

KHM SOCIETE ANONYME
versus
G MOBILE (PVT) LTD
and
MUNYARADZI GWATIDZO
and
CHAMUNORWA SHUMBA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 September 2015 and 7 October 2015

Civil Trial

T Magwaliba, for the plaintiff
First and Second defendants in default
S Hashiti, for the 3rd defendant

MATHONSI J: This is a legal battle between the plaintiff, a company incorporated in terms of the laws of the British Virgin Islands, and the third defendant who is sued as surety and co-principal debtor he having signed a deed of suretyship on 28 July 2010 interposing himself as such for the due and punctual payment of all amounts due by the first defendant in terms of a loan facility availed to the first defendant by the plaintiff. The first and second defendants have long capitulated by signing a deed of settlement on 31 March 2011 as a result of which a judgment was entered against them in favour of the plaintiff on 21 October 2011 in the sum of \$214 793-82 plus interest of 5 per cent per annum and costs of suit.

The plaintiff has pleaded that the first defendant borrowed from it the sum of \$260 000-00 on or about 28 July 2010 on certain terms and conditions contained in a loan agreement signed on behalf of the first defendant at Harare on 28 July 2010 and on behalf of the plaintiff at Johannesburg South Africa on 29 July 2010. Further, that the second and third defendants bound themselves as sureties and co-principal debtors aforesaid by virtue of deeds of suretyship signed on 28 July 2010.

In terms of clause 3 of the deed of suretyship the third defendant renounced the benefits of excussion and division, *non causa debiti*, *non numeratae pecuniae*, no value received, *errore calculi*, revision of accounts and other exceptions. In terms of clause 4 he

agreed that the plaintiff was entitled *inter alia*, to compound or compromise or make such other arrangements with the first and second defendants as it may deem fit. Clause 6 then provides:

“I declare that all admissions and acknowledgments of indebtedness by G-Mobile (Private) Limited shall be binding on me and that in the event that the liquidation, insolvency, judicial management or assignment of G-Mobile (Private) Limited or any other co-surety or co-principal debtor, the Lender shall not be compelled to prove any claim against the estate thereof, and that no dividends or payments which the Lender may receive from such estate shall prejudice its rights to recover from me to the full extent provided in this Deed any amount which after the receipt of such dividends or payments may remain owing to the Lender under the Loan Facility. I also declare that I shall not lodge any claim against the estate of G-Mobile (Private) Limited in the event of its insolvency in the event that the lender decides to lodge a claim against such estate.”

Clause 7 provides that the provisions of the Deed shall remain in full force and effect until all current and future obligations by the first defendant to the plaintiff have been fulfilled and that the third defendant can only be released earlier by a written release signed by the plaintiff.

The plaintiff averred that the first defendant defaulted on its obligations in terms of the loan agreement as a result of which all the defendants were given notice to pay the full amount owing together with interest and penalty interest of \$42 018,96. Although the first defendant paid some money towards the debt in response to the notice, the capital sum of \$260 000-00 and interest of \$43 849-96 remained outstanding at the time the summons was issued which sums the plaintiff claimed.

In his plea the third defendant challenged the interest rate charged. While admitting that he executed the deed of suretyship, the third defendant averred that he had done so in his capacity as a shareholder and director of the first defendant. Having ceased to be such, one Masimba Ndoro who took over his position also took over all his liabilities under the deed of suretyship. Further, the deed of settlement entered into between the plaintiff on the one hand and the first and second defendants on the other, was a compromise arrangement whose effect was to release the third defendant from his obligations under the deed of suretyship.

The third defendant added that he is not only entitled to be indemnified by the first and second defendants and Masimba Ndoro from liability but also that the debt was secured by a financial guarantee from Expert Credit Guarantee Corporation of Zimbabwe (Pvt) Ltd in terms of which the plaintiff was required to proceed first against that guarantor before it could sue the third defendant. As the plaintiff has not sued that entity first, the claim against the third defendant is premature and should fail for that reason. For good measure, the third

defendant alleged that the plaintiff was using the name of Micropal, a registered money lender in Zimbabwe, in order to circumvent the laws of Zimbabwe governing microfinance institutions and put the plaintiff to the proof that it is entitled to relief in terms of the laws of the British Virgin Islands.

The issues for determination at the trial were initially agreed as:

1. Whether the third defendant is liable to the plaintiff in respect of the deed of suretyship he signed on 28 July 2010.
2. Whether the plaintiff is entitled to the relief sought in terms of the laws of the British Virgin Islands or Mauritius.
3. Whether the plaintiff is using the name of Micropal to circumvent the laws of Zimbabwe governing microfinance institutions.
4. The amount, if any, payable to the plaintiff.

The parties have agreed that it is not necessary to lead evidence at all and have submitted a statement of agreed facts. They would therefore like the matter to be decided on the agreed facts which are:

- “1. The plaintiff, KHM Societe Anonyme, a company registered in Mauritius, issued a summons commencing action accompanied with a declaration claiming the payment against the three defendants jointly and severally the one paying the others to be absolved of the sum of US\$303 849-96 together with penalty interest at the rate of 0.5% per day on the sum of US\$260 000-00 with effect from 1 December 2010 to the date of full payment. Cost of suit were sought on an attorney and client scale.
2. The Plaintiff’s declaration which is already part of the record set out the full cause of action. The facts in the summons are common cause. In summary, the Plaintiff’s claim was based upon a loan agreement for the sum of US\$260 000-00 entered into between it and the 1st Defendant on 28 July 2010. This loan agreement is document No. 1 on the Plaintiff’s bundle of documents submitted before the Honourable court.
3. The 2nd and 3rd Defendants were sued in their capacity as sureties and co-principal debtors with the 1st Defendant. A copy of the deed of suretyship signed by the 3rd Defendant is at pages 37 to 41, item 6 of the Plaintiff’s bundle of documents. Clause 3 renounced the benefits of all legal exceptions including the benefit of excussion. Clause 4 also provided that the Plaintiff could compromise the debt or make such other arrangements with the principal debtor as it could deem fit.
4. At the time that the 3rd Defendant signed the deed of suretyship, he was a shareholder and director in the 1st Defendant. Subsequent thereto, he resigned from the directorship and relinquished shareholding in the said company. In his place, one Masimba Ndoro was appointed.
5. In paragraph 7 of his plea, the 3rd Defendant indicated that he would seek indemnity against the 1st and 2nd Defendants and Masimba Ndoro and would institute proceedings in terms of Rule 93 of the High Court Rules. He did not however do so.

6. As will be apparent from items 4 and 5 of the Plaintiff's bundle of documents, pages 34 to 36, the 1st and 2nd Defendants entered into a deed of settlement with the Plaintiff in terms of which they accepted liability as at 31 March 2011 in the sum of US\$288 849-96 being the balance outstanding as at that date together with interest of US\$33 948-86. The amount on certain terms set out on page 34 of the Plaintiff's bundle of documents. It was specifically provided that in the event of default by the 1st and 2nd Defendants, the Plaintiff would be entitled to apply for judgment in respect of any balance outstanding without further notice to the said Defendants.
7. Consequent upon the default of the 1st and 2nd Defendants, on 21 October 2011, judgment was entered by this Honourable Court against the 1st and 2nd Defendants pursuant to an application by the Plaintiff. By then, the balance outstanding in respect of which judgment was entered had been reduced to US\$241 793-82. Interest was granted at the rate of 5% per annum together with costs of suit.
8. On the 3rd of July 2015, the Plaintiff issued a certificate of balance which is item number 7, page 42 on the Plaintiff's bundle of documents. In terms of the said certificate, the balance outstanding and due by the principal debtor, the 1st Defendant as at the 3rd of July 2015 was the sum of US\$236 315-00 together with interest at the rate of 5% per annum from the 3rd of July 2015 to the date of full payment.
9. From the above agreed facts, the sole question for determination is whether the 3rd Defendant is liable in terms of the deed of suretyship. The parties therefore place this issue before the Honourable Court for determination."

Mr *Hashiti* for the third defendant submitted that the plaintiff does not have a cause of action against the third defendant because the latter signed the deed of suretyship in his capacity as a director of the first defendant. He has since retired from that position as a result of which the suretyship has expired. He submitted further that upon retiring, the third defendant had made a proposal to the plaintiff that a person who was taking over directorship from him be substituted as surety in his place and stead. In fact a notice to that effect was given to the plaintiff, which was asked in correspondence sent by the third defendant's legal practitioners to sign a deed of cancellation. The plaintiff did not respond to such correspondence and therefore by its silence, it acquiesced to the release of the third defendant as surety.

Reliance was then placed on authorities dealing with the doctrine of quasi mutual assent. In my view reliance on that doctrine is misplaced because, as stated by the learned author R.H. Christie, *Business Law in Zimbabwe*, 2nded, Juta & Co Ltd at pp 31-2:

"This doctrine is simply a recognition of the fact that a party to contractual negotiations is no better equipped than the court to plumb the mind of the other party, so if the other party's words or actions gave him reasonably to understand that their minds had met, then there was a contract even if, in truth, their minds did not meet. The doctrine stems from Blackburn J's words (in *Smith v Hughes* (1871) LR 6 QB 597 607 restating the rule in *Freeman v Cooke* (1848) 2 Ex 654 663) adopted in Zimbabwean law in *Diamond v Kernick* 1947 (3) SA 69 (A) 83; *Levy* above at 562A; (*Levy v Banker Holdings (Pvt) Ltd* 1956

R&N 98 (FS); *Springvale* above at 148, 9, 469-70 (*Springvale Ltd v Edwards* 1968 (2) RLR 141 (A) 148-9' 1969 (1) SA 464 469- 70):

'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'."

I agree with Mr *Magwaliba* for the plaintiff that quasi mutual assent would not set in simply because the parties did not enter into a new agreement. A creditor holding on to the security of a suretyship does not lose that security merely because the surety, in a desperate effort to be released, sends a proposal, complete with a deed of cancellation of the suretyship demanding his release and the substitution of a third party not approved by the creditor, which the creditor does not respond to. It is a celebrated principle of our law that existing rights cannot be waived by implication but by express terms.

It is important to note that the liability of the third defendant as surety and co-principal debtor was premised, not on his position as director of the first defendant, but upon the deed of suretyship that he signed. It is that written document which became the true memorial of the relationship between the parties and not some other issues, imagined or real not recorded therein.

Mr *Hashiti* then took the fight to the realm of the law relating to compromises. He submitted that the third defendant was released as surety the moment the plaintiff entered into a compromise with the first and second defendants, that is when a deed of settlement was signed between them on 31 March 2011 which made no reference to the third defendant and led to a court order being entered against the first and second defendants on 21 October 2011. By entering into a new agreement with the other defendants, the plaintiff automatically released the surety from his liabilities in terms of the deed of suretyship. I do not agree with that proposition.

A suretyship is a separate agreement between the surety and the creditor. It is a stand-alone agreement binding the surety to the creditor: *Trinity Engineering (Pvt) Ltd v Karimazondo & Ors* HH 672/15. That point was made emphatically by the learned authors *C.F. Forstyth & J T Pretorious* in *Caney's The Law of Suretyship*, 6thed, Juta at p 30 where it is stated:

"Although there are three parties involved, there is not necessarily a tripartite agreement or contract; indeed, in practice there seldom is. There is the transaction, as a result of which the principal debtor is bound to the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus the principal debtor is bound to

the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus the principal debtor is not necessarily a party to the contract between the surety and the creditor, but nonetheless, there comes into existence the obligation of the principal debtor to reimburse the surety what he pays to the creditor..... The surety's obligation arise from the making of the contract of suretyship, from then he becomes bound to the creditor and from then he becomes a conditional creditor to the principal debtor in relation to his right of recourse against the latter." (the underlining is mine).

The third defendant relies on the deed of settlement concluded by the plaintiff and the co-principal debtor in order to hedge from liability on the basis that it constitutes a compromise which released him from his obligations under the deed of suretyship and yet the authorities relied upon by Mr *Hashiti* relate to situations where the creditor releases the principal debtor completely. The issue is succinctly addressed by C.F. Forstyth and JT Pretorius, *ibid*, at p 208, where the learned authors state:

"Although the old authorities are not entirely harmonious on the question of the effect of an extension of time, the law was laid down by the Appellate Division in *Estate Liebenberg v Standard Bank of South Africa Ltd* (1927 AD 502 at 520ff). The central rule is that where the creditor gives the debtor more time in which to pay before the debt falls due, and time is of the essence, that amounts to a material alteration and releases the surety. Unlike in English Law, should the grant be made after the debtor is *in mora*, the surety is not released. This is because the surety can avoid any prejudice in such circumstances by paying the debt when it falls due and exercising his right of recourse against the debtor (the underlining is mine).

In this matter, when the letter of demand was written to the defendants on 11 October 2010, "no single payment (had) been made" to the creditor meaning that the principal debtor was already *in mora* by then. The summons was issued on 14 December 2010 and the deed of settlement relied upon by the third defendant to seek release from the suretyship was only signed on 31 March 2011.

What this means therefore is that the compromise was made after the debt had fallen due and summons issued for the recovery of the whole amount. The debtor was already *in mora* and therefore the compromise did not release the surety who remained firmly bound by the agreement between himself and the creditor.

Even if I were wrong in that conclusion, I would still not countenance the release of the third defendant for another reason. In terms of the provisions of the contract between the parties I have cited above, the creditor was at liberty to compromise or compound or make any arrangements with the principal debtor without prejudice to its rights contained in the deed of suretyship. That is what the third defendant signed to and it binds the parties. He cannot seek now to rely on legal niceties which he contracted out of.

I can do no better than recite the remarks of JESSEL, M.R in *Printing Registering Co v Sampson* 19 Fq 462 at 465 that:

“If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract”.

The third defendant freely and voluntarily tied himself to a suretyship agreement, in terms of which he bound himself to cover the debt of the first defendant. He agreed that even if the plaintiff compromised with the first defendant that would not prejudice the latter’s rights under the suretyship. Whatever the circumstances the court cannot lightly interfere with the parties’ freedom of contract. By the same token, the court will not make another contract for the parties but will hold sacred that which they crafted for themselves expressing their free will.

I conclude therefore, in respect of the “sole question” for determination placed before me by the parties in their statement of agreed facts that the third defendant is indeed liable to the plaintiff in respect of the deed of suretyship that he signed on 28 July 2010.

Looking at all the instruments of debt and the circumstances of the matter, the third defendant should have capitulated a long time ago and consented to judgment like the other two defendants. There was absolutely no merit in his defence and in pursuing it, he has not only managed to delay the conclusion of the matter by almost 5 years, but has also impoverished the plaintiff unnecessarily by way of legal costs. He must therefore bear the costs on an admonitory scale.

In the result, it is ordered that:

1. Judgment be and is hereby entered against the third defendant, whose liability is joint and several with that of the 1st and 2nd defendants, judgment having already been entered against them on 21 October 2011, in the sum of \$236 315-00 together with interest on the capital sum of \$192 026-00 at the rate of 5% per annum from 22 November 2013 to date of payment.
2. Costs of suit on the scale of legal practitioner and client.

Messers Wintertons, plaintiff’s legal practitioners
Messrs G.N. Mlotshwa & Co, defendants’ legal practitioners