

DISTRIBUTABLE (14)

ZFC LIMITED
v
TAPIWA JOEL FURUSA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & UCHENA JA
BULAWAYO, 15 March 2016

T. Zhuwarara, for the appellant

L. Uriri, for the first respondent

GOWORA JA: This was an appeal against the whole judgment of the High Court delivered on 13 May 2015. After perusing the record and hearing the submissions of the parties, this Court allowed the appeal and indicated that the reasons would be availed in due course. The following are the reasons for the order:

The appellant entered into an agreement with a company called Farmcrop Enterprises in terms of which Farmcrop Enterprises would sell fertilizers and crop chemicals on behalf of the appellant after which sale, it would remit the proceeds to the appellant. On 3 July 2009, the respondent bound himself as surety and co-principal debtor with Farmcrop

Enterprises, (“the company”) for the due performance, by the latter, of its obligations in favour of the appellant.

It was alleged that the company sold fertilisers and crop chemicals on behalf of the appellant between 31 January 2011 and 12 September 2011 but failed to account to the appellant for the sum of US\$46 717.16. On 13 September 2011, the appellant wrote to the respondent demanding payment in the sum of US\$46 717.16 which it stated had become due and payable as a result of the company’s failure to pay. The demand was made on the basis of the deed of suretyship that the respondent had signed in favour of the appellant.

On 26 September 2011, the respondent and one Lazarus Nyakudya wrote a letter to the appellant in which they acknowledged their indebtedness to the appellant and also expressed their wish to transfer the suretyship of the respondent to Lazarus Nyakudya. On the same day, Lazarus Nyakudya signed a deed of suretyship as surety and co-principal debtor with Farmcrop Enterprises in favour of the appellant on the same terms as the deed of surety signed by the respondent, save to say that Lazarus Nyakudya expressly renounced all the benefits available to a surety.

The appellant issued summons against the company and the respondent on 1 December 2011 claiming payment of US\$46 717.16. The former was in default and the appellant obtained judgment in default in the sum claimed.

The respondent entered an appearance to defend and filed a plea. It was respondent's defence that he had been wrongly cited because the transfer of his suretyship to Lazarus Nyakudya had the effect of absolving him of his duty as surety towards the appellant.

After the close of pleadings, the matter was referred to a judge in chambers for the holding of a pre-trial conference. The parties agreed at the pre-trial conference that the claim should be reduced to US\$40 954.15. The only issue referred to trial was whether or not the appellant accepted that the respondent was no longer bound to the appellant as a surety and co-principal debtor whether he was properly substituted by Lazarus Nyakudya. As a consequence the focus for trial was the liability of the respondent.

Both parties called witnesses in support of their positions. The respondent also called as a witness a former employee of the appellant. The court *a quo* made a finding that the evidence showed that by accepting a second deed of surety from Lazarus Nyakudya on 26 September 2011, the appellant had exonerated the respondent of any form of liability. It held that the correct debtor was Lazarus Nyakudya because the first deed of surety signed by the respondent was compromised by the second which was signed by Lazarus Nyakudya. In the result, the appellant's claim was dismissed. Aggrieved by this decision, the appellant appealed to this Court on the following grounds:

1. The Learned Judge misdirected himself when he found that the Deed of Suretyship signed by the respondent on 3 July 2009 had been cancelled when in fact there was no evidence to demonstrate that the Deed of Suretyship had been cancelled.

2. The Learned Judge erred and misdirected himself by failing to pay due regard to the provisions of clause 5 of the Deed of Suretyship which provided that it would remain in force until the appellant had agreed in writing to cancel the Deed of Suretyship. There was no written document cancelling the aforesaid Deed of Suretyship.
3. The Learned Judge misdirected himself by finding that there was a novation when the respondent had not alleged that the new Deed of Suretyship that was signed by Lazarus Nyakudya created a novation of the principal debt. The deed of Suretyship signed by the Respondent could not have been terminated by the Deed of Suretyship signed by Lazarus Nyakudya which said nothing about it.
4. The Learned Judge fell into error as the conduct of the parties quite clearly was not consistent with the intention to create a novation as the appellant did not cancel the original Deed of Suretyship.
5. The Learned Judge erred by admitting a letter written by the appellant's Treasury Accountant to its Legal Practitioners as this evidence was inadmissible in terms of s 8(6) of the Civil Evidence Act [*Chapter 8:01*].

From the grounds of appeal, there were two issues for determination. These were:

1. Whether there was a transfer of suretyship from the respondent to Lazarus Nyakudya.
2. Whether there was a violation of s 8(2) of the Civil Evidence Act [*Chapter 8:01*].

I shall deal with the issues raised.

- 1. Whether there was a transfer of suretyship from the respondent to Lazarus Nyakudya.**

The appellant's case was that without the respondent producing a written cancellation of the agreement as required in clause 5 of the Deed of suretyship signed by the respondent, the deed of suretyship still bound the respondent thus the court a quo erred in dismissing its claim against him.

Clause 5 of the deed of suretyship reads as follows:

“The Surety shall remain in full force as a continuing security, notwithstanding an intermediate settlement or fluctuations in the amounts outstanding from time to time by the Debtor in terms of the contract in place, notwithstanding the death or legal disability of me, until the said ZFC Limited has agreed in writing to cancel this suretyship and the suretyship shall further remain in force as a continuing security, binding upon me, notwithstanding that it may on any ground in whole or in part have ceased to be binding on me.”

On the basis of this clause the appellant argued that it did not cancel the deed of surety in writing and thus the respondent remained indebted. It relied on the case of *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (SC) in which KORSAH JA stated:

“The general principle which applies to contracts, and commonly designated as *caveat subscriptor*, is that a party to the contract is bound by his signature, whether or not he has read or understood the contract, or the contract was signed with blank spaces later to be filled in. Expatiating on this principle in *National and Grindlays Bank v Yelverton* 1972 (1) RLR 365 (G) at 367; 1972 (4) SA 114 (R) at 116G-H, DAVIES J cited with approval, the following statement by INNES CJ in *Burger v Central South Africa Railways* 1903 TS 571 and 578 (decided before the promulgation of s 6 of the General Laws Amendment Act):

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effects of the words which appear over his signature.””

This authority highlights the principle that the signatory to an agreement is bound by the impression of assent created by his or her signature in the mind of the contract enforcer. The appellant therefore averred that the parties were bound by clause 5 and that the deed of suretyship should have been cancelled in writing by the appellant in order to absolve the respondent from liability.

The respondent, *per contra*, argued that the appellant's conduct showed that it exonerated him from liability and accepted the transfer of suretyship from him to Lazarus Nyakudya. He argued that on 26 September 2011, he wrote a letter addressed to the appellant with Lazarus Nyakudya a part of which read:

“... As such, we wish to register the transfer of surety to Mr Lazarus Nyakudya who will arrange the debt repayment arrangements with ZFC.”

The respondent submitted that this letter communicated their intention to transfer the suretyship to Lazarus Nyakudya and the communication from Chitauro that his superiors agreed to such transfer was proof that he was exonerated from liability. The respondent also argued, that the letter from the appellant to its legal practitioners showed that the liability had shifted from the respondent to Lazarus Nyakudya. The letter stated the following:

“Re: HANDED OVER DEBTOR: FARMCORP ENTERPRISE RESPONSE

Please find attached the response from the above mentioned debtor. They have acknowledged the debt and written a letter to transfer the surety from Tapiwa Joel Furusa, to one, Lazarus Nyakudya.

May you proceed with the recovery of the debt. We hope the information available will aid you in this case ...”

It is on the basis of that letter that the respondent submitted that the appellant accepted that his obligation as a surety had been transferred to Lazarus Nyakudya and that this was also confirmed by the deed of surety signed by Lazarus Nyakudya. The question that thus lies for determination by this Court is whether the documents and evidence produced by the respondent in the court *a quo* show that his deed of suretyship was cancelled.

The respondent called one Pondai Chitauru to testify on his behalf. He was formerly employed by the appellant as a debtor's clerk. He had dealt with the respondent during the relevant period and he was the clerk seized with the Farmcrop debt. It was he who received the letter from the respondent and Nyakudya proposing the transfer of the suretyship from the respondent to Nyakudya. He had given the letter in question to the appellant's treasury accountant who instructed him to permit Nyakudya to execute a deed of suretyship. However under cross-examination he accepted that there never was a formal letter from the appellant cancelling the deed of suretyship executed by the respondent.

The parties were bound by the clause which stipulated that the deed of suretyship would be cancelled in writing by the appellant and it was admitted by all witnesses who testified on behalf of the respondent that there was no document which explicitly stated that the appellant had cancelled the deed of suretyship. That alone is evidence that the respondent still remained liable in terms of the deed of suretyship.

As correctly stated by counsel for the appellant, the letter it wrote to its legal practitioners was colourless and did not reflect that the appellant cancelled the agreement of sale. It merely stated that Farmcrop had written a letter to transfer suretyship from the respondent to Lazarus Nyakudya. It was erroneous for the court *a quo* to attach meaning to the letter which is not clear from its wording. The remarks of GUBBAY JA (as he then was) in *Mxumalo & Ors v Guni* 1987 (2) ZLR 1 (S) at 8 come to mind. He stated:-

“The language used is plain and unambiguous and the intention of the Law Society is to be gathered there from. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used.”

These remarks are apposite. It was not for the court *a quo* to read the letter to mean that the appellant had accepted the purported transfer of suretyship from the respondent to Lazarus Nyakudya. The clear language used in the letter does not reflect such an intention.

The court *a quo* also erred in making a finding that the first deed of suretyship signed by the respondent was compromised by the one signed by Lazarus Nyakudya. Compromise is defined by R.H Christie in ‘The Law of Contract in South Africa’ 3rd edition at page 505 as follows:

“Compromise, or *transactio*, is the settlement by agreement of disputed obligations, whether contractual or otherwise. If any offer to settle in particular terms is not accepted, the offeree cannot treat an inseparable part of the offer and sue on it. Even a criminal charge may be settled by the process known as plea bargaining and the resulting compromise will be enforceable. It is a form of novation differing from the ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of the compromise being the final settlement of the dispute or uncertainty.”

What is derived from the above definition is that a compromise is a settlement of a disputed obligation through another agreement which then replaces the principal agreement. *In casu*, the appellant accepted the deed of surety signed by Lazarus Nyakudya but did not cancel the first deed executed by the respondent. Consequently there was no compromise because as already highlighted, the appellant had to cancel the deed of suretyship in writing to make it valid. That this is a correct reflection of the true status between the parties is borne out by the evidence of the respondent himself and Nyakudya.

The respondent accepted that in terms of clause 5 of the deed, the appellant had to agree in writing to the cancellation of the suretyship. He also admitted that the letter written by the

appellant to its legal practitioners did not expressly state that it had agreed to the transfer of his indebtedness to Nyakudya. He was relying on an explanation given to him by Chitauro. Further, to compound matters, by the time he and Nyakudya wrote the letter proposing the transfer of his indebtedness the debt was already due as a letter of demand had been sent to him.

Nyakudya's evidence was to the effect that the debt had been transferred and that he had assumed liability in the place of the respondent. He accepted however that at no stage did the appellant state or intimate that it had cancelled the deed executed by the respondent.

The court *a quo* failed to give due weight to the critical point that the deed of suretyship could only be cancelled by the appellant in writing in terms of clause 5 of the deed. Contracts are sacrosanct unless the evidence shows that they were not entered into freely and voluntarily. R.H Christie in *Business Law in Zimbabwe* at page 67 states:

“The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as *caveat subscriptor* rule is therefore that a party to a contract is bound by his signature whether or not he has read or understood the contract.”

It is on the basis of this principle that the court *a quo* ought to have found that the respondent was still indebted to the appellant. There was no evidence before the court that showed that the deed of suretyship was cancelled by the appellant in writing. The court *a quo* thus erred in finding that the respondent was incorrectly sued as a debtor by the appellant.

2. Whether there was a violation of Section 8(2) of the Civil Evidence Act [Chapter 8:01].

Appellant alleges that the court *a quo* erred by admitting exhibit 5, the letter it wrote to its legal practitioners, as evidence as this was in contravention of s 8(2) of the Civil Evidence Act. The provision states:

“(2) No person shall disclose in evidence any confidential communication between—
(a) a client and his legal practitioner or the legal practitioner’s employee or agent; or
(b) a client’s employee or agent and the client’s legal practitioner or the legal practitioner’s employee or agent;
where the confidential communication was made for the purpose of enabling the client to obtain, or the legal practitioner to give the client, any legal advice.”

Although the respondent stated that he was given the letter by Chitauro, it was evident that the appellant and Chitauro had not parted on the best of terms. The court *a quo* stated that it was inclined to accept the argument from the respondent that the former had allowed the letter to fall into the hands of the respondent and that as a result it had tacitly waived the privilege afforded under the Act. In *Law Society v Minister of Transport & Communications & Anor* 2004 (1) ZLR 257 (S) at 261F-G, CHIDYAUSIKU CJ, had occasion to comment as follows:

“The court was referred to a wide range of authorities that underpinned the importance and significance of the lawyer client privilege. In the case of *Baker v Campbell* (1983) 153 52(HCA) it was held that the privilege existed not simply in relation to litigation but to advice sought between a client and a lawyer so that the client can regulate his affairs. In another case cited to this court, it was held that the privilege between lawyer and client even overrode the policy consideration that no innocent man should be convicted of a crime—see *S v Safatsa & Ors* 1988 (1) SA 868(A), at pp 878-887. In this regard, see also *Mahomed v President of the Republic of South Africa & Ors* 2001(2) SA 1145(C) at pp 1151-1155. The sanctity of the lawyer-client privilege and the need to minimize inroads into that privilege are emphasized in a number of Canadian cases that were cited by the applicant.”

The court *a quo* held that the appellant waived its privilege by allowing the respondent to have possession of the letter. Clearly the letter is a communication between a legal

practitioner and a client and would be covered by privilege unless it can be shown that the appellant consented to the letter being given to the respondent.

The view I take is that there was no evidence placed before the court *a quo* that the appellant consented to the production of the letter to the respondent. The *onus* was on the respondent to show waiver of the privilege. This *onus* was not met and it was a misdirection on the part of the court *a quo* to hold the letter admissible without tangible evidence of such waiver.

The appeal clearly had merit and that is the reason that it was allowed by the court. Accordingly, the Court made the following order:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“Judgment is granted in favour of the plaintiff against the second defendant Tapiwa Joel Furusa for the payment of US\$40 954.18 with interest thereon at the rate of 5 per cent per annum from 18 September 2011 to the date of payment in full. The costs of this action shall be paid by the second respondent on the legal practitioner client scale.”

ZIYAMBI JA: I agree

UCHENA JA: I agree

Messrs Gill, Godlonton & Gerrans, appellant’s legal practitioners

Matsikidze & Mucheche, respondent’s legal practitioners