

HAANSBRO (PVT) LIMITED
versus
LOVEMORE PFUPAJENA CHIHOTA
and
VALENTINE MUSHAYAKARARA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 18 & 19 January 2018

Civil Trial

Ms S.R Ratisai, for the plaintiff
T.A. Chiurayi and I.H. Chiwara, for the 2nd & 3rd defendants

ZHOU J: The plaintiff claims against the second and third defendants a sum of US\$ 16 016 being the balance outstanding in respect of goods sold and delivered to the first defendant. The original amount claimed in the summons was US\$66 801-39. The court was advised that the claim against the first defendant was abandoned after it went into liquidation. The claim against the second and third defendants is based on a suretyship agreement which the two defendants signed guaranteeing the obligations of the first defendant to the plaintiff. The second and third defendants contest the plaintiff's claim on the basis that the suretyship does not cover the debt which is the subject of the claim.

The plaintiff led evidence from Janine Bobby, its General Manager. Her evidence was that prior to the signing of a Credit Agreement and Suretyship Agreement on 3 March 2014 the first defendant owed a sum of US\$77 334-53 which was reduced to US\$77 334-53 by a payment of US\$38 which was credited on that day. She stated that the Credit Agreement which was signed on 3 March 2014 was in respect of the outstanding debt. The suretyship agreement which is in the same document as the credit agreement and was also signed on that same day was, accordingly to her, meant to secure the already existing debt as well as future debts which would accrue to the plaintiff by the first defendant.

The defendants relied on the evidence of Valentine Mushayakarara, the third defendant. His evidence was that the Credit Facility was a separate agreement to enable the first defendant to purchase goods from the plaintiff on credit during the period of 60 days which, according to

him, was the life span of the credit facility. The facility had nothing to do with the debt of \$77 334-53 which was already owed to the plaintiff by the first defendant prior to the signing of the credit facility agreement. The witness stated that the suretyship agreement which he and the second defendant signed was meant to guarantee debt arising from the credit facility agreement which was signed by the plaintiff and first defendant on 3 March 2014. As far as he was concerned the suretyship agreement was part of the credit agreement signed on the same day that the suretyship agreement was signed.

Although nothing really turns on whether the suretyship agreement was part of or a separate agreement from the credit facility agreement, it is clear that the suretyship is part of the same document in which the credit facility agreement is contained. The real issues for determination are:

- (a) Whether the credit facility relates to monies which were already owed prior to its signing; and
- (b) Whether the suretyship agreement covers any debt other than that arising from the credit facility agreement signed on 3 March 2014.

Both issues can be easily disposed of. The credit facility agreement does not relate to a debt that was due prior to its signing because the liquidation of that debt had already been agreed upon prior to the coming into existence of the credit facility. The correspondence produced in evidence shows that it was agreed that that debt would be settled by way of a deposit of US\$10 000 followed by monthly payments of \$6000-00. The credit facility agreement does not refer to the outstanding debt. The credit allowed is stated to be in a sum of US\$60 000-00. The submission by Ms *Ratisai* for the plaintiff that the outstanding debt of US\$77 334-53 was included in the \$60 000-00 is startling. Not only does the submission not make sense, but the credit facility clearly shows that the \$60 000-00 represented the maximum value of goods which the first defendant could access on credit during the period of 60 days in which the facility would be in place.

The suretyship agreement explicitly states that “all the conditions of this agreement are applicable to me/us”. This agreement could only mean the credit agreement which the suretyship was accessory to. The suretyship agreement does not purport to guarantee obligations which accrued prior to its execution. If that was the intention of the parties that it would guarantee past and future debts outside the credit facility then it would have clearly stated so. After all, it was drafted by the plaintiff which was aware of the outstanding debt owed to it by the first defendant at the time that the suretyship agreement was signed.

The common law benefits which the defendants renounced by signing the suretyship agreement do not support the plaintiff's case at all. Their renunciation is only in relation to the debt to which the surety is accessory. That debt is one that arises from the credit facility signed on 3 March 2014.

In all the circumstances, the plaintiff has failed to prove its claim against the second and third defendants, as the debt claimed is not secured by the suretyship agreement upon which these defendants are being sued.

In the result, the plaintiff's claim against the second and third defendants is dismissed with costs.

Ratisai Law Practice, plaintiff's legal practitioners
Coghlan, Welsh & Guest, 2nd & 3rd defendants' legal practitioners