TOTAL ZIMBABWE (PVT) LTD

versus

RONALD BAKARI

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 2 November 2015, 8 & 18 February 2016, & 30 March 2016

**TRIAL**

*T Pasirayi*, for the plaintiff

*T Zhuwarara*, for the defendant

DUBE J: This is a claim for monies outstanding from a debt to which the defendant allegedly stood surety to.

The circumstances arising in this claim are mostly common cause. The plaintiff is Total Zimbabwe (Pvt) Ltd, a company dealing in petroleum products. The plaintiff entered into a marketing licensing agreement with SM Tyres (Pvt) Ltd in terms of which the company was permitted to enter, operate and utilise the plaintiff’s service station at Nyamapanda Border Post. The plaintiff was to provide petroleum based products and other products commercialised by it for sale at the service station. S.M. Tyres was granted a credit facility for the supply of the produce by the plaintiff. It failed to pay for the products supplied and acknowledged the arrears resulting in the plaintiff cancelling the Marketing Licence Agreement entered into, suing it and obtaining judgment in the sum of $37 497,42.

The plaintiff avers that the defendant stood as surety and co-principal debtor to the marketing licence agreement between the plaintiff and SM Tyres and that the defendant is liable jointly and severally with SM Tyres for the payment of the arrears owed to the plaintiff. The plaintiff has issued summons against the defendant on the premise that he is a surety and co-principal debtor to the agreement between the plaintiff and S.M. Tyres for the outstanding amount.

The defendant denies guaranteeing the liability of S M Tyres to the plaintiff. He claims not to know SM Tyres and claims that he signed a suretyship document which was blank on the spaces meant for dates and witnesses, at the instance of a friend who wanted to use it for his company called Limpopo Investments (Pvt) Ltd. The defendant maintains that there is no cause of action against him. In his plea he claimed that the claim has prescribed in that the marketing licence agreement which was to run from 1 February 2007 for a period of three years expired on 31 July 2010 and that any claim arising therefrom against the defendant has prescribed.

The following issues were referred to trial,

1) Whether or not the claim is prescribed.

2) Whether or not the deed of suretyship signed by the defendant in favour of plaintiff is valid.

3) If the answer to 1.2 is in the affirmative, whether or not the defendant is liable to the plaintiff for the sum of $37 497, 42.

The trial opened with the plaintiff calling its General Trade Manager, Ester Verenga. She was the plaintiff’s sole witness. She testified that when the transaction in issue was entered into she was the retail manager for the plaintiff. The defendant together with Shadreck Mawire entered into a deed of suretyship and a guarantee in favour of the plaintiff on 28 December 2006. The plaintiff also entered into a marketing licence agreement with S.M. Tyres, trading as Nyamapanda Service. The arrears were computed at $37 49742. S.M. Tyres acknowledged the arrears. In May 2011 the agreement was suspended and the dealership was terminated in July 2011 and the company vacated the premises in August 2011. The witness acknowledged under examination that she is not the one who prepared the deed of suretyship as a template is used. She was not present when it was signed and she did not try to find out who the witnesses were and who was present when it was signed. The former retail manager, Mr Chiunda is the one who put these papers together. She is aware that the former manager claims that the surety deed and guarantee is for Limpopo Investments. She was unaware of the company called Limpopo Investments or of any dealings it had with the plaintiff. She was aware that the defendant claims that he signed the deed in favour of Limpopo Investments and not S.M. Tyres. She insisted that because it is endorsed on the deed that it is for Nyamapanda Service Station and Mr Mawire who represented the S.M. Tyres also signed it, it was signed in favour of SM Tyres. She sees a link between the deed of surety and the marketing licence agreement. She acknowledged under cross examination that many people have approached the plaintiff to try to use Nyamapanda Service Station. She accepted that any person who intends to use Nyamapanda Service Station has to have a deed of surety attached to the operator’s agreement. She insisted that the deed of surety is only signed when you sign the agreement. The witness did not establish if the defendant is a director of S.M. Tyres. The plaintiff sued S.M. Tyres and obtained judgement against it. The witness gave her evidence well. She maintained hers story under cross examination. Although this is a single witness case, the evidence of the witness was clear, truthful and satisfactory. Her version was corroborated by the contents of the surety document and other documents produced. She was a credible witness and I believed her.

At the close of the plaintiff’s case, the defendant applied for absolution from the instance. The defendant submitted as follows. The plaintiff’s case fell apart during cross examination .The evidence of the sole witness to the plaintiff’s case revealed that the surety document was signed for Limpopo Investments and not SM Tyres. The defendant contended that the witness did not prepare the surety agreement on which the plaintiff’s case is based and she did not know how both the Marketing License Agreement and Surety Agreement found themselves together. Further that the former retail manager responsible for the signing of the surety agreement states that the surety agreement was signed in favour of an entity known as Limpopo Investments (Pvt) Ltd and not for the debt owed to the plaintiff by SM Tyres as alleged. The defendant did not raise the issue of prescription as part of this application. The plaintiff opposed the application and I will not for the purposes of this judgment summarise its argument.

The test to be employed in deciding an application for absolution from the instance is well settled and was laid down in *United Air Charters Ltd* v *Jarman* 1994 ( 2) ZLR 341 (SC). A plaintiff will withstand such an application if at the close of his case , there is evidence which a court, directing its mind to such evidence , could or might find for him. See also *Katerere* v *Standard Chartered Bank Zimbabwe Limited* HB 51/08, *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A); *Lourenzo* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 for the same approach.

I dismissed the application after considering submissions from both parties. The issue of onus exercised my mind. The law is that the onus of proving one’s case in a matter involving a dispute over a surety agreement is on the one who seeks to rely on the suretyship deed. The position changes where a surety challenges liability for a debt based on a surety agreement he signed. In *Langeveldt* v *Union Finance* (4) SA 572 (W), the court discussed the subject of a surety seeking to be released from liability in terms of his suretyship agreement and held that the surety bears the onus of convincing the court that he did not intend to enter into the suretyship agreement in issue. That is the correct legal position. Where a surety seeks to avoid liability in terms of a surety agreement and challenges a surety agreement, the onus switches to him to show why he should not be bound by the surety agreement. He bears the onus of convincing the court that it was not his intention to enter into the agreement in issue. Similarly, where a surety challenges a surety agreement and he makes an application for absolution from the instance at the close of the plaintiff’s case, his application cannot from a practical standpoint succeed because of the reverse onus reposed on him. A defendant who applies for absolution from the instance at the close of the plaintiff’s has not had an opportunity to present his own case and defence at this stage of proceedings. Whether or not he has managed to discharge the onus on him can only be resolved after he has led his own evidence and canvassed fully his defence. His side of the story has to be heard first before a decision to dismiss the plaintiff’s case is made, this, because of the onus resting on the surety.

The defendant’s challenge to liability is that the surety document he signed which the plaintiff seeks to rely on was done for Limpopo Investments and not SM Tyres. The onus shifted onto him the moment he raised this defence, to show that he did not sign the surety document for SM Tyres. It was mischievous of the defendant to apply for absolution from the instance at the close of the plaintiff’s case.

I dismissed the application and allowed the matter to proceed to the defence case. The defendant testified in his own case. His evidence is as follows. He signed the surety agreement after he had been requested by Whitecliff Chiunda, a Total marketing executive to do so. He was told by Mr Chiunda that he wanted to use the surety document to negotiate with his employers so that he could operate Nyamapanda Service Station. He signed the deed of surety for Mr Chiunda’s company Limpopo Investments. He endorsed all the names on the surety document and included Mr Mawire’s name because two sureties were required. He did not know him Mr Mawire. He was not present when Mr Mawire signed the document. He also endorsed his own contact numbers. The surety document was not dated when he signed it. The date was added without his consent. He had not had sight of the operating license when he signed the surety. He endorsed the words Nyamapanda Service Station on the deed document because that is the place where Limpopo Investments was supposed to operate from. He failed to endorse the words Limpopo Investments on the document through an oversight and thought that the endorsement of Nyamapanda Service Station was sufficient. Under cross examination, the witness denied that the fact that he endorsed the words Nyamapanda Service Station on the deed meant that the deed of surety was for SM Tyres. He maintained that he did so because that is the place Limpopo Investments was supposed to operate from. He does not know S M Tyres and did not enter into any surety arrangement for SM Tyres. He was surprised that the agreement is for SM Tyres. When he contacted Mr Chiunda about it, he was told that there must be a mix-up. He was not calling Mr Chiunda as his witness as he gave him an affidavit outlining what happened. It is not necessary for him to testify because everything is sorted with the plaintiff’s witness who confirmed that Mr Chiunda told her that the deed of surety was for Limpopo Investments. The witness did not impress as a truthful witness.

The defendant was required to file his closing submissions of argument by 28 February 2016 and he failed to comply with that directive resulting in the court preparing judgment without the benefit of his submissions. The question of prescription was not argued and no determination will be made in that respect.

It is common cause that the defendant signed and made all endorsements on the deed of suretyship except for the date and the portion where Mr Mawire signed. There is a marketing licence agreement signed between SM Tyres and Mr Mawire of SM Tyres trading as Nyamapanda Service Station. The issue for determination is for whom the deed of surety was signed.

In *Fourlamel (Pty) Ltd* v *Maddison* 1997 (1) SA 333 (A) the court held that the following factors ought to be laid out in writing in order to constitute a valid and binding deed of suretyship.

a) Identity of the creditor

b) Identity of the surety

c) Identity of the principal debtor

d) The rights and obligations of the parties.

See also *Spairstein* v *Anglo African Shipping Co SA Ltd 1978 4 SA, Langeveld* v *Union Finance Holdings (Pty) Ltd 19 SA for* the same proposition.

The onus is on a plaintiff to prove that all the formal requirements for the surety’s validity appear on the document. A surety agreement where the principal debtor and creditor are not ascertainable from the papers which are subject of the surety agreement does not comply with the requirements of a deed of suretyship. The deed of suretyship filed in support of this claim reveals on the face of it that it was signed for Nyamapanda Service Station, being the principal debtor. Accompanying this deed is a marketing licence agreement for SM Tyres trading as Nyamapanda Service Station signed by a representative of SM Tyres. It is clear from the marketing licence agreement that SM Tyres traded as Nyamapanda Service Station. The fact that both the deed and the Marketing Licence agreement bear the same date and were signed by Mr Mawire supports the plaintiff’s assertion that the documents relate to SM Tyres and are for the same transaction. The documents were signed the same day signifying that they were prepared for the same transaction. There is an unmistakable link between S M Tyres and Nyamapanda Service Station. The identity of the principal debtor is clear. The identity of the creditor is also clearly visible on the deed. The deed shows that the defendant and Mr Mawire bound themselves as sureties and co-principal debtors with Nyamapanda Service Station to the plaintiff. The rights and obligations of the parties are fully and clearly laid out. All the essentials of a valid contract of suretyship are present in this deed. A valid contract of suretyship was entered into by the parties to the surety agreement.

The defendant is the one who endorsed most of the details on the document. The words Nyamapanda Service Station were endorsed by the defendant. He also endorsed Mr Mawire’s name as co-surety. He endorsed his own name together with his telephone details and signed the document. The defendant seemed to be in control of the situation and knew what he was doing when he signed the surety deed. The defendant testified that he appreciated the implications of the surety agreement .The defended is not illiterate. He is a former telecommunications specialist and holds a diploma in telecommunication.

Where a person has signed a document to enter into a transaction which he later challenges, he is required to explain to the court why he asserts that he did not intend to enter into the transaction. The defendant failed to explain under cross examination why he did not endorse the name of Limpopo Investments on the deed, choosing to say that this was through an oversight. He knew the implications of the document that he had drawn up and signed. It is incomprehensible how the defendant would endorse on the deed only the name of Nyamapanda Service Station .The defendant failed to explain why he did not endorse either the name of Mr Chiunda or Limpopo Investments on the surety document if he understood the surety agreement to relate to the two. Right under his name in paragraph 1(a) of the deed is stated that the surety binds himself jointly and severally with the operator for his due and punctual performance yet he did not find out who the operator was. The defendant claimed that he was shown a marketing licence agreement for Limpopo when he signed the surety document yet he was unable to produce any documentation related to Limpopo Investments that ties with the surety deed. It has not been shown that Limpopo Investments ever operated the service station or ever made any arrangements for the operation of the service station. The endorsement of Nyamapanda Service Station by the defendant shows clearly that it was meant to reflect for who the deed was being signed thus SM Tyres. An obvious link has been shown between the marketing licensing agreement and the surety deed. The plaintiff’s witness insisted that the deed of surety is only signed when you sign the marketing licence agreement as an operator. The word ‘’operator’’ is clearly used in reference to the licensee under the marketing license agreement. The only marketing licence agreement shown to have been signed with an operator which is supported by a surety deed is the one produced, involving SM Tyres and the plaintiff. He also never bothered to find out who his co-surety was. No link has been shown between Mr Mawire and Limpopo Investments. No reason has been advanced why Mr Mawire would act as a surety for Limpopo Investments. The defendant is bound by what he gave out and signed for.

A man, who signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There is a presumption that a person who authors and signs a document does so after he has acquainted himself with the contents thereof and that any person who enters into a contract has the intention to enter into it and be bound by the terms of the agreement. These principles sum up the *caveat subscriptor* rule. A surety who endorses all the essential details of a surety deed on the deed document cannot turn around and say that he did not understand the import of the deed. He is taken to have acquainted himself with the contents of the document and is bound by its contents. The defendant filled in the details of the surety deed, and signed it thereby accepting the import of the terms and conditions of the agreement he signed. The maxim *caveat subscriptor* is applicable to the circumstances of the signing of this document. The evidence led leads to one conclusion, that the defendant and Mr Mawire bound themselves as sureties and co –principal debtors for S M Tyres.

A litigant who challenges a surety deed on the premise that he signed it for a different entity or person can only discharge the onus resting upon him to show that he never intended to sign the document on behalf of the plaintiff and be bound by it by calling evidence to support that assertion. He is required to call direct and conclusive evidence in support of his assertion. He is required to do more than make a bare denial of the surety deed or simply make a challenge to the surety deed and leave it there. It was incumbent upon the defendant to call Mr Chiunda to show that the deed was done for Limpopo Investments and that he indeed did sign the deed for Limpopo Investments. The defendant failed to call Mr Chiunda to come and substantiate his version and hence the defendant has failed to discharge the onus on him to show that the deed of suretyship he signed was for Limpopo Investments. The probabilities favour the plaintiff’s version that the defendant bound himself as surety and co-principal debtor with Mr Mawire for SM Tyres. The defendant signed the agreement of surety, specifically accepting the import of its terms and conditions into the document he signed. The plaintiff is entitled to its claim. I accordingly make the following order,

Judgment is granted against the defendant for,

1. Payment in the sum of $37 497, 42

2. Interest at 5% per annum from January 2013 to date of payment in full.

3. Costs of suit.

*Gill Godlonton and Gerrans*, plaintiff’s legal practitioners

*M C Mukome*, defendant’s legal practitioners