DISTRIBUTABLE (63)

EVA MUZUVA
v
FBC BANK LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & MAVANGIRA JA
HARARE, SEPTEMBER 22, & NOVEMBER 16, 2015

B Mtetwa, for the appellant

F Girach, for the respondent

ZIYAMBI JA:

[1] This is an appeal against the whole judgment of the High Court sitting at Harare. The order granted against the appellant is as follows:

> "It is ordered that judgment be and is hereby given in favour of the plaintiff against the fifth defendant for payment of a sum of US$685 442.46 together with interest thereon at the rate of 6.5% per month plus a penalty rate of 5% per month with effect from 1st June 2011 to the date of payment in full, and costs of suit on an attorney- client scale. The fifth defendant's liability is joint and several with that of the first, second, third, and fourth defendants, the one paying the others to be absolved."

BACKGROUND

[2] DUNLETH ENTERPRISES (PVT) LTD ("DUNLETH") obtained certain advances and facilities from the respondent who carries on the business of banking. As security for the repayment of these facilities, the respondent obtained, from the appellant and three other sureties, signed guarantees of payment as well as deeds of hypothecation over their immovable properties.

The appellant, unlike the other sureties, is not a director of DUNLETH but is related to Duncan Mukondiwa who is a director of DUNLETH.

[3] The guarantee signed by the appellant in favour of the respondent was dated 18 September 2009. Paragraph 1 of the guarantee read as follows:

> "In consideration of **FIRST BANKING CORPORATION LIMITED** allowing **DUNLETH ENTERPRISES PRIVATE LIMITED** (hereinafter called "the Debtor") such banking facilities as the said Bank may in its sole discretion deem fit (either by way of the continuation of any existing facilities and/or providing new or further facilities), subject to the conditions hereinafter mentioned. I the undersigned **EVA MUZUVA (MS)** do hereby guarantee and bind myself as surety for the repayment on demand **of all sums of money which the Debtor may now or from time to time hereafter owe or be indebted in to the said Bank** its successors or assigns whether such indebtedness be incurred by the Debtor in **its** own name or in the name or any firm in which the Debtor may be trading either solely or jointly with others in partnership or otherwise, **and whether such indebtedness arises from money already advanced or hereafter to be advanced,** or from promissory notes or bills of exchange already or hereafter to be made accepted or endorsed or from guarantees given or to be given by the Debtor to the said Bank on behalf of third parties or guarantees given by the Bank on behalf of the Debtor, or in respect of any indebtedness which may take the place of any novated debt, even if such novation takes place after the termination of this guarantee, or otherwise howsoever, including interest, discount, commission, legal and collection costs, stamps and all other necessary or usual charges and expenses, provided nevertheless that the total amount to be recovered from me hereunder shall not exceed in the whole the sum of ----------
> **UNLIMITED----------** together with such further sums for interest charges and costs as shall from time to time have accrued or become due and payable thereon." (The emphasis is mine.)

In addition, on 21 October 2009, the appellant caused to be registered a Deed of hypothecation against her property called STAND 156 GROOMBRIDGE TOWNSHIP 2 OF LOT 39A MOUNT PLEASANT measuring 4062 square meters.

[4] DUNLETH having defaulted in its payments of the various amounts advanced to it by the respondent, summons was issued, in the High Court, against it as well as the four sureties, on 7 September 2011, for the outstanding sum of $685 442.46 and costs. DUNLETH and the other three sureties did not defend the claim and judgment was entered against them on 28 February 2012. The appellant, who was the fifth defendant in the court *a quo*, defended the claim, unsuccessfully, on the following grounds:

1. Because the word UNLIMITED was not written into the agreement at the time she signed it she was liable only to the amount of 150 000.00.
2. Proof that her liability was not to extend beyond 150 000.00 is to be found in the Deed of Hypothecation which limits her indebtedness to 150. 000.00
3. Payments had been made by the other defendants in excess of 150 000.00 and these payments had expunged any further indebtedness by herself to the respondent.

The approach adopted by the High Court in determining the matter was:

> "I need to consider whether the fifth defendant's liability was limited to a sum of US$150 000 which is stated in the deed of hypothecation as well as whether the principal debtor has discharged its obligations to the plaintiff in a manner that discharges the fifth defendant from liability."

The Court went on to find that the appellant's liability was not limited to the amount stated in the deed of hypothecation and that the appellant was not discharged from liability in respect of the remaining indebtedness of DUNLETH to the respondent.

ISSUES ON APPEAL

[5] As I see it, the main issue to be decided in this appeal is whether the court *a quo* was correct in finding that the appellant is liable, in terms of the guarantee, to pay the amounts claimed.

[6] The grounds of appeal repeated the issues set out above[1]. Mrs *Mtetwa,* who appeared on behalf of the appellant, criticized the court *a quo* for not taking proper note of the pleadings and issues for trial as well as incorrectly applying the law. She submitted, that there was no room for the application of the maxim *caveat subscriptor* as the word 'unlimited' was not shown by the respondent to have been written into the agreement at the time of its signature by the appellant; that the appellant's case had always been that she had signed the form with blank spaces thereon; and that the word 'unlimited' had been inserted in the blank space after her signature and without her knowledge. In any event, the quantum of the appellant's indebtedness was not proved at the trial and the learned Judge misdirected himself in not ascertaining the actual amount now owing by the debtor (and therefore the appellant) since the respondent had, in evidence, admitted that certain payments had been made. She submitted that the appellant was totally unaware of the facility letter which set out the terms of the facilities granted to DUNLETH.

[6] Mr *Girach,* however, submitted, that this was a simple action on a guarantee where the debtor had failed to pay; that the terms of the guarantee are quite clear even if the dispute of fact concerning the word 'unlimited' was not resolved or was resolved in favour of the appellant; that the guarantee clearly covered all present and future amounts owing to the respondent by DUNLETH; and that the appellant had noted the appeal simply for purposes of delay since it is clear that the *caveat subscriptor* rule applied.

[7] In my view, the appellant's insistence that she signed the guarantee with blank spaces does not assist her. Where a surety signs a guarantee leaving blank spaces, certain legal

[1] Para [3] supra

principles come into application. As stated by the court *a quo,* it is not open to a party who has signed an agreement in blank leaving the other party to complete the rest to deny being bound by the terms of the agreement. At p 3 of his judgment the learned Judge said[2]:

> "In the case of *National and Grindlays Bank Ltd v Yelverton* 1972 (4) SA 114 (R) the court considered the implications of signing a contract in blank, where a printed form containing blank spaces was allegedly filled in after signature. Applying the *caveat subscriptor* principle, the court held that the signatory could escape liability only by raising one of the defences that would have availed if the blank spaces had been filled in prior to the signature, that is, the normal defences which would be available to any signatory. Those defences are misrepresentation, fraud, illegality, duress, undue influence and mistake. See R H Christie, *The Law of Contract in South Africa* 3rd Ed., p.197; A.J Kerr. *The Principles of the Law of Contract* 4th Ed., p. 90.
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> In relation to suretyship agreements, blanks in written contracts can sometimes be dealt with either on the basis that they could be filled in from another document where there is such a document which is incorporated by reference, or that the clause containing the blank was designed solely for the benefit of one party who, by leaving the blank, has elected not to take the proffered benefit. See *First Consolidated Holdings (Pty) Ltd v Bisset* 1978 (4) SA 491 (W) at 495-6, Christie, *The Law of Contract in South Africa* 3rd Ed., p.139. *In casu,* the terms of the deed of hypothecation were not incorporated into the terms of the guarantee. The fifth defendant does not explain why she did not fill in the sum of US$150 000 if she genuinely believed that figure to represent the full extent of her liability in terms of the guarantee form which she signed. That, in my view, is the approach which is consistent with the dictates of modern commercial convenience."

[8] I fully agree with the learned Judge. Further as the learned Judge remarked[3]:

> "I do not believe that the addition of the word 'unlimited' altered the extent of the fifth defendant's liability from what it would be if that word was to be excluded. The document is worded in sufficiently clear terms to mean that in the absence of a figure being mentioned then the liability is unlimited. Clause 1 of the guarantee form signed by the fifth defendant provides, *inter alia*, that the fifth defendant guarantees and binds herself as surety "for the repayment on demand of **all sum or sums of money which the Debtor may now or from time to time hereafter owe or be indebted in to the said Bank …"** (my emphasis) The unlimited guarantee could only have been limited if a specific amount had been stated in the blank space in which the word "unlimited" is inserted. Indeed, it is clear that the word unlimited does not even grammatically accord

[2] Record p235
[3] Record p 236

with the sentence in which it is inserted, as that space would be relevant where there is a specific figure to be filled in. The words preceding the blank space illustrate that the space is meant for a specific sum of money to be inserted if there is one agreed upon."

[9] As to the significance of the limitation in the deed of hypothecation, one need do no more than quote the learned Judge:

> "The deed of hypothecation specifically provided that the liability of the fifth defendant in respect of that security was not to exceed a sum of US$150 000. But that limit applied only to the security constituted over the fifth defendant's immovable property, Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant. It does not in any way limit the liability constituted through the guarantee form to a sum of US$150 000. That conclusion does not at all depend on what the second defendant represented to the fifth defendant. The two, that is, the deed of security [the guarantee] and the deed of hypothecation, are separate and distinct forms of security; one has a maximum limit of liability while the other one does not limit the liability to a specific amount."

[10] The reasoning is in my view unassailable. In the absence of any of the defences mentioned in [7] above, the appellant was correctly held to be bound by her signature and therefore liable, in terms of the guarantee document, not only for the debts of DUNLETH which were in existence at the time of signature of the guarantee, but for all future debts incurred by DUNLETH for as long as the suretyship agreement remained extant.

[11] A further consideration is that the appellant had the option, in para 4 of the guarantee, of terminating the guarantee by giving notice to the respondent. She did not do so. She ought to have terminated the guarantee after three months if she is truthful in her allegation that she understood, and believed, that the debt owed by DUNLETH would be paid within that period.

[12] It remains to consider the appellant's contention that the payment by other sureties of an amount in excess of $150 000.00 should be regarded as having extinguished the liability of the appellant.

This contention is based on the premise that the appellant's total liability in terms of the guarantee and the deed of hypothecation is limited to $150 000.00. It has already been shown that this contention is erroneous for the reasons set out above. In addition to the deed of hypothecation, the appellant signed an unlimited guarantee in favour of the respondent in respect of the debts of DUNLETH both present and future. As already indicated, whether the document was signed in blank or after the insertion of the word 'unlimited', the consequences are the same. I therefore agree with the finding of the learned Judge that the fact that the total payments made by the debtor to the respondent exceed the sum of $150 000.00 does not present a defence to the appellant since those amounts did not clear the debt and the appellant remains liable, in terms of the guarantee, for as long as the debt or any part of it remains unpaid.

[13] In addition, I do not consider that there was any misdirection by the court *a quo* in failing to ascertain the exact amount owing. Since the liability of the appellant is joint and several with the other sureties and the principal debtor, that amount can be ascertained by the parties themselves based on calculations of the amounts that have been paid. In any event, DUNLETH, by not defending the claim, had clearly admitted its indebtedness in the amount claimed and, in terms of para 4 of the guarantee, the appellant declared herself to be bound by "all admissions or acknowledgements of indebtedness" by DUNLETH.

[14] Accordingly the appeal lacks merit and it is hereby dismissed with costs.

GOWORA JA: I agree

MAVANGIRA JA: I agree

Mtetwa & Nyambirai, appellant's legal practitioners

Messrs Costa & Mudzonga, respondent's legal practitioners