

Judgment No. S.C. 115/2001
Civil Appeal No. 385/2000

(1) AGUY CLEMENT GEORGIAS
(2) TRINITY ENGINEERING (PRIVATE) LIMITED v

ZIMBABWE DEVELOPMENT BANK FINANCIAL SERVICES LIMITED

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 17, 2001 & JANUARY 10, 2002

G C Chikumbirike, for the appellants

F Girach, for the respondent

ZIYAMBI JA: The appellants in this matter claimed, in the High Court, that they had made an overpayment in error to the respondent and, basing their claim on the *condictio indebiti*, sought an order for the refund to them of the sum overpaid, being \$739 688,18. They now appeal against the judgment of the High Court dismissing their application with costs.

The facts upon which the application is based, as gleaned from the judgment of the court *a quo*, are that on 17 December 1996 the High Court granted, by consent of the parties, a judgment against the appellants and in favour of the respondent, which was then known as Standard Chartered Finance Zimbabwe Limited (case number HC 4362/93). A subsequent application to the High Court by the appellants to have the judgment rescinded was dismissed by the High Court, prompting the appellants to appeal to this Court against that dismissal in case number

SC-138-98. The appeal having been dismissed with costs, the process of execution commenced and certain movable and immovable property belonging to the appellants was attached in execution.

The appellants, with a view to obtaining a stay of the sale in execution of the immovable property attached, made representations to the respondent who agreed to stay the sale in execution on condition that the appellants provided an irrevocable bank guarantee for the full indebtedness of the appellants. Such a guarantee was given, on the appellants' behalf, by the Commercial Bank of Zimbabwe (CBZ). It read:

“We the Commercial Bank of Zimbabwe Limited, do hereby irrevocably guarantee and bind ourselves jointly and severally, as sureties and co-principal debtors for the payment of \$5 860 690.35 plus interest at 40% per annum from the 15th April 1999 which Trinity Engineering (Private) Limited owe the Zimbabwe Development Bank Financial Services in terms of the High Court Order number 4362/93 dated 17th December 1996”.

The letter was signed by Gideon Gono on behalf of CBZ and the figure stated therein took into account the amount due and payable to the judgment creditor as at 15 April 1999, including all the costs and disbursements incurred, and interest accrued to that date as well as auctioneer's charges.

On 14 June 1999 the respondent made demand for, and in due course received, payment in terms of the letter of guarantee.

On 12 January 2000 the appellants filed an application in the High Court claiming from the respondents the sum of \$739 688,18 with interest at the rate of 40% from 15 April 1999. (Although it was alleged in para 13 of the respondent's opposing affidavit (at page 62 of the record) that “two draft orders are annexed to the

applicants' claims. The one seeks payment in the sum of \$5 860 690,35 and the other in the sum of \$739 688,18", only one draft order is on record). The appellants' claim in the court below was stated by the learned judge thus:

"The applicants contended that the sum of \$5 860 690,35 reflected in the guarantee was inserted there in error because the amount which should have been guaranteed is the judgment debt, namely \$4 351 269,77 plus the interest which had accrued to that date less any amounts paid before 15 April 1999. Although no specific figure is mentioned, it is contended that such amount is less than \$5 860 690,35. Consequently, so the contention goes, there has been an overpayment made in good faith under reasonable error which the applicants are entitled to claim under the *condictio indebiti*."

The learned Judge went on to consider the facts and concluded that:

"It must follow that the applicants' contention that the amount which should have been put in the guarantee was \$3 351 269,77 cannot be correct because interest and other charges had since been added to the judgment debt. The amount of the writ had exceeded the original judgment debt and, in addition, there were other charges which were secured by the guarantee, such as auctioneer's fees. The exact amount which was due on 15 April 1999, which ... was greater than the judgment debt was agreed to be \$5 860 690,35. How that figure was arrived at has not been explained. It is apparent that the deponent to the founding affidavit is mistaken when he states that there is an error in the guarantee in so far as the judgment debt is reflected as \$5 860 960,35 instead of \$4 351 269,77. The guarantee was sought and granted for the purpose of securing a stay of the impending sale of the applicants' goods which stay could only be acceded to if the full amount due under the writ was secured by a bank guarantee. In order to support the contention that there is an error in the guarantee the applicants should prove the full amount which was due under the writ as at 15 April 1999. If such amount is less than the amount reflected in the guarantee then there may be an argument about overpayment.

The author of the guarantee, who is also the person who negotiated with the respondent's representatives, accepted that the full amount payable was \$5 860 690,35. He has not deposed to an affidavit in support of the applicants' contention. Without his evidence, one can only conclude that what the deponent to the founding papers states is no more than a series of deductions based on the initial assumption, which is wrong, that the figure which should have been inserted in the guarantee is the original judgment debt and not the amount due under the writ.

It has therefore not been established that there was an overpayment".

I can find no fault with the reasoning of the learned judge. On that basis alone, the application could have been dismissed. However, the learned judge then went on to test the appellants' averments against the requirements of the *condictio indebiti* and found that the appellants' claims had not been substantiated.

I respectfully agree with the conclusions reached by the learned judge as well as his exposition of the requisites of a *condictio indebiti*, which need not be repeated here since they were lucidly set out in the judgment of the court *a quo*. (See *Aguy Clement Georgias & Anor v ZDB Financial Services Limited* HH-235-2000).

In the result, the appeal is without merit and it is dismissed with costs.

EBRAHIM JA: I agree.

MALABA JA: I agree.

Chikumbirike & Associates, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners