FBC BANK LIMITED
versus
ELIAS HWENGA
and
MERCY HWENGA
and
KENNETH SCHOEFIELD
and
PRINCE NYEMBA
and
A P PHILLIP & COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 February, 30 March, 2016

Trial

T Mpofu, for the plaintiff
T Mugandiwa for the defendants

DUBE J: The facts of this matter are common cause. At the hearing of the matter, the parties agreed that their dispute does not depend for its resolution on the making of findings of fact. They agreed to proceed by way of stated case.

The plaintiff issued summons against the defendants claiming monies lent and advanced to UBM in respect of which the defendants acted as guarantors and co-principal debtors. On 26 August 2013, the plaintiff and United Builders Merchants (Pvt) Ltd (UBM) entered into a composite loan facility and guarantee agreement in terms of which the plaintiff granted a medium term loan facility of $937 000-00 together with a medium term Bank Guarantee Facility of $63 000-00 to provide UBM with working capital. Mortgage bonds were registered over properties belonging to the defendants to secure the facilities. The bank guarantee would expire on 31 December 2013 with the loan facility expiring on 31 December 2016 and all outstanding

amounts would become due and payable on 31 December 2013. The first to fifth defendants who were directors of UBM signed guarantees in favor of UBM.

Subsequent to the signing of the loan facility and guarantee facility, the plaintiff which was insolvent and struggled to service its creditors, made an application in terms of s 191 of the Companies Act [*Chapter 24:03*] for leave to convene a scheme of arrangement meeting. An order was granted on 27 November 2013 and a scheme meeting held on 16 December 2013. A scheme of arrangement between UBM, its members, and creditors was approved with the plaintiff as the secured creditor. An operational and turnaround plan was agreed to. It was agreed at the scheme meeting that the terms of the Secured Creditor's Scheme of arrangement were to be the terms contained in the facility letter dated 26 August 2013. The plaintiff would grant UBM a composite facility in the sum of $1 000 000-00. The banking facility was to expire on 31 December 2016. The terms of payment were extended from 31 December 2016 to 31 December 2019. The main features of the scheme of arrangement were a joint venture agreement between UBM and P and L Hardware (Pty) Ltd and the Zimbabwe Conglomerate through a vehicle called UBM P and L (Pvt) Ltd (The Joint Venture Company). The scheme of arrangement was essentially a restructuring and reorganization of UBM'S debts. UBM proceeded to draw down on the facility in the sum of $1000 000-00 and failed to pay back the amounts so drawn down. The plaintiff has applied for the setting aside of the scheme of arrangement. The plaintiff has also instituted proceedings against the defendants for the discharge of their obligations as guarantors and seeks payment of $1 141 260-36 jointly and severally against all the defendants.

The plaintiff accepts that the scheme of arrangement that was entered into by UBM, the plaintiff and others amounts to a compromise. The plaintiff however maintains that the debt has not novated. The plaintiff contends that the defendants are bound by the guarantees and are not entitled to be released from the obligation they entered into. It submitted that this matter stands to be resolved on the basis of the wording of the guarantees the defendants signed.

The defendants argued that the original agreement being the banking facilities agreement was extinguished and replaced by a new agreement, the scheme of arrangement which amounts to a compromise between UBM and its creditors. Further that the scheme of arrangement constitutes novation of the original agreement between the plaintiff and UMB and any breach which the plaintiff may have relied on in terms of the original agreement fell away. The

defendants submitted that they are not guarantors of any obligation and that their guarantees expired upon the conclusion of the scheme of arrangement to which they are not party to. The defendants contend further that their liability as guarantors can only be resuscitated if the proceedings for the vacation of the scheme of arrangement instituted by the plaintiff and currently pending are successfully prosecuted. The defendants take issue with the fact that the plaintiff has instituted proceedings against sureties without first seeking relief against the principal debtor and therefore that the amount owed is not yet due by them. The defendants contend that any dispute regarding what may be owed by UBM or the defendants stands to be decided in terms of the new agreement. The defendants have counterclaimed for the vacation of their guarantees and the setting aside of the mortgage bonds passed in favor of plaintiff. The dispute before me is whether any circumstance has occurred which absolves the defendants from the obligations they assumed in terms of the guarantees they signed. The following issues were referred to trial:

1. Whether or not the debt owed by UBM to the plaintiff is due and payable.
2. Whether or not the guarantees signed by the defendants in favor of the plaintiff were discharged by the sanctioning of the scheme of arrangement entered into between the plaintiff and UBM.
3. Whether or not the plaintiff is entitled to payment of the debt owed from the defendants

Schemes of arrangement are provided for under s191 of the Companies Act [*Chapter 24:03*]. Both parties accept that there was a compromise arrangement. A scheme of arrangement is a court approved compromise or arrangement. RH Christie in Business Law in Zimbabwe at pv108 defines a compromise as follows,

> "Compromise is the settlement by agreement of disputed obligations and is a form on novation, replacing the disputed obligations by the obligations created by the agreement of compromise."

A compromise arrangement comprises of an element of 'give' and 'take' and may result in a reorganization of the structure, operations and or financial obligations of a company. The effect of a compromise is dealt with in Amlers' Precedents of Pleadings, 7th ed at p 98, where the author states as follows,

> "In the absence of a reservation of the right to proceed on the original cause of action, the compromise agreement bars any proceedings based on the original cause. Not only may the original contract not be relied on but the parties are not entitled to go behind the compromise and

raise defenses to the original cause of action when they are sued on the compromise" See also *Mathle* v *Mathole* 1951 (1) SA 785(T)

The effect of a compromise is that it bars any proceedings based on the original cause unless there is an agreement to the contrary. UBM has not fully repaid the loan facility advanced to it under the original facility of 26 August 2013. The principal debtor has also not met the terms of the scheme of arrangement and is in default of the scheme of arrangement. The effect of the compromise arrangement is that the plaintiff lost the right to sue UBM under the original agreement. I did not understand the plaintiff to be relying on the original contract. The basis for this action is the failure to meet the terms of the scheme of arrangement. The original agreement had a requirement for security in the form of guarantees. The plaintiff relies on the guarantees given, which it contends constitute unlimited and continuing security and covers the scheme of arrangement. The court will later be considering the terms of the guarantees and deciding whether the guarantees cover the scheme and whether the guarantors have been discharged from liability.

It is pertinent to examine to what extent the terms of the original agreement were affected by the scheme of arrangement. The scheme comprises the terms and conditions in the facility letter dated 26 August 2013. The effect of the compromise, is that the banking facility was substituted with the scheme of arrangement. The terms of the facility letter were incorporated into the scheme terms. The terms of the agreement were carried forward. Under the scheme of arrangement, the security is reinstated and the terms of the facility letter do not alter the debt. The outcome of the scheme is that a joint venture agreement between UBM and two South African registered companies came into existence. The reorganization and the scheme of arrangement resulted in the continued existence of UBM albeit in a different form. The major changes made are with respect to the joint venture and the extension of time within which the obligation was to be met. The extension in this matter was given after the debt became due and payable when the principal debtor was already in default.

The plaintiff has applied to set aside the scheme of arrangement. The scheme of arrangement is extant and has legal implications. For as long as a scheme of arrangement has not been suspended, it can be acted upon. The application to set aside the scheme of arrangement has no relevance to the question of liability of the defendants. I am not persuaded by the defendants'

argument that the plaintiff cannot institute proceedings against UBM before the scheme of arrangement has been set aside or the merits of the application determined.

The court is being asked to consider what the effect of the compromise arrangement on the guarantees is. The submission by the defendants is that the original banking facility has novated. Novation involves the substitution of a new contract for a new one with the new one extinguishing the rights and obligations under the old contract. See, R H Christie *Business Law in Zimbabwe* p 107 and 108. See also *Milnor* v *Salisbury City Council* 1949 (1) SA 246. Caneys *Law of Suretyship*, 4 ed at p 178 defines novation as follows,

> "Novation (novatio) may be effected by agreement between the parties (*novatio voluntaria*) or by operation of law (*novatio necessaris*), but we are here primarily concerned with the former. Such novation discharges the surety. The reason for this is that the debtor's original obligation no longer exists and with it has gone the obligation of the surety unless, of course, he has agreed otherwise .The above is well established and uncontroversial law."

Gibson's Mercantile and *Company Law in South Africa* 8th ed p 553, para 1 and Carney's *Law of Suretyship,* 4 ed @ 178, the authors deal with the question regarding whether an extension of time to pay granted by the creditor to the principal debtor can discharge the surety. The authors state that if the agreement between the creditor and principal debtor amounts to a novation, the surety is discharged. They rely for this proposition on the *Estate Liebenberg* v *Standard Bank of South Africa* 1927 AD 502 @ 507. They make the observation that an extension of time granted after the debt has become due cannot be regarded as novation and the surety is not discharged. The authors state that where the extension is granted by agreement of the creditor and principal debtor before the debt has become due, without the consent of the surety, the surety is usually released.

The traditional approach is that novation may be effected by contract or by operation of law. Where novation is effected by operation of law, it extinguishes the old agreement and substitutes it with a new one thereby discharging the surety or guarantor.

The plaintiff contends that the original agreement has merely been varied and for that reason the debt has not novated. The plaintiff relies for that proposition on the case of *Zimbabwe Football Association* v *Mufurusa 1985 ZLR 244 ,1985 (3) SA1050(Z).* The plaintiff argued that the law of novation in this country is to contrary effect. The plaintiff submitted that a guarantor whose debt has novated cannot be discharged from his liability where he has not been able to show that he has been prejudiced by an extension of terms of payment of a debt. The facts of the

Mufurusa case (*supra*) are as follows. The defendant guaranteed a loan taken by a musical promotions company from the plaintiff. The principal debtor defaulted in repayment of the loan. It offered to pay in installments and the creditor accepted payment of the monthly installments. The creditor sued the surety for the full outstanding amount. Summons were issued against the guarantor who contended that the initial agreement had been novated by the compromise agreement entered into between the creditor and the principal debtor to which he was not a party and that his liability fell away. Mfalila J held that the arrangements under the new agreement were very different from those in the original agreement and that it would be flying in the face of hard facts to say that the agreement had not been novated. The court held further that the extension of time was granted after the whole debt had become due and payable and that this could not *per se* discharge the defendant as surety unless he could show that he was prejudiced thereby and that the defendant had failed to do so. The court also held that the novation affected the extent and not the nature of the defendant's obligation to the plaintiff, instead of being liable for the whole amount at once in the case of default, the defendant under the new agreement became liable only to the extent of the unpaid installments.

The decision in *Mufurusa* has been widely criticized. In Caney, The Law of Suretyship 6th Ed, the authors CF Forsyth and J T Pretorius express the view that the court's decision declining to release the guarantor from liability was wrong, given that the court found that the agreement had been novated. The authors express the following view,

> "It is difficult to view this decision as anything other than clearly wrong. Given that the judge expressly holds that the original agreement had been novated and given that it was clear that the debtor's obligations under the agreement were the only obligations secured by the surety, the surety must have been released. Not surprisingly, the decision has been was strongly criticized."

The decision is also criticized in the 1985 Annual Survey of South African Law at pp 169 -71. The net effect of the *Mufurusa* decision is that it is not every case of novation that will discharge a surety or guarantee from liability. Further, that where it has been shown that the guarantor has not been prejudiced by an extension of time to pay, he cannot be released from liability. The court relied for this proposition on the *Estate Liebenberg case* where the court stated that every extension of time is not considered to effect a novation. The court held as follows,

> "It must be accepted that by our law not every extension of time is considered to effect a novation. If novation is given after the debt becomes due and payable, when the debtor is *in*

> *mora*, then a failure to sue the debtor or even the granting to him of an extension of time cannot be regarded as a novation therefore the surety is not discharged. He can be released if he shows that he suffered prejudice." See also *Beer* v *Roach* 1950 (4) SA 370.

On p 169 of the *Annual Survey of South African Law*, the writer states the following on the traditional view,

> "The traditional view is that a distinction should be drawn between arrangements that novate an agreement , thus extinguishing the original agreement and replacing it with a new one, and arrangements that merely alter arrangements; in the latter the surety remains liable unless he is prejudiced by the new arrangement."

Traditionally, a difference is drawn between arrangements that novate an agreement and those that simply have the effect of altering agreements. Where an agreement is novated, the guarantee is discharged from liability. If on the other hand a debt has become due and an extension of time to pay has been granted, the agreement is merely altered, the guarantee remains obligated to the creditor unless he can show that he is prejudiced by the new arrangement.

The court in *Mufurusa* seemed to be alive to the distinction. The court found that it would be flying in the face of hard facts to deny that the agreement in question was novated and that the new agreement affected the extent and not the nature the obligation to the plaintiff. The court went on to hold that the surety remained liable. The court was dealing with an issue concerning alteration of a contract and the court was alive to that fact. The problem with the *Mufurusa* case seems to lie with the court's its use of words. The criticism of the *Mufurusa* decision stems from the fact that having tried to follow the traditional approach to novation, the court found that the debt had been novated. The court went on to find that the debt had been altered by the extension of time to pay granted but that because there was no prejudice that the guarantor had suffered from the extension of time to pay granted,the surety was not discharged from liability. It appears that the court got caught up in the traditional approach of determining whether the surety remains bound and distinguishing between the extent and the nature of an obligation. According to the traditional approach, it is either the debt has novated and the surety becomes entitled to release or it is deemed a mere alteration of the original agreement which will require the court to look into the question of prejudice. The suggestion seems to be that if a debt is novated, that's the end of the matter, the guarantor is discharged. Once you pronounce novation, there is no way of escaping the discharge of the guarantor unless the terms of the guarantee or suretyship provides otherwise. Based on the outcome of the case and the court's reasoning, it could be said that the

court did not treat this case as one of novation. I agree that based on the court's reasoning the surety ought to have been released.

The writer suggests that distinctions between the extent and the nature of an obligation are likely to provide intractable problems in practice. He suggests that the court lost sight of the contractual relationship between the surety and the creditor. He suggests that the approach to take is to ask whether the contract between the surety and the creditor contains an undertaking to be bound in these particular circumstances. In a case where a debt has novated and a court is faced with a surety or guarantee agreement which contains a clause with an undertaking by the surety to be bound in the event of novation, setoff or any other defense, it becomes unnecessary for the court to consider what the effect of the novation is. The duty of the court remains simply to interpret the clause to see if it has the effect of binding the surety or guarantee in the face of novation, setoff or in those particular circumstances. Where the surety agreement contains no such clause, the traditional approach may be the route to follow.

This matter stands to be decided on the terms and the wording of the guarantees signed by the defendants in favor of the principal debtor. The intention of the parties to the guarantees is determined by the language used. In Caney's *The Law of Suretyship at* p 109 ,the authors say the following on the approach a court should take in construing the intention of the parties in a guarantee,

> "The intention of the parties is determined by the language used, giving effect to the ordinary meaning of their words and to the grammatical sense in which they have expressed themselves, unless if it appears from the context that both parties intended their language to bear a different meaning. If the language is clear, we must give effect to it and in so doing presume that the parties knew the meaning of the words used."

A court dealing with a dispute concerning the terms of a guarantee is required to give effect to the intention of the parties. To achieve this, the court must closely examine the language used in the terms of the guarantee. It is upon the terms that of the guarantee that the court is able to determine what the parties intended. The court should not be seen to be making the contract for the parties.

The guarantees exclude rights of novation. The terms of the four guarantees are identical and state in opening as follows:

> "I the undersigned ……. Do hereby guarantee and bind myself as surety for the repayment on demand of all sum or sums of money which the debtor may now from time to time hereafter owe

> or be indebted in to the said Bank its successors or assigns whatever such indebtedness be incurred by the debtor in ITS own name or in the name of any firm in which the debtor may be trading either solely or jointly with others in partnership or otherwise, and whether such indebtedness arise from money already advanced or hereafter to be advanced ------- or in respect of any indebtedness which may take place of any novated debt, even if such novation takes place after the termination of this guarantee, or otherwise howsoever……..”

Clause 1 makes reference to future unknown debts. In *Coca Cola Financial Corporation* v *Finstat International Ltd* [1998] QB 43 the court decided that there is nothing at law to preclude parties to a guarantee to agree that the guarantor would not be entitled to rely on a set off or counterclaim when proceedings are instituted against the guarantor. In the 4th edition of Caney’s book, the authors state that when novation takes place, the surety is released from liability unless the surety has agreed otherwise. In *Continental Illinois National Park & Trust Company of Chicago* v *John Paul Papanicolau* [1986] 2 *Lloyds’s Rep* 441 the court dealing with a set off and counterclaim held that a guarantor could not rely on a set off and counterclaim against a creditor when these rights have been expressly excluded under the terms of the guarantee.

There is nothing in our law that precludes an agreement where parties to a guarantee exclude the right to novation. This approach embodies the concept of freedom of parties to contract .The right of novation can be excluded by agreement between the parties. The law allows parties to include any terms in a contract that they consider appropriate for as long as they are not illegal. This means that a guarantor’s common law right of novation may be expressly excluded by terms of a guarantee. A creditor seeking to rely on the terms of a guarantee to exclude a guarantor’s right to novation is required to show that the parties agreed and intended to exclude that right. A guarantor cannot successfully plead novation when the right to novation has been explicitly excluded under the terms of the guarantee. The court cannot interfere with the terms of the contract, to do so will have the effect of defeating the commercial objective and purpose of the guarantee and would be out of touch with business practice and reality.

A surety or guarantor is not necessarily released from liability where the agreement between the creditor and principal debtor is novated. Where a surety or guarantor agreement contains a special clause which excludes certain rights which otherwise a surety would have and notwithstanding certain acts being done by the creditor that would otherwise release him, doctrines such as compromise ,set off and novation cease to have any application. The surety is not released from liability if it is shown that the parties intended that to be the effect of the

agreement. The surety is not released from liability and remains bound by the terms of the surety agreement or guarantee.

A close reading of the terms of the guarantees reveals that the parties contracted to exclude the rights of novation and had a clear intention to exclude the right. The guarantee contains an undertaking to be bound by the guarantee even where the debt has novated. Clause 1 contains an express term excluding the right to novation of a debt. Clause 5 also makes it succinctly clear that no insolvency or compromise of the debt shall prejudice the bank's rights to recover to the full extent of the guarantee. The clauses give the creditor flexibility when dealing with the principal debtor and surety. There is no doubt in my mind that the right of novation is excluded by the terms of the guarantees. It is immaterial that the novation takes place after the termination of the guarantees. What was due at the date of novation is fully recoverable. The guarantors are barred from invoking the defense of novation and are not released from this obligation on the basis of novation.

The parties entered into an unlimited guarantee. An unlimited guarantee is one where the guarantor is asked to guarantee all amounts due and owing in connection with the debt or other indebtedness owed to the lender. It is not limited as to time or amount. A guarantee covers either general indebtedness or may be a once off cover for a single advancement of a specific loan advanced to the principal debtor, in which case it is a single transaction guarantee and covers no others. A guarantee may cover the past, future and present liabilities of a principal debtor. Such a guarantee is an unlimited guarantee and covers a continuing debt and is wide enough to cover not only facilities existent at the time of the execution of the guarantee but also facilities to be entered into in the future.

The guarantee provides in Para 8 that the guarantee shall remain in force as a continuing security. The guarantee covers all sums of money which the debtor may be owed from time to time. It is a revolving fund as the indebtedness arises from money already advanced or thereafter to be advanced. The terms of the guarantee covers both present and future indebtedness. It is continuing security. The debtors guaranteed all sums of money owed by the debtor in respect of indebtedness which may take place and includes a novated debt in terms of Clause 1. Paragraph 5 provides that the compromise of the obligations between the principal debtor and the creditor will not affect the defendant's liability. Even if the guarantee is

terminated the guarantor's liability remains as the date of termination. Paragraph 13 of the guarantee provides that no act or omission on the plaintiff's part affects the validity of the defendant's obligations. The guarantors who were directors of UBM are not illiterate. The presumption is that a man who appends his signature to a document has acquainted himself with the contents of that document. See *Muchabaiwa* v *Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (SC). The *caveat subscriptor* rule applies to the facts of this a case. The defendants signed these guarantees and are bound by the terms thereof.

The guarantees have not been terminated, they are continuing guarantees and remain in force for as long as UBM remains liable to the plaintiff, and the defendants remain bound by the terms of the guarantee. The novation or otherwise of the principal debt does not disturb the defendant's liability because the agreement specifically provides that novation will change nothing. The guarantees have not been terminated, leaving the liability of the defendants still intact.

The defendants submitted in the alternative that they should be released from liability on the ground that the scheme of arrangement has prejudiced them in that it has curtailed UBM'S capacity to service its debts and resulting in the interest payable increasing. The defendants in clause 1 bind themselves for the repayment of all sums of money which the debtor may from time to time owe or be indebted to the plaintiff whether the indebtedness is incurred solely by the principal debtor or by the debtor trading jointly with others howsoever that indebtedness arises. It does not matter how the indebtedness was incurred, the defendants remain obliged to the creditor.

Even assuming that the guarantees have terminated, para 9 of the guarantees state that should the guarantee be terminated, the liability of the guarantor or his estate for the amount due from the principal debtor at the time when the guarantee is so terminated shall remain. Clause 13 reinforces this point and provides that no act or omission on the part of the bank in any way relating to the guarantee shall release or discharge the guarantor from his obligations.

The liability of a guarantor depends on that of the principal debtor. In order to sustain a claim against a guarantor, a creditor is required to show that the principal debtor is obligated to it and has defaulted in repaying the debt or that the guarantor has accepted liability for the debt. The rationale behind the idea of a guarantee is that the guarantor undertakes to answer to the

creditor in the event that the principal debtor fails to pay the debt. A creditor who has a guarantee at his disposal has an election to proceed against the principal debtor or guarantor. Once a creditor shows that the principal debtor has defaulted and sues a guarantor he becomes entitled to summary judgment unless the guarantor raises a triable issue or valid defense to the claim. See *United Asian Bank Bhd* v *The Nigeri Semmbilan Devt Corp* [1989] 1 MLJ 230. A guarantor cannot insist that a creditor proceeds against the principal debtor first before he acts against him. For as long as the principal debtor has defaulted in its payments and remains liable to the creditor, the guarantor can be called upon to make good his obligation. For as long as UBM has been shown to have defaulted in payment the debt and is still obligated to the plaintiff, the guarantor is still obligated to the plaintiff besides the guarantees having terminated.

The defendants submitted that it was agreed between UMB and the plaintiff in the scheme of arrangement that the debts owed were going to be paid from the dividends that were to be earned by UBM and that the servicing of the debt was conditional upon UBM receiving a dividend. The defendants submitted further that the earning of a dividend would therefore trigger the obligation on the part of the principal debtor the requirement to pay its creditors and hence UBM was not in default of payment and was as at the date of institution of the proceedings not in default. That the debt has not yet become due. The scheme of arrangement states under paragraph (h) that profits from the joint venture will be applied towards payment of UBM liabilities and it was envisaged that UBM would be able to pay all its present liabilities over 6 years.

One of the effects of the scheme was that the facility agreement was carried forward with the dates of payment being carried forward resulting in an extension of time to pay. The plaintiff alleges that the principal debtor failed to pay back the amounts drawn down when the monthly repayments fell due on 30 June 2014 and that UBM defaulted on their interest payments and that this has triggered the acceleration clause. Payments of all amounts due were deferred for six months counting from the date of the scheme of arrangement. Payment of $77 692.92 which is part interest should have been paid by 31 march 2014. The parties agreed on time periods when payments would be made by UBM .Whilst it was anticipated that the payment would be made from profits of the joint venture it is clear that UBM was expected to start repayments after 6 months of the sanctioning of the scheme. No repayment has been made to the plaintiff since the

scheme of arrangement was sanctioned. For as long as there were time frames set, they were required to be adhered to. The time to pay came and passed and no payments were made. UBM is in default. .

The defendants raise the benefit of excussion as a defense. The benefit of excussion (*beneficium ordinis seu excussionis),* is defined in Carney, (*supra*) at p 125 as,

> "The right of the surety against a creditor to have him proceed first against the principal debtor with a view to obtaining payment from him, before turning to the surety for payment of the debt or of so much of it as remains unpaid."

The authors define the purpose of the benefit as follows,

"The purpose of the benefit of excussion is not to make matters difficult for the creditor but to oblige him in the first instance to seek payment from the principal debtor… but if the debtor cannot pay, it would be harmful to the creditor to require him to spend money and incur delay in excussing the debtor. The same sentiments were relied on in *Lange Accessories (Pvt) Ltd* v *Fisher and Another* 1974 (1) SA 61 (R) where the court held that if the objective facts point to an inability by a principal to pay, the courts will not insist on excussion. A surety may renounce the benefit of excussion. Where a surety renounces the benefit, the creditor may sue him for the debt without first excussing the principal debtor. He ranks the same as the principal debtor. He may be sued immediately the debt becomes due. This is the case in this matter. In clause 6 of the guarantees, the defendants renounce the benefit of excussion. There was no obligation on the part of the plaintiff to *excuss* the principal debtor first before proceeding against the guarantor. There is nothing to stop the plaintiff from proceeding against the guarantors first.

The evidence points towards the inability of the principal debtor to service the debt. UMB remains liable to the plaintiff. The defendants agreed that they would remain liable to the creditor even in the face of novation. The guarantors are liable to meet their obligations and there cannot be insistence on excussion. The defendants are bound by the guarantees they signed. The main claim succeeds. The defendants' claim in reconvention is for cancellation of the mortgage bonds registered against the defendant's properties. That claim cannot succeed once it has been found that the guarantees are valid and may be acted upon. The properties mortgaged by the defendants are liable to execution.

In the result it is ordered as follows,

1) The defendants' claim in reconvention is dismissed.
2) The plaintiff's claim is upheld.
3) The defendants are jointly and severally, with one paying the others to be absolved to pay,
   a) the sum of $1 141 260-36
   b) interest on the sum of $1 141 260-36 at the rate of 35% per annum calculated from 1 April 2014 to the date of payment in full.
4) Stand 309 The Grange Township o Stand 1 of the Grange Township in the District of 8 Salisbury, held under Deed of transfer number 27261/2002 is hereby declared especially executable.
5) Stand 24 Winchedon Township of Lot D of Borrowdale Estate in the District of Salisbury, held under deed of Transfer number 9730/2003 is declared especially executable.
6) Stand 62 Luna Township of Subdivision K of Luna of Section 4 Borrowdale Estate in the District of Salisbury, held under Deed of Transfer number 8011/98 is declared especially executable.
7) Costs of suit.

Mawere & Sibanda, plaintiff's legal practitioners
Wintertons, defendant's legal practitioners