LOCAL AUTHORITIES PENSION FUND
versus
CHEGUTU MUNICIPALITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 1 November 2006

Chamber application

Mr *Dube*, for the plaintiff
No appearance for the defendant

KUDYA J: This is an application for default judgment which is based on a liquid document, in the form of an acknowledgement of debt.

THE FACTS

On 1st September 2005 at Harare the defendant, duly represented by its Chamber Secretary executed an acknowledgement of debt in which it acknowledged to be 'truly and lawfully indebted to the Local Authorities Pension Fund (hereinafter referred to as the "creditor") in the sum of $310 495 405.94 which we acknowledge to be a new loan (the total indebtedness) broken down as follows:

- 115 078 635.98 as capital amount and
- 169 938 040.52 being interest on the capital amount at 308% per annum up to 1 July 2005.
- 8 228 729.94 as collection commission including 15% VAT thereon.
- 17 250 000 including VAT at 15% being legal costs incurred up to and including 1 July to date.

  Together with interest at the rate of 308% per annum on the total indebtedness from 1 July 2005 to date of final payment and which we undertake to repay on the terms outlined herein."

On 17 March 2006 the plaintiff issued summons out of this court seeking against the defendant:

a) 310 495 405.94 being the capital amount due
b) interest thereon at the rate of 308% per annum from 1 July 2005 to date of payment in full
c) costs of suit on attorney and client scale.

It attached the acknowledgement of debt to its declaration.

The summons was served on the defendant on 23 March 2006 at its place of business at Civic Centre Chegutu. The period within which to enter appearance expired on 6 April 2006. On 21 June 2006, the plaintiff applied for default judgment.

On 18 July 2006, I caused the Registrar to seek explanation from the plaintiff on why the acknowledgement of debt carried interest in excess of capital and why the summons sought interest on interest in violation of the i*n duplum rule*.

THE LAW

Mr *Dube* for the plaintiff respondent on 27 July 2006 in the following terms:

"The acknowledgement of debt creates a new debt which comprises of the old capital amount and all interest. The plaintiff's claim is based on a compromise entered into by the parties. The *in duplum* principles does not apply to compromises See the case of *Georgias and another v The Standard Chartered Finance Zimbabwe Limited* 1998 (2) ZLR 488 at 497 B-C where GUBBAY CJ as he then was, said:

> "It follows that a waiver of the *in duplum* rule in advance cannot be sanctioned, for to do so would defeat these two objectives. However, a compromise *ex post facto* involves different considerations. Where there is a dispute about monies owing and the debtor knowing that he cannot be forced to pay accrued interest over the double for good cause agrees to settle his obligations and pay the creditor a sum, which includes or embraces such interest, he has put himself outside the purpose of the rule. He is no longer exposed to the perceived evils which the rule is formulated to combat. He is not being exploited and does not need protection against himself. He is now making an informed choice."

In *Georgias* case, *supra*, Georgias had in his pleadings joined issue with the Standard Chartered Bank disputing the quantum of the capital and the amount of interest alleged to have accrued thereon. The action was set down for trial. On the date that the matter was reset for hearing the parties entered into a deed of settlement which was entered as a consent judgment by the High Court which in essence accepted liability of interest above the *in duplum* maximum. *Georgias* attempted to seek rescission of judgment both in the High and Supreme Court and failed.

The learned Chief Justice defined compromise at 496D in these terms:

> "Compromise or *transactio* is the settlement by agreement of disputed obligations, or of a law suit the issue of which is uncertain. The parties agree to regulate their

intention in a particular way, each receding from his previous position and conceding something-either diminishing his claim or increasing his liability."

The facts of the case of *Dennis Peters Investments (Pvt) Limited v Ollerenshaw & others* 1977(1) SA197 (W) referred to with approval in *Georgias case* involved a suit based on an acknowledgement of debt which was executed after an exchange of correspondence between the parties attorneys over a period of four months. The correspondence was attached to the plaintiff's affidavits. MELAMET J found at 208E-G that a compromise had been effected and crystallized by the acknowledgement of debt. In the present matter there is no history of the dispute nor is there evidence which tends to show that the defendant was aware of the existence of the *in duplum* rule and that it deliberately abandoned its protection in a process of give and take with the plaintiff.

In the absence of such evidence, I am not satisfied that the acknowledgement of debt executed on 1st September 2005 is a compromise.

CONCLUSION

In the premises the interest claimed cannot in my judgment exceed the sum equivalent to the capital of $115 078 635.98. At *in duplum* interest freezes and will only start to run from the date of judgment.

The total amount due to the plaintiff in my calculation is ($115 078 635.98 + $115 978 635.98 + $8 228 729.44 +17 250 000.00) $255 635 001.40.

It is accordingly ordered that the defendant shall pay the plaintiff:

(a) the sum of $255 636.00 (revalued) together with interest thereon at the rate of 308% per annum from 1 November 2006 to the date of payment in full.

(b) Costs of suit on an attorney and client scale.

Messrs Dube *Manikai and Hwacha,* plaintiff's legal practitioners