank registered in terms of the laws of Zimbabwe whereas the respondent is a company also registered in terms of the laws of Zimbabwe.

Sometime in 1998 the parties entered into a banker/customer relationship wherein the applicant provided the respondent with an offshore loan facility in the sum of US817 522.99 that is to say United States Dollars.

The agreed terms of repayment were that the respondent would repay to the applicant the loaned amount in United States Dollars from the proceeds of the sale of its coffee and tobacco.

The agreed repayment terms were stipulated under clause 6.2 of the parties' written agreement which provided as follows:-

> "6.2 USD OFFSHORE LOAN
> Payable in five monthly instalments of USD200 000.00 plus interest until 31 December 2001 depending on Reserve Bank allowing 100% of external coffee revenue being paid in USD to the loan. If not to be extended to 31 December 2002 as agreed."

On the 10th July 2002 the respondent through its lawyers Henning, Lock Donagher and Winter wrote to the respondent acknowledging being indebted to the applicant in the sum of US$817 522.99 but offering to repay the equivalent in local currency. The letter reads:

"Dear Sir

RE: WATERGATE ENTERPRISES (PRIVATE LIMITED : OFFSHORE LOAN

Our above named client wishes to repay its loan with you in full.

As of today's date the balance due and outstanding is US$817 522.99 or the equivalent in local currency. This was confirmed earlier today by you.

The current exchange rate to the US Dollar is 55 Zimbabwean dollars to one United States dollar.

Accordingly the balance due and payable is $44 963 764.45.

This amount is available now and can be paid by bank transfer.

Payment is tendered in full and final settlement of our client's debt to you. Kindly advise us of the account number to which the money is to be transferred."

The applicant refused to accept the offer insisting on payment in United States Dollars. What stands to be determined is whether or not the applicant is entitled to repayment in United States dollars. There is no material dispute of facts.

It is trite that once a contract is reduced to writing the written document is considered to be the exclusive memorial of the parties' agreement.

It is also trite and a matter of elementary law that agreement or consensus is of the essence of contract.

The repayment terms simply stipulated that "Depending on Reserve Bank allowing 100% of external coffee revenue being paid in USD to the loan if not to be extended to 31 December 2002."

What that means is that in the absence of Reserve Bank approval the repayment period was to be extended to the 31st December 2002 as previously agreed.

The attempt to introduce a foreign term allowing the respondent to effect repayment in local currency is therefore unacceptable and has no basis at law. The option whether or not to accept repayment in local

currency rests with the applicant and not the respondent. The respondent sought to rely on the case of *Makwindi Oil Procurement (Pvt) Ltd v National Company of Zimbabwe* 1988 (2) ZLR 482 (SC) for the proposition that where the agreement is to repay in foreign currency the debtor has an option to repay either in foreign currency or its equivalent in local currency as at the date the amount fell due. That proposition of law is at variance with the sentiments of the presiding judge in that case.

In that case the then Judge of Appeal CHIEF JUSTICE GUBBAY had occasion to remark after surveying a number of local and foreign authorities that:-

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement." (my emphasis)

In the POST SCRIPTUM at page 495 the learned CHIEF JUSTICE noted that:-

> "the full bench decision of the National Provincial Division in *Elgin Brown and Haner* (*Pty) Ltd v Dampsklibsselskabet Farm Ltd* 1988 (4) SA 671 (N), which came to notice of this court shortly after judgment had been delivered is in accordance with the view expressed that there is no bar to the grant of an order in foreign currency."

In this case the currency of the contract is in United States Dollars. This is for the simple but obvious reason that the respondent received payment in United States dollars and undertook to repay in United States dollars. In these highly inflationary times which have led to the inexhaurable devaluation of the Zimbabwean dollar it is just and equitable that repayment be effected in United States Dollars.

If however for one reason or another, the applicant is unable to recover the amount owed in United States dollars it should recover the equivalent in local currency at the prevailing foreign currency exchange auction rate as at the date of enforcement. The respondent cannot be allowed to benefit from its default and breach of contract. The parties agreed in terms of clause 7.11 of their written agreement that interest be charged at the London Inter Bank offer rate together with an arrangement fee of 1% totaling 8.21% per annum.

In terms of clause 17 of the parties contract the respondent to pay all costs and other charges incurred by the applicant arising out of the grant or recovery of the loan facility including legal costs on a legal practitioner/client scale and collection charges of any amounts due to the applicant.

As regards collection commission I consider it unjust and unfair that the applicant should claim both legal costs and collection commission. The applicant's legal practitioners have no legal basis for claiming collection commission because they did not collect any amount for their client. All what they did was to successfully sue the respondent. They are therefore entitled to costs in terms of the rules of court.

The case of SEDCO v GUVHEYA 1994 (2) ZLR 311 is instructive on that point. In that case it was held that:-

> "It was not appropriate to order that collection commission be paid as well as costs. A contractual provision to that effect would be penal in nature. Collection commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, but not collection commission, unless subsequent to the issue of summons the debtor has agreed to pay collection commission. (my emphasis)

That being the case the court can only give effect to the intention of the parties at the time of concluding their contract. In the result it is ordered:-

1. (i) that judgment be and is hereby granted in favour of the applicant in the sum of US$817 522.99 together with interest thereon at the rate of 8.21% per annum to the date of final payment.

   (ii) That in the event that for any reason whatsoever the applicant is unable to recover payment in United States Dollars it shall be entitled to recover the full amount or part thereof in Zimbabwean Dollars at the prevailing Foreign exchange auction rate as at the date of repayment or enforcement.

Coghlan Welsh and Guest, the applicant's legal practitioners
Henning Lock Donagher & Winter c/o Honney & Blackenberg, the respondent's legal practitioners