HC 1508/02

RAUF HAROON MANDHU
versus
SCOTFIN LTD

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 3 October 2002 and 30 April 2003

Opposed Application

Mr *Wernberg*, for the applicant
Mr A.P. de Bourbon *SC*, for the respondent

GARWE JP: This is an application for the rescission of a default judgment granted by this court on 8 August 2001.

The facts of this matter are as follows. On 26 June 1993 the applicant bound himself jointly and severally as surety *in solidium* and co-principal debtor for the due fulfilment of all obligations and punctual payment of all sums due from time to time in consideration of hire purchase facilities already granted or in future to be granted to Expedite Haulage (Pvt) Ltd (“Expedite Haulage”). Expedite Haulage failed to pay in terms of its agreement with Scotfin Ltd ("the respondent") following which the respondent repossessed the goods forming the subject of the hire purchase agreement and resold them leaving balances outstanding. It is not clear when this happened but Mr *Wernberg* during oral submission told the court that this was in 1995. Thereafter the respondent instituted proceedings against Expedite Haulage and on 13 September 1999 this Court granted judgment in its favour. That judgment remains unsatisfied.

On 15 June 2001, the respondent then instituted an action against the applicant as surety and co-principal debtor for payment of the amounts specified in the judgment granted against Expedite Haulage. A judgment in default was then granted against the applicant on 8 August 2001. It is that judgment which the applicant seeks to have rescinded.

The explanation proffered by the applicant for the default is that he had sold the property where service of the summons was effected and that he had since left the property. For that reason he says he did not have sight of the summons. That explanation has not been seriously challenged. Although in the agreement of sale the seller is reflected as Haroon Abdulla there is evidence suggesting that the property in question was the subject of an agreement of sale. In all the circumstances therefore I am persuaded to hold that the explanation given for the default is acceptable.

It is agreed between counsel that the real issue is whether the applicant has a defence on the merits. It is the applicant's contention that having signed the deed of guarantee in 1993, a period of more than three (3) years had lapsed before the respondent instituted the present proceedings. Therefore, so he argues, the respondent's cause of action had prescribed by the time a summons was issued in June 2001 against the applicant.

The respondent, on the other hand, argues that on the papers the cause of action on which applicant was sued was the judgment debt of September 1999. It was submitted that as surety to the principal debt the applicant remains bound while the principal debt remains payable or is still due in terms of a judgment.

The issue before me can be simply stated. It is whether the suretyship debt itself had prescribed independently of the principal debt. Put another way the issue is whether the interruption of the running of prescription against the principal debtor would have in any way affected the running of prescription against the surety in this case.

As already noted, it is the contention of the applicant, in his founding affidavit, that a period of three years had lapsed from the time the deed of suretyship had been executed and that therefore any cause of action against him had prescribed. That

position is of course not correct in law for the reason that in terms of Section 16 of the Prescription Act, prescription only commences to run as soon as a debt is due. Mr *Wernberg*, for the applicant, conceded the point. In his submissions he argued that by 1995 when the respondent re-took possession of the hire-purchase goods, prescription had started running. In short his submission was that prescription started running from 1995 - and not 1993 as stated in the founding affidavit. Mr *de Bourbon,* for the respondent, submitted that the applicant cannot be allowed to change the basis of his pleadings in this fashion. Whilst I accept that there is some substance in the submissions by Mr *de Bourbon* in this regard, I am however satisfied that, in the absence of prejudice, the submission by Mr *Wernberg* can be entertained. It involves a point of law. The position is now settled that a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed - see *Ahmed v Manufacturing Industries* SC 254/96; *Muchakata v Nertherbum Mine* SC 31/96; *ZESA v Dera* SC 79/98.

On the facts, the deed of surety was executed in 1993. It was submitted during argument that by 1995 the principal debtor had defaulted in his payments and the goods forming the subject of the hire purchase agreement had been repossessed by the applicant. If this submission is correct then prescription would have started running from 1995 and by 1998 the debt

would have been extinguished as against both the principal debtor and the appellant. The position is now established that if a principal debt is prescribed, the surety debt would be extinguished at the same time - see Section 24(2) of the Prescription Act [*Chapter 8:11*] and also *Absa Bank Bpk v de Villiers* 2001 (1) SA 481 (SCA). Whether or not the principal debt had prescribed is not really an issue before me although some comment has been made on this aspect. The respondent, in the last paragraph of its opposing affidavit, says the principal debtor filed an application for rescission of judgment on the basis that the claim had prescribed and that the application was dismissed by CHATIKOBO J. No further detail has been given. The issue is whether a suretyship debt can prescribe independently of the principal debt. The position now seems settled that a suretyship debt can prescribe independently of a principal debt before the institution of proceedings and further that the running of prescription, as regards the surety, was not delayed by any personal circumstance which delayed the running of prescription against the principal debtor - see *Absa Bank Bpk v de Villiers* 2001 (1) SA 481 (SCA). However, it is clear that in order to determine whether the suretyship debt has prescribed independently of the principal debt in any given case one must have regard to the provisions of the contract of suretyship itself.

Looking at the matter from a different angle the issue that

arises is the effect on the applicant of the judgment granted against the principal debtor on 13 September 1999. Under Roman Law liability of a surety was dependent on a debtor without limitation and the obtaining of a judgment against a principal debtor was a perpetual bar to a plea of prescription by a surety - see *Rand Bank Ltd v De Jager* 1982 (3) SA 418, 422. In the Rand Bank case BAKER J in an exhaustive review of Roman Dutch Law authorities came to the conclusion that the position under Roman Law applied only to co-debtors *in solidium* and not to sureties. He further held that as a general rule if a creditor wishes to have recourse against all his solidary debtors, he must sue them all. If they have all waived the benefits of excussion and *de duobus vel pluribus reis,* prescription starts to run in their favour as soon as summons is served on the one sued and should logically run for three years. Therefore in order not to lose his recourse, a creditor must sue the others within those three years (at page 455 D-F).

The position now seems settled that, in the final analysis, regard must be had to the contract of suretyship and the interpretation of that contract. In particular there is need to ascertain whether the intention of the parties was to limit the liability of the surety and in particular whether such liability would extend to a judgment debt which remains unsatisfied.

In the present case in terms of the deed of suretyship, the applicant undertook as follows:

> "In consideration of facilities already granted or in future to be granted to Expedite Haulage (Pvt) Ltd… either by the discount of Hire Purchase/Suspensive Sale Agreement/Lease Hire Agreements/ Acknowledgements of Debt/Memoranda of Agreement of Sales, or by the discount of Bills of Exchange

and/or Promissory Notes or by any other means whatsoever I bind myself jointly and severally as surety *in solidium* and co-principal debtor for the due fulfillment of all his/their obligations and the punctual payment of all sums due by them from time to time, and I expressly renounce the benefits of division and excussion ….”

From the wording of the deed of suretyship, it is clear the intention was not
to limit the applicant's liability to the hire purchase agreement executed in 1993. Liability is extended even to acknowledgements of debt, or facilities granted "by any other means" and the obligation to pay extends to all sums due from time to time. Liability also extended to facilities to be granted in future. It seems to me that a judgment debt arising from the failure to honour the terms of the hire purchase agreement was contemplated.

Accordingly, my finding is that the applicant remains liable in terms of his contract of suretyship to pay sums arising out of a court judgment. The applicant therefore has no defence in this regard. He has no defence to the claim.

Accordingly the application be and is hereby dismissed with costs.

P Chiutsi, applicant's legal practitioners.

Gill, Godlonton & Gerrans, respondent's legal practitioners