ZFC LIMITED
versus
FARMCROP ENTERPRISES (PRIVATE) LIMITED
and
TAPIWA JOEL FURUSA

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 8,9,12 July 2013 & 13 May 2015

Civil trial

K Ncube, for the plaintiff
C Mucheche, for the second defendant

BERE J: The plaintiff issued summons out of this court on 1 December 2011 against the defendants seeking to recover US$46 717.16 for the defendant's failure to remit to the plaintiff proceeds from the sale of fertilizers and crop chemicals pursuant to the agreement entered into by both parties. At the time of the hearing of this matter the parties agreed that the correct amount of claim should be reduced to US$40 954.15. It was also common cause that judgement, having already been obtained against the first defendant, the focus in these proceedings be against the second defendant only.

As already indicated the principal agreement in this case pertained to the plaintiff and the first defendant. The second defendant's liability in the whole arrangement stems from exh 1 (the deed of surety) signed by the second defendant on the 3rd of July 2009.

The liability of the second defendant was sought on the basis of clause 5 of exh 1 which reads as follows:

> "5. The Surety shall remain in full force as a continuing security, notwithstanding any intermediate settlement or fluctuations in the amounts outstanding from time to time by the Debtor in terms of the contract in place, and notwithstanding the death or legal disability of me, until the said ZFC Limited has agreed in writing to cancel this suretyship and the suretyship shall further remain in force as a continuing security, binding upon me, notwithstanding that it may on any ground in whole or part have ceased to be binding on me."

The second defendant's position as amplified in his plea of 6 March 2012 was that in pursuing him the plaintiff was targeting the wrong defendant. He argued that he, with the

blessing or approval of the plaintiff had transferred his suretyship to one Lazarus Nyakudya and that it was to Lazarus that the plaintiff had to look to for payment.

It will be noted that on 5 December 2012 the parties signed a joint pre-trial conference memorandum which identified one triable issue, *viz*,

> "Whether or not the plaintiff accepted that the 2nd defendant should no longer be surety on behalf of the 1st defendant and substituted in place thereof Lazarus Nyakudya."

The first witness to testify for the plaintiff was Victor Magaya, the director and company secretary of the plaintiff.

His understanding of exh 1 was that it could only be cancelled if that was made in writing, and that since there was no written notification to the second defendant, the alleged cancellation was of no force or effect.

The witness further testified that it was his understanding that even if another deed of surety was signed by Lazarus Nyakudya, that deed should not exonerate the second defendant from his liability to the plaintiff unless there was notice to that effect to the second defendant by the plaintiff.

In contrast the second defendant, whilst accepting that he had signed both surety documents marked exh 1 A and B, argued that the plaintiff through its point person who was directly dealing with the second defendant had agreed to transfer the suretyship from the second defendant to one Lazarus Nyakudya.

The point person for the plaintiff who over saw and authorised the transfer of suretyship was one Gonai Chitauro who first sought permission from his superiors in the plaintiff company. It was the second defendant's uncontroversial testimony that Pondai Chitauro assured him that it was not unusual in the plaintiff company to have suretyship transferred as it was common practice.

The second defendant further testified that the discussed transfer of suretyship culminated in the execution of exh 3 by Lazarus Nyakudya who by virtue of that exhibit took over the liability from the second defendant.

In support of the position taken by the second defendant Gondai Chitauro confirmed the transfer of suretyship from the second defendant to Lazarus Nyakudya Lazarus. The witness's evidence was that when the second defendant approached him with a request to transfer the suretyship, he approached his senior with the plaintiff company, Mr Saviery who authorised the desired transfer of suretyship. The witness said that Mr Saviery, the accountant took part in preparing the surety document for Lazarus and that it was this Mr

Saviery who instructed that the plaintiff legal practitioners be advised of the changes in the suretyship arrangement.

The evidence as explained by the second defendant and confirmed by Gondai Chitauro got further confirmation from non-other than the new surety himself Lazarus Nyakudya who took it a step further by personally making the first payment towards the liquidation of the plaintiff's liability through the latter's legal practitioners Messrs Gill Godlonton and Gerrans legal Practitioners.

The long and short of the second defendant's position is that the plaintiff, by accepting the transfer of the suretyship agreement from himself to Lazarus Nyakudya exonerated him from liability.

THE LEGAL ARGUMENTS

It was strenuously argued by the plaintiff's counsel Mr *Ncube* that greater regard must be had to clause five(5) of the surety agreement signed by the second defendant. For clarity's sake the clause in question is framed as follows:

> "5. The Surety shall remain in full force as a continuing security, notwithstanding any intermediate settlement or fluctuations in the amounts outstanding from time to time by the Debtor in terms of the contract in place, and notwithstanding the death or legal disability of me, until the said ZFC limited has agreed in withstanding that it may on any ground in whole or part have ceased to be binding on me"

I need to emphasise that this same clause five (5) is also to be found in the surety document executed by the transferee of the same and subsequent document , Lazarus.

The point harped on by the plaintiff's counsel was that clause five of the surety document must be strictly interpreted to mean that until the liability was paid in full, the surety agreement remained in full force irrespective of the existence of other surety agreements subsequently entered into by other parties.

Mr *Mucheche* who appeared for the defendants provided an equally persuasive argument which was diametrically opposed to the position taken by Mr *Ncube* for the plaintiff. Mr *Mucheche* argued that the subsequent surety agreement signed by Lazarus amounted to novation of the original surety agreement. In doing so counsel was leaning on the views of Professor RH Christie[1] who stated as follows:

> "Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged, but novation is not to be regarded as a form of payment…….

[1] The Law of Contract in South Africa, 5th ed, 2006

> Compromise, or transactio, is the settlement by agreement of disputed obligations, whether contractual or otherwise. If any offer to settle in particular terrns is not accepted, the offeree cannot treat an inseparable part of the offer and sue on it. Even a criminal charge may be settled by the process known as plea bargaining and the resulting compromise will be enforceable. It is a form of novation differing from the ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of the compromise being the final settlement of the dispute or uncertainty."

To further reinforce his argument counsel also relied on a passage from Gibson's *South African Mercantile and Company Law*[2] where the learned author commented as follows:

> "Novation occurs where the partied agree on a new contract that replaces the old one completely. So the original contract is terminated and a new contract may, indeed bring third parties to the original contract into the new contract as parties (for example assignment, and delegation"[3]

Back home counsel sought to rely on the ratio lucidly laid down by Makarau JP (as she then was) in the case of *Taruva Taruva* v *Deven Enginering P/L and Others* where the learned judger authoritatively stated the legal position as follows:

> "Our Law of contract has for long recognised that a new agreement that settles a dispute operated as *res judicata* in respect of the old agreement and in itself becomes a valid and binding contract between the parties. Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind a compromise and raise defences to the original cause of action when sued for a compromise. (See *Road Accident Fund* v *Ngulube* 2008 (1) SA 432 (SCA), *Lieberman* v *Santam Ltd* 2000(4) SA321 (SCA) para 11-12, *Hamilton* v *Van Zyl* 1983 (4) SA 379 (E) *Majora* v *Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87 (SC).
> This in our law is referred to as a compromise. The courts in South Africa have been moved on to hold that a compromise need not necessarily however follow a disputed contractual claim. Any kind of doubtful right can be the subject of a compromise. A valid compromise may even be entered into to avoid a spurious claim. In establishing whether a claim has been compromised one is concerned simply with the principles of offer and acceptance. See *E Bob A Lula Manufacturing and Printing CC* v *Kingtex Marketing (Pvt) Ltd* 2008 (20 Sa 327) (SCA)"[4]

Now, having laid down the two competing legal positions adopted by counsel in this case I must now proceed to deal with the dispute before me.

It does seem to me that the conduct of the parties in this case as informed by Ex 5,6,7,8 and 9 unequivocally reinforced the point that the plaintiff compromised the deed of surety executed by Tapiwa Joel Furusa by acceeding to it being transferred to Lazarus Nyakudya as evidenced by the deed of suretyship signed by the latter with the approval of the plaintiff. This new deed is marked exh 3 and was executed on 26 September 2011.

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[2] South African Mercantile and Company Law, JJ R Gibson, 8th Edition 2008 p105
[3] South African Mercantile and Company Law, JJ R Gibson, 8th Edition 2008 p455
[4] HH 8/2009 at p 10

That the transfer of the debt was acknowledged by the plaintiff is confirmed by the letter of 29 September written by the plaintiff to its legal practitioners, Messrs Gill, Godlonton and Gerrans, which letter reads as follows:

> "Dear Sirs
> **Re: HANDED OVER DEBTOR: FARM CROP ENTERPRISES RESPONSE**
> Please find attached the response from the above mentioned debtor. They have acknowledged the debt and written a letter to transfer the surety from Tapiwa Joel Furusa, to one, Lazarus Nyakudya.
> May you proceed with the recovery of the debt. We hope the information available will aid you in this case.
>
> Yours faithfully
> J. Sarieri
> **TREASURY ACCOUNTANT**"

It is further common cause that when the new debtor, Lazarus Nyakudya made proposals to settle the debt to Messrs Gill, Godlonton and Gerrans, he made certain undertakings through exh 8 which proposals were followed by a direct first payment of $4 000.00. It is significant that the receipt from the plaintiff's legal practitioners bore the new debtor's particulars, that is L Nyakudya representing the first defendant Farmcrop. See exh 8. This payment of $4 000 was followed by another letter to plaintiff's counsel (exh 9) where the new debtor made further proposals to settle the debt.

It is clear to me that all these developments in this case, looked at in the light of the clear evidence of the second defendant's testimony supported by the evidence of the plaintiff's point person Gondai Chitauro demonstrate beyond doubt that by accepting a second deed of surety from Lazarus Nyakudya on 26 September 2011 the plaintiff had exonerated the second defendant of any form of liability. Through novation the plaintiff pushed the second defendant outside its reach. The second defendant must therefore be believed when he argues that the plaintiff is targeting the wrong person or debtor.

The correct debtor must be Lazarus Nyakudya. The plaintiff clearly compromised its entitlement to proceed against the second defendant when it entered into a new deed of surety with Lazarus Nyakudya and it is to Lazarus that it must look to for payment.

It will be noted that during the recording of the evidence of the second defendant, the defence produced exh 5, which letter the second defendant came into possession during the various exchanges that he had with the plaintiff. Mr *Ncube* for the plaintiff strenuously objected to the production of this letter arguing that it was inadmissible in terms of s 8 (6) of the Civil Evidence Act [*Chapter 8:01*], a position which was vehemently opposed by Mr *Mucheche* for the second defendant.

It is understandable why Mr *Ncube* was uncomfortable with the production of this letter which I marked exh 5. It was clear this exhibit was going to do a lot of damage to the plaintiff's case. The strong view that I took was that this letter ought to be admissible as it was relevant to the issue before the court and that by allowing the second defendant to have that letter the plaintiff had waived its privilege to it.

In the final analysis, the plaintiff's claim is dismissed with costs.

Gii, Godlonton & Gerrans, plaintiff's legal practitioners
Matsikidze & Mucheche, second defendant's legal practitioners