

CALEB DENGU
AND
WILSON TENDAI NYABANDA
VERSUS
ZIMBABWE ALLIED BANKING GROUP LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 17 March 2014 and 7 May 2014

Opposed matter

Advocate E. Matinenga, for the exceptients
Advocate Magwaliba, for the respondent

MATANDA-MOYO J: The plaintiff issued summons against the defendants on 18 January 2013 for the payment of \$521 686-47 being money lent and advanced to Onclass Investments (Pvt) Ltd. Plaintiffs on its declaration stated that such loan was given in terms of a credit facility agreement between plaintiff and Onclass Investments (Pvt) Ltd. The two defendants acted as sureties and co-principal debtors with Onclass Investments. Plaintiffs sought an order declaring second defendant's property namely Stand 120 Adylinn Township 6 of stand 8 of Adylinn North held under deed of transfer number 46187 executable. Plaintiff sought interest, collection commission and costs on a higher scale against the defendants.

Both defendants entered appearance to defend. On 11 February 2013 defendants requested further particulars amongst which they sought to be furnished with particulars of how the amounts were disbursed. Under para 3 (b) the following particulars were sought;

“3. Ad Paragraph 9

(a)-----

(b) How was the money availed to the Principal Debtor? If it was by way of Banker's Acceptances copies thereof are requested.”

Plaintiff provided the further particulars as follows:-

“3. Ad Paragraph 3

- a) The money was disbursed into the principal debtor's account.
- b) Copies of the banker's acceptances are attached hereto as Annexures 'B1', 'B2', 'B3', 'B4', 'B5', 'B6', 'B7' and 'B8'”.

Defendants then filed an exception to the claim as follows:

- “1. The plaintiff sues on a facility allegedly advanced in the form of banker’s acceptances, Annexures “B1” to “B8” to the plaintiff’s further particulars.
2. Banker’s acceptances are negotiable instruments within the contemplation of the Bills of Exchange Act [*Cap* 14:02].
3. A plaintiff who found a cause of action on a bill of exchange such as a banker’s acceptance is obliged to allege that:
 - 3.1. the plaintiff is the legal holder of a banker’s acceptance that is due, and
 - 3.2. the banker’s acceptance was drawn and availed by the defendant and
 - 3.3 the banker’s acceptance was presented for payment after the due date, and
 - 3.4. the banker’s acceptance was dishonoured, and
 - 3.5. notice of dishonour was given in terms of the Act
4. The plaintiff has not alleged any of the essential requisites to relief founded on a banker’s acceptance.
5. Consequently the claim is bad in law for want of plea of a proper course of action.”

The exceptants argued that the respondent’s course of action is founded on banker’s acceptance. However, the summons do not allege material facts to a suit founded on banker’s acceptances. The exceptants argued therefore that the summons do not disclose a cause of action. The respondent on the other hand denied that its cause of action was based on banker’s acceptances. It is respondent’s argument that its claim as per the summons is very clear. It is based on money lent and advanced to the Onclass Investments (Pvt) Ltd in terms of a credit facility agreement. Such amounts were allegedly deposited into Onclass Investments (Pvt) Ltd’s account.

It is true that from a reading of plaintiff’s cause of action its cause of action arises from monies lent to Onclass Investments (Pvt) Ltd in terms of a credit facility agreement. Plaintiff sues defendants based on surety documents they signed with plaintiff whereby second defendant pledged a certain piece of property as security. Sureties are persons who pledge security with a creditor to cover the indebtedness of another. The defendants herein engaged with the plaintiff to be answerable in the second degree for the default of Onclass Investment (Pvt) Ltd. The defendants’ liability in this matter therefore follows that of the principle debtor. It follows therefore that the defences available to Onclass Investments (Pvt) Ltd are automatically available to the defendants as sureties.

An exception to the summons succeeds if the excipient shows that the summons and the declaration do not disclose a cause of action and that it is vague and embarrassing. It is not a process to challenge the evidence in the matter. Plaintiff's summons and declaration herein disclose a cause of action. The issue of the banker's acceptance constitute evidence. The defendants can plead to the averments made by the plaintiff in the summons and declaration. The plaintiffs have a right to control their pleadings. It is not for the defendants to substitute plaintiff's cause of action. It is improper for the defendants to force the plaintiffs to base their cause of action on banker's acceptance. Defendants can answer to plaintiff's claim and can introduce the issue of banker's acceptance in their defence. The onus of showing that a pleading is excipiable rests on the excipient see *Voset and Others v Kleynhans* 2003 (2) SA 148 (C).

The plaintiff referred me to the case of *Francis v Sharp and Others* 2004 (3) SA 230 where HJ ERASMUS J at 237 C-H stated as follows;

"I preface evaluation of these exceptions by three preliminary observations. First, in *Colonial Industries v Provincial Insurance Co. Ltd* 1920 CPD 627 at 630 BENJAMIN J said in regard to the general approach to exceptions:

"Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of setting the dispute between the parties an excipient should make out a very clear, strong case, before he could be allowed to succeed."

Secondly the courts are reluctant to decide upon exception questions concerning the interpretation of a contract ----- . In this regard, it must be borne in mind that an excipient has the duty to convince the court that he had a strong clear case."

In my opinion this is not one such strong case made by the excipients.

In the premises the exception is not successful and the application is dismissed with costs.

Messrs Mawere and Sibanda, plaintiff's legal practitioners
Honey and Blackenberg, defendant's legal practitioners