Yonrue Trading Corporation, represented /by and Thru its President, Mr. William G. Barclay and/or its authorized representative of the City of Monrovia, Liberia APPELLANT VERSUS The **International Bank (Liberia) Limited (IB)**, formerly International Trust Company of Liberia (ITC), represented by and thru its Executive Vice President and General Manager, Mr. Wilfredo C. Ochaoda, of the City of Monrovia, Liberia APPELLEE

APPEAL. RULING AFFIRMED

HEARD: May 19, 2005 DECIDED: 14 September, 2005

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

The Appellant/Respondent in this case is a Company called YONRUE Trading Corporation while Appellee/Petitioner is the International Bank of Liberia limited (IB), formerly International Trust Company of Liberia (ITC).

The facts show that *on* March 21, *2001. the* Appellant *obtained* a loan from the Appellee in the amount of Sixty Thousand United States Dollars (US$60,000.00) as indicated by the Promissory Note signed by the Appellant. The parties agreed to sixteen percent (16%) interest on the loan per annum and attorney collection fee of ten percent (10%). In order to secure the loan, the

Appellant executed a Chattel Mortgage Agreement and a Mortgage Deed Agreement. Under the Chattel Mortgage Agreement the Appellant used has collateral, a 6.06-ton DAF 1700 Truck (Serial # 340741) and a 1976 Magirus Deutz Dunip Truck (Serial # 4900094006, Registration *it* 0490 BT), while the Mortgage Deed consists of a certain parcel of land with buildings thereon in the City of Paynesville, Montserrado County, Republic of Liberia, valued at Three Hundred and Fifty-Four Thousand Six Hundred and Sixty United States Dollars and Thirty Seven Cents (US$354,660.37) bounded and described as follows:

"Commencing at the northern corner of Lucy Anderson's property, thence running on magnetic bearings: North 70 degrees west 82.5 feet parallel with a 30 foot street to a point thence running south 20 degrees west 132 feet to a point, thence running south 70 degrees east 82.5 feet to a point; thence running north 20 degrees east 132 feet parallel with Lucy Anderson's property to the point of commencement and containing one (1) lot or 1/4 acre of land and no more."

In both the Chattel Mortgage and the Mortgage Deed Agreements, it is provided that

in the event the Mortgagor defaults in paying the loan, the Mortgage would he foreclosed and the properties used as collaterals exposed to sale at public auction and proceeds applied to "payment of costs, expenses and attorney fees, then against the principal amount of the loan outstanding with interest, the rest and residue, if there be any, shall be paid to the Mortgagor." The loan matured and became due and payable on January 14, 2002.

On March 28, 2004, the Appellee filed a Petition for Foreclosure against *the Appellant* contending that the Appellant had defaulted in the payment of the loan. The Appellee prayed Court for judgment against Appellant in the amount of Sixty Six Thousand Seven Hundred and Four United States Dollars (US$66,704.00) which amount represents the principal, sixteen percent (16%) interest rate per annum and ten percent (10%) attorney's collection fee.

The Appellant filed a six-count Returns to the Petition filed by the Appellee. We have deemed it necessary to quote counts 2, 3, 4, 5, and 6 of the said Returns as follows:

"2. That as to count two (2) of the Petition, Respondent says that whilst, it is true that it applied to the Petitioner to secure loan in the amount of US$110,000.00 to undertake the project of expanding its existing business to make same viable sufficiently and promptly repay, the amount as per agreement, yet the Petitioner in its attempt to frustrate the efforts of Respondent in making a prompt repayment, reduced the amount applied for to US$60,000.00 which was very inadequate to revitalize Respondent's existing business to pre-war status, as anticipated to enable Respondent to operate fully and repay Petitioner as per agreement. Respondent says that because of the inadequacy of the amount of loan received from petitioner, unable to resuscitate its 101 Gas Station to full pre-war capacity and repair spoiled steel body and dump trucks. Predicated' on t inadequacy of the amount received from Petitioner which made it difficult for the loan to be serviced as per schedule and Respondent's determination to service its loan, proposed to surrender two trucks (DAF Truck & Mercury Truck to the Petitioner Bank as additional collateral to secure the balance forty-five percent loan to fully resuscitate Respondent's facilities but Petitioner turned down Respondent's proposal. Respondent makes profert herewith its letter of September 11, 2001 proposing to, surrender its trucks as additional collateral to secure the balance forty-five per cent loan as exhibit "R/1" to form a cogent part hereof *to substantiate Respondent's* contention. Hence, count two (2) of the Petition should be overruled.

3. That further to count two (2) hereof, Respondent says that Petitioner in its attempt

to further frustrate performance by it, Petitioner without notice to Respondent, closed its United States Dollars and Liberian Dollars accounts numbers 04-00-00699-5 and 01-00201755 with the respective balance of US$1,900.00 and L$60,000.00. Respondent says that under the doctrine of impossibility of performance, a party to a contract is relieved of his or her duty to perform where performance becomes impossible or totally impracticable through no fault of the party and such a situation constitutes an exception to the general rule that the promissor must either perform or pay damages. Hence, the Petition is a nullity and should be dismissed.

4. That as to count three (3) of the Petition, Respondent says that the interest rate of 16% per annum being charged by the Petitioner is illegal. For under the law, it is usury for a party to charge an interest in excess of 10%. Hence, count three (3) is legally unfounded and should be overruled.

5. That as to count four (4) of the Petition, Respondent says that although it executed a chattel mortgage and a mortgage deed to secure the loan, but performance of the contract was made impossible by the Petitioner. Respondent further contends that besides the failure of Petitioner to grant Respondent the full amount requested which rendered Respondent unable to restore its facilities to pre-war status, thereby making performance impossible, the general economic condition of the country is another factor. Respondent submits that predicated on these factors, its failure to perform is not its fault. Hence, count four (4) of the Petition should be overruled.

6. That as to counts five (5) and six (6) of the Petition, Respondent submits that under the doctrine of impossibility of performance, a party to a contract is relieved of his or her duty to perform where performance became impossible or totally impracticable through no fault of the party and such a situation constitutes an exception to the general rule that the promissor must either perform or pay damages. In the instant case, the Respondent requested the amount of One Hundred and Ten Thousand United States Dollars (US$110,000.00) to fully restore its business to pre-war status for the purpose of operating effectively to service its loan. Notwithstanding, Respondent's good intention to service its loan according to schedule, the Petitioner made performance impossible when it only granted Respondent half of the amount requested which could not fully restore Respondent's business facilities to prewar status. Hence, counts 5 and 6 should be overruled."

Pleadings rested with the Appellee's Reply and the Trial Judge - heard arguments on law issues. The Judge, in his ruling on law issues held that the pleadings filed by the

parties did not contain any factual issues to warrant the trial of the case. He identified two basic law issues presented by the pleadings, and they are: 1) Whether or not under the facts of this case the doctrine of impossibility of performance is applicable? 2) Whether or not the interest rate charged in the agreement of loan under review is usurious and therefore illegal?

On the first issue, the Trial Court held that the doctrine of impossibility of contract is not applicable to the case. The Court held that no evidence was before it showing that the Appellee committed itself to provide Appellant with any amount over and above Sixty Thousand United States Dollars (US$60,000.00) and that there was no conditionality placed on the repayment of the loan.

The trial Court also considered the contention raised by the Appellant that the economic condition in the country was of such that it did not permit it to pay the loan. On this point, the Court held that this was not a valid reason or defense. Further, the Trial Court ruled that there was no evidence produced that the Appellee unilaterally closed the Appellant's account and that assuming that the Appellant's account was even closed, said Appellant had adequate remedy at law.

On the issue of the interest rate of sixteen percent (16%) being usurious and therefore illegal, the Court ruled that the Appellee and the Appellant willingly agreed to the interest rate of sixteen percent (16%) per annum and therefore the Appellant was estopped from renouncing and repudiating the said interest rate.

As we see it, the pertinent issues in this case are:

1. Whether or not the Appellant is excused from payment of the loan it obtained from Appellee under the doctrine of impossibility of performance of contract.

2. Whether or not the interest rate of 16% charged on the loan is usurious and therefore illegal.

3. Whether or not the Trial Court Judge acted properly when he held that the case did not contain any issue of facts to warrant trial and therefore was justified in granting judgment to the Appellee during ruling on disposition of law issues.

The facts in this case are admitted by the Appellant. The Appellant does not deny obtaining the loan in the amount of Sixty Thousand United States Dollars (US$60,000.00) from the Appellee; it does not deny using the aforementioned

personal and real properties as collaterals for the payment of the loan; it does not deny that it defaulted on payment when the loan matured and became due and it does not also deny agreeing to the interest rate of sixteen percent (16%) per annum as well as attorney collection fee of ten percent (10%).

The Appellant's basic contention, however, is that it applied for a loan of One Hundred and Ten Thousand United States Dollars (US$110,000.00) to expand its business, but that in an attempt to frustrate its efforts, the Appellee reduced the amount to Sixty Thousand United States Dollars (US$60,000.00). As a result, according to the Appellant, due to the inadequacy of the amount received, it became impossible for it to repay the loan. In its Returns filed before the Trial Court and in its brief filed before this Court the Appellant's basic defense is impossibility of performance of contract. The Appellant also argued that the Trial Court should have tried the case on the facts presented instead of granting summary judgment in favour of the Appellee.

Let us now look at the Appellant's defense of impossibility of performance of contract raised in the first issue and see whether it is applicable to the case before us.

Under the doctrine of impossibility of performance of contract, the party is absolved from non-performance due to impossibility as well as impracticability because of the extreme and unreasonable difficulty, expense, injury or loss involved. In that case something unexpected must have occurred and the risk of the unexpected occurrence must not have been allocated either by agreement or by custom... According to Black's Law Dictionary, 5th Edition (1979) "Although impossibility or impracticability of performance may arise from many different ways, the tendency has been to classify the cases into several categories. These are: a) Destruction, deterioration or unavailability of the subject matter or tangible means of performance; b) Failure of the contemplated mode of delivery or payment; c) Supervening, prohibition or prevention by law; d) Failure of the intangible means of performance, and e) Death or illness....".

Assessing the facts of the case before us against the spirit and the intent of the doctrine relied on by the Appellant, we see no situation of extreme difficulty, expense, injury or loss that prevented and thus excused the Appellant from paying the loan it took. While the impact of the civil war in our country on every aspect of life, activities and institutions can not be denied, it is common knowledge that during the period (March 2, 2001 — January 24, 2002) when the Appellant took loan from the Appellee and failed to pay, businesses were operating within reasonably fair climate.

That the Appellant applied to a financial institution and was granted a loan is an attestation of this fact. On the , other hand, it is no defense that the Appellant received a lesser amount than what he applied for, as it is normal business practice for a lending financial institution after receiving and reviewing a loan application, to approve the amount it deems fit in keeping with its cash flow capacity and in line with its guidelines. In such case, the applicant is at liberty to refuse the amount approved by the financial institution, if in the applicant's view the said amount is so small that it will not serve the purpose of the loan. But it is unlawful and a serious transgression of business ethics for a businessman to obtain a loan, use the proceeds thereof, 'and refuse to pay back on the ground that it was not given what it had asked for. We see that in the Promissory Note on the loan, the Chattel Mortgage Agreement,, and the Mortgage Deed Agreement, the principal amount of the loan is Sixty Thousand United States Dollars (US$60,000.00) and no more. Nowhere in any of these instruments do we see an undertaking by the Appellee Bank to provide additional amount to the Appellant. It was about six months after receiving the Sixty Thousand United States Dollars (US$60,000.00) under the loan arrangement and without making a single installment payment that the Appellant wrote a letter ("R/1" referred to in Count 2 of the Returns) requesting the Appellee Bank for additional amount. Under the circumstance we agree with the Appellee that it was not under obligation to grant the additional amount requested by the Appellant. We are therefore of the opinion that the doctrine of impossibility of contract is not applicable to the facts and circumstances in this case.

Concerning the second issue whether or not the Trial Judge acted properly by granting summary judgment in favor of the Appellee, this Court says that it is a practice in our jurisdiction for a Trial Court to grant summary judgment to a party if it is satisfied that there is no genuine issue as to any material fact and the party in whose favour judgment is granted is entitled to it as a matter of law.. Abraham , B. Keita, 39 LLR 710 (1999). Also our Civil Procedure Morris et al. vs. Musa Law provides at Section 11.3(3) as follows:

"The Court shall grant summary judgment if it is satisfied that there is no genuine issue as to any material fact and that the party in whose favour judgment is granted is entitled to it as a matter of law...."

We agree with the Trial Judge that the pleadings filed by the parties do not present genuine issues of material fact so as to warrant trial of the case. Recourse to the records reveal that the Appellant obtained the loan of Sixty Thousand United States Dollars (US$60,000.00) from Appellee and not a single installment payment was

made against said loan. The interest rate and the attorney collection fee are not in dispute. The Appellant admitted the facts of the case as presented by the Appellee, but maintained that under the doctrine of impossibility of performance of contract he is absolved from the claim of the Appellee. Under such circumstance, the Trial Court was justified in entering a summary judgment in favor of the Appellee, the said Trial Court having rightly concluded that the doctrine of impossibility of performance of contract was not applicable to this case. We fully concur with the Trial Court that there exists no need for submitting the case to trial, as in such case, the legal conclusion rests with the Trial Court to make the determination.

The third and last issue deals with the contention of the Appellant that the interest rate of 16% per annum applied to the loan was usurious and therefore illegal.

As stated, both the Appellant and the Appellee agreed to the interest rate of sixteen percent (16%) per annum. So, we again agree with the Trial Judge that the Appellant is estopped from renouncing and repudiating its own action under which it had benefited. Moreover, the contention of Appellant that the sixteen percent (16%) interest rate is usurious is untenable and without legal basis. The Appellant relied on Section 3.1 of the General Business Law in support of its contention that the interest rate of 16% per annum is usurious. That law which was amended long ago provides that:

"No person shall take, receive, or charge any greater amount for the lending of money than ten percent per annum. [Or, as may be fixed by the National Bank of Liberia under authority of the Financial Institution Act and the National Bank Act.]"

We here underscore the portion of the above quoted law which says "Or, as may be fixed by the National Bank under authority of the Financial Institution Act and the National Bank Act". The question is, has the National Bank of Liberia order authority of the Financial Institution Act and the National Bank fixed any, new interest rate since Section 3.1 of the General Business Law was enacted, and the answer is yes. On Tuesday, July 27, 2004, the Government of the Republic of Liberia announced that the Central Bank of Liberia (CBL), pursuant to its mandate under Section 55 of the Central Bank Act of 1999 has issued its Regulation No. CBL/SD/01/2004 on Regulation Concerning Interest Rate Determination.

The amended version of the regulation concerning interest rate now states:

"Pursuant to the authority vested in it by Section 39 of the New Financial Institution Acts of

1999, and consistent with Section 35 of the Central Bank of Liberia Act of 1999, the Central Bank of Liberia hereby prescribes, makes, regulates and sets forth as follows:

1.0 REVOCATION OF REGULATION NO. CBL/SD/02/2002

1.1 Regulation No. CBL/SD/02/2002 issued on April 15, 2002 as carried in Liberia Official Gazette Volume III, No. 2 is hereby revoked.

1.2 Every banking institution opera ling in Liberia shall, as of the date herein below written, be required to adhere to the determination of interest rate and other charges influenced by market forces. The interest rate and all charges, inclusive of commissions, fees, and discounts for lending of money shall be market determined, provided, however, that for during the two-year period immediately following the effective date of this regulation, no banking institution shall take, receive or charge an effective rate of interest greater than twenty-five percent (25%) per annum, inclusive of commissions, fees, discounts and related charges, but exclusive of penal charge(s) and collection fees for default.

From the foregoing, it is clear that the law relied on by the Appellant had been revoked and in lieu thereof, the prevailing interest rate made and provided is twenty-five percent (25%) per annum. Therefore, we do not find the interest rate of sixteen percent (16%) per annum which was expressedly agreed to by the Appellant and Appellee usurious.

Based on what we have stated above, we find no reason to disturb the Ruling of the Trial Court. The said ruling is hereby confirmed and affirmed. The Clerk of this Court is hereby ordered to send a mandate to the Court below: to resume jurisdiction and enforce its ruling. Cost against Appellant. AND IT IS HEREBY SO ORDERED.

COUNSELLOR C. ALEXANDER B. ZOE OF THE PROVIDENCE LAW ASSOCIATES APPEARED FOR THE APPELLANT.

COUNSELLOR JAMES C. R. FLOMO OF THE HENRIES LAW FIRM APPEARED FOR THE APPELLEES.