CBZ BANK LTD
versus
DAVID JOEL LASKER
and
RUSSEL EDWARD SMITH

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 4 February and 17 June 2015

Civil Trial

T. Magwaliba, for the plaintiff
E.W.W. Morris, for the defendant

MATANDA-MOYO J: At the date of trial the parties agreed that the matter proceeded by way of special case as it became clear there were no disputes of facts. The plaintiff issued summons against the defendants, jointly and severally, for payment of the sum of USD $2 752 012.54 together with interest on the amount compounded monthly at the rate of 20% per annum from 1 November 2011 to date of full payment with the second defendant's liability being limited to $500 000. The plaintiff also claimed collection commission and costs of suit on a legal-practitioner client scale.

The agreed facts by the parties are as follows:

Archer Clothing Manufacturers (Pvt) Ltd became indebted to the plaintiff in terms of an agreement wherein the plaintiff provided an overdraft facility. The agreement between the parties was signed on 23 December 2010 and such agreement was produced before the court. In terms of clause 9 of that agreement the directors of Archer Clothing Manufacturers were required to provide guarantees as sureties for the liability of the company to the plaintiff. The two defendants herein are the directors of Archer Clothing.

Archer Clothing was placed under judicial management and is currently under provisional liquidation after failing to meet its financial obligations to pay debts to various creditors. The first and second defendant executed a joint suretyship of $500 000.00 in favour of the plaintiff on 16 January 2009. On 9 April 2010 the first defendant executed a suretyship in favour of the plaintiff where he undertook to be liable for the sum of $2 500 000-00.

As at 2 February 2015 Archer Clothing owed the plaintiff the sum of $2 752 012.54. An *in duplum* schedule was also provided showing the various balances.

The defendants denied liability on the following grounds.

1. That the deed of suretyship signed by the first defendant on 9 April 2010 was intended by all parties to cancel the deed of suretyship signed by the second defendant on 16 January 2009.
2. That the defendants disputed the fact that Archer Clothing owed the amount claimed by the plaintiff. In the result the defendant denied owing the plaintiff the amounts claimed.
3. That they settled all liabilities to the plaintiff arising out of monies owed to the plaintiff by Archer Clothing and
4. That as from 9 April 2010, all liabilities that might have arisen out of the indebtedness of Archer Clothing to the plaintiff was terminated by agreement between the parties.

The issues referred for determination by this court are as follows:

(a) Whether or not the guarantee signed by the first and second defendants on 16 January 2010 was superseded by the guarantee signed by the first defendant on 9 April 2009.

(b) How much, if anything is owed by Archer Clothing Manufacturers (Pvt) Ltd to the plaintiff.

(c) Whether or not the first defendant is indebted to the plaintiff in any sum and if so the extend of such indebtedness and

(d) Whether or not the first and second defendants have settled all their liabilities to the plaintiff arising from money owed by the Principal debtor.

Mr *Morris* argued that the first defendant on 9 April 2009 signed a deed of suretyship that covered the full indebtedness of the principal debtor to the plaintiff. That in itself, argued counsel, shows an intention to release the second defendant. He argued that the intention is very clear and should the court find that there is an ambiguity then such ambiguity should be resolved in favour of the second defendant. Counsel for the defendants urged this court to adopt the *contra profens* rule. I understand the rule to apply to contractual interpretation which provides that where an agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording. The reasoning behind this rule is to encourage drafters of agreements to be clear and explicit in

their drafting. This rule is mostly used in standard contracts, the so called "take it or leave it contracts".

Mr *Magwaliba* for the plaintiff disagreed with the above contention. It was his argument that there was nothing in the second suretyship signed by the first defendant which showed an intention to release the second defendant. He argued that the court must simply interpret the deed of suretyship in coming to a decision. He referred me to the case of *PTC* v *Lamb* 2002(1) ZLR 54(H) where Smith J followed the reasoning, in *Bulsarva* v *Jordan and Co Ltd (Conshu Ltd)* 1996(1) SA 805A where Jourbert JA @ 809 D said:

> "Counsel were *ad idem*, in my view correctly that this question has to be decided exclusively with reference to the interpretation of the deed of suretyship".

Looking at the initial deed of suretyship it is clear that the first and second defendants bound themselves jointly as sureties and co-principal debtors to the tune of $500 000.00. The amount recoverable from both of them was not to exceed $500 000.00. This meant they were individually or mutually responsible to the plaintiff for the amount. The plaintiff could recover the entire judgment from either of the two. On a subsequent date on 9 April 2010 the first defendant signed another surety document where he assumed liability to $2 500 000.00. Although there is no specific mention of the first suretyship it is clear from the pleadings that the first defendant increased his extent of liability. The question is whether such actions by the first defendant created a new suretyship agreement which excluded the second defendant.

The plaintiff argued that the second deed was executed by the first defendant in his personal capacity. The first defendant in that deed made no reference to the second defendant. The plaintiff argued that the first defendant only undertook his liability for a higher amount without reference to the second defendant. The plaintiff argued that the second defendant failed to prove that the deed of suretyship terminated the earlier deed. Alternatively he also failed to show that he obtained the consent of the plaintiff to be released from liability or to cancel the deed of suretyship. See *HNR Properties CC* v *Standard Bank of SA Limited* 2004(4) SA 471 (SCA).

I agree with defence counsel that in the present scenario the court adopts the *contra prefentum* rule. It is the first defendant's case that he signed a new surety document which did away with the first, thus releasing the second defendant from such suretyship. Coupled with the fact that the first defendant signed for the whole debt, his version is the more probable one. The mere fact that the subsequent surety document makes no mention of the previous one, is simply because the plaintiff opted to have the first defendant sign a standard

surety document. The courts should frown upon such practice by the plaintiff of failing to draft new documents and preferring to use standard documents.

Where one of two sureties to a contract assented to a change which altered his liability to his prejudice, it has been held that the other surety was released and the former bound for the whole liability see *Mendy* v *Stevens* 61 Fed 77. The first defendant herein bound himself as surety for the whole debt thus releasing the second defendant.

I however do not find any basis for the first defendant escaping liability. Even Counsel for the first defendant rightly found no meaningful submissions to make.

The defendants have failed to show that they have settled the debt owing. That onus was on them and they failed to discharge such onus.

The defendants argued that the principal debtor had entered into a scheme of compromise with its creditors. Such scheme would release the defendants herein. This argument does not find favour with the court. The defendants in signing as sureties for the loans were actually saying that, should the principal debtor fail to settle the amount, due to any reasons they would be obligated to do so up to the amounts secured. This is one such scenario. That defence in my view holds no water.

Accordingly I order as follows:

1. That first defendant be and is hereby ordered to pay the sum of $2 752 012.54 plus default interest compounded monthly at the rate of 20% per annum calculated from the 1st November 2011 to the date of payment in full.
2. That first defendant pays collection commission calculated in terms of the Law Society of Zimbabwe tariff and costs on a legal practitioner-client scale.
3. That the claim as against the second defendant is dismissed.

Mawere & Sibanda, plaintiff's legal practitioners
Atherstone & Cook, defendants' legal practitioners