PAMUKA (PVT) LIMITED
versus
NEDSHINE INVESTMENTS (PVT) LIMITED
and
HAPPYMORE MASVAURE
and
TASIYANA MAKUVATSINE
and
LORRAINE MASVAURE
and
TINASHE MASVAURE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 27 September & 13 October 2021

Opposed Application-Summary Judgment

T Zhuwarara, for the applicant
T Kativhu, for the respondents

MUZOFA J: The applicant applies for summary judgment against the respondents as set out in the amended draft order for US$211 314,47, costs of suit on an attorney client scale and an order declaring stand number 997 Glenlorne Township 25 of Lot 30 of Glenlorne, Harare especially executable.

The applicant is a duly incorporated company in terms of the law. The first respondent is a company registered in terms of the laws of Zimbabwe. The second and third respondents are private individuals. They are sued in their capacity as sureties and co-principal debtors of the first respondent. They allegedly passed a surety in favour of the applicant. The fourth and fifth respondents are also adults who are sued in their capacity as sureties and co-principal debtors by virtue of a surety they passed in favour of the applicant. They also securitised their immovable property known as stand number 997 Glenlorne Township 25 of Lot 30 of Glenlorne, Harare.

Background

The applicant and the first respondent entered into an oral agreement on 3 October 2019. In terms of the agreement the first respondent was to purchase and supply 516 metric

tonnes of fertiliser for the applicant. The fertiliser was supposed to be purchased and delivered within 30 days of payment by the applicant. The full purchase price and supply of the fertiliser was US$321 726.00 payable into an account held by Addlesys Consultant (Pty) Limited, a company in South Africa. The applicant secured a loan from its bankers for the purchase of the fertiliser. The loan agreement was time bound and any default attracted a penalty fee. Although denied, the applicant's case was that, in the event of a breach the first respondent jointly and severally with the second, third, fourth and fifth respondents would be liable to refund the purchase price together with interest, charges and penalties levied on the amount by the applicant's bankers and other regulating authorities. The respondents would also be liable for costs together with collection commission in the event the applicant institutes legal proceedings .The respondents would also be liable for damages arising out of the any breach. The second and third respondents by surety guaranteed the fulfilment of the contract, they undertook to refund the applicant the purchase price including the interest, charges and penalties imposed by the applicant's bank. They also undertook to make good all legal costs, collection commission and penalties levied by the Zimbabwe Revenue Authority.

The applicant duly paid the full amount of USD 321 726.00 into Addlesys Consultant (Pty) Limited's account in South Africa. The first respondent supplied 169.950 metric tonnes of fertilizer. A balance of 346.050 metric tonnes remained outstanding. Despite making an undertaking to make good the breach the first respondent failed to supply the agreed tonnage of fertiliser. The applicant terminated the contract and advised the first, second and third respondents of their liability as a result of the breach. The second and third respondents undertook to pay US$211 314. 47 being the balance purchase price for the outstanding tonnage of fertiliser, ZIMRA penalties and interest accrued on the amount. The applicant avers that the correct amount should be US $ 312 039.70, the respondent incorrectly calculated the interest. The fourth and fifth respondents offered the property as security for the payment of US$211 314.47 on 9 September 2020.

The applicant served the respondents with a notice of demand on 17 of September 2020 for payment of US$211 314. 47 for the refund of the undelivered fertiliser, US$ 21 303.96 being interest accrued on the loan and US$ 219 347.32 for financial loss, collection commission and costs of suit. Despite the demand the respondents failed to pay the amount claimed.

Thereafter the applicant issued summons claiming various amounts. On being served with the summons the respondents filed a special plea. The special plea was not set down and

subsequently the respondents filed their plea on the merits .In their plea the respondents averred that a supervening impossibility arose due to the Covid 19 induced lockdown regulations which curtailed all cross border transportation between Zimbabwe and South Africa. In addition they challenged the joinder of the second to the fifth respondents as sureties and co principal debtors. The applicant considered that the plea was filed as a dilatory tactic and that the respondents did not have a *bona fide* defence. The respondents opposed the application and filed opposing affidavits.

The respondent's defence

The second respondent deposed to an affidavit on behalf of himself and the first respondent. The third and fifth respondents filed affidavits associating themselves with the second respondent's averments. Although the second respondent stated that he was authorised to depose an affidavit on behalf of the fourth respondent, no such authorisation was filed by the fourth respondent.

The respondents' opposition is that the second, third, fourth and fifth respondents did not bind themselves as sureties. On that basis they were wrongly joined to the proceedings. The first respondent is a company with a separate legal persona. It entered into the agreement with the applicant. It can be sued in its capacity as such. The respondents do not deny that the agreement was not satisfied, but maintained that performance was made impossible by the Covid 19 induced lockdown. In respect of the US$211 347.32 that the respondents are said to have unconditionally acknowledged indebtedness the point taken was that the acknowledgment was made in a without prejudice letter which the court must not rely on. The respondents relied on the authority of *Kazingizi & Anor* v *Kazingizi & Anor*[1], *Enterprises and Swanepoel SA* v *Rhine Sports Invetsments (Pvt) Ltd*[2] that a without prejudice letter cannot be used as evidence in court. Therefore there was no acknowledgement of debt.

The law

Both parties set out the applicable law in such an application. Summary judgment is provided for in r 30 of the High Court Rules, 2021 "the Rules". In action proceedings where the defendant has entered appearance to defend, the plaintiff may at any time before a pre-trial conference make a court application for summary judgment. It is an extra ordinary remedy

[1] HH 797/15
[2] 2018(1) ZLR 321(H)

which is granted to expeditiously dispose of a matter where the defendant has entered appearance to defend for the purposes of delaying the proceedings.

A plaintiff seeking summary judgment must bring itself within the sphere of r 30. See *Shingadia v Shingadia*.[3] The plaintiff must set out facts that show that its claim is unassailable both factually and legally. The plaintiff may attach documents to the founding affidavit to verify the cause of action and show that there is no genuine defence to the action.

A respondent faced with an application for summary judgment may file an affidavit or give oral evidence with the leave of the court. He/she must set out facts that show 'that he or she has a genuine and sincere defence to the action and such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant' r 30 (5) of the Rules. The defence must not be set out in general terms, it must be disclosed '…with sufficient clarity and completeness to enable the court to decide a *bona fide* defence'. See *Mbayiwa* v *Eastern Highlands Motel*[4].

A suretyship agreement is an accessory contract where the surety undertakes to the creditor of another that the principal debtor will perform his obligation and that in the event the principal debtor fails to do so the surety will perform it or falling that, indemnify the creditor[5].The ordinary principles of a binding contract apply. There must be parties who intend to be bound by the contract of suretyship. See also *Bakari* v *Total Zimbabwe (Pvt) Ltd*[6].

Analysis

The applicant has sued the second to fifth respondents as sureties and co- principal debtors. The applicant has not verified the basis of the suretyship. The applicant and the 1st defendant entered into an oral agreement. Invariably the terms of the agreement have to be proved in the event the respondent disputes them. It is clear that the joinder of the respondents is put into issue. In my view the second and third respondents' suretyship cannot be said to be unassailable. Counsel for the applicant conceded that there may be no basis for the third respondent's joinder. I certainly agree. In respect of the second respondent it was submitted that he is in control of the first respondent. The submission is untenable in light of the settled position of law that a company is a separate legal persona. No liability attaches to its directors

[3] 1966 RLR 285 (G) @ 288- 289 A
[4] SC 139/86
[5] Caney's The Law of Suretyship,6th Ed,2010
[6] SC 21/19

or owners except in instances recognised at law. There is nothing in the founding affidavit verifying the assertion that the second respondent bound himself as surety.

The fourth and fifth respondents' liability arises from the sworn affidavits they executed which the applicant attached to its affidavit. They confirm that they are co-owners in title to some property described in deed of Transfer T084082/2001. Further they authorise that the property be used as security;

> "for the indebtedness of our father Happymore Masvaure' the 2nd respondent herein', to Pamuka Private Limited in the amount of US$211,314-00(Two hundred and eleven thousand three hundred and fourteen US Dollars) until settlement of the debt."

They are sued as surety and co- principal debtor. At the outset the document is not a contract of suretyship. It is a sworn affidavit. It has no parties. The applicant as the creditor did not sign as a party to the contract. In the sworn affidavit the fourth and fifth respondents do not undertake to guarantee performance by the first respondent, more so they do not undertake to make payment in the event the first respondent fails to perform its obligations. They do not renounce the rights that are incidental to such a contract. There can no justifiable inference to be drawn for these circumstances that the parties were in agreement to be bound in a suretyship agreement. I find it difficult to accept the point made for the applicant that by simply putting in or offering the property as security the fourth and fifth respondents bound themselves as co-principal debtors and surety. The parties did not enter into a valid suretyship agreement .The respondents raise a defence which, if proved they may be released from liability. Linked to my finding is the request to have the property declared especially executable. If the fourth and fifth respondents have a *bona fide* defence on their joinder, it naturally follows that the issue on the requested declaration must be referred to trial. The applicant has failed clearly set out the facts showing that its claim is indisputable on this issue. It is my view that the issue must be referred to trial.

In respect of the claim for US$ 211 314.47 the applicant referred to the case of *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd*[7] as authority that, what is not denied in affidavits must be taken as admitted. This is the correct approach in our courts. It dispenses of the need to prove those facts. In para 20.11 the applicant specifically makes averments verifying its cause of action that second and third respondents undertook to repay the amount of US$211 314.47. This admission was made on behalf of the first respondent which entered

[7] 2007 (2) ZLR 89 (S)

into the contract with the applicant. This was not denied by the respondent. The only issue raised is that the claim of US$6 789.10 is contested. Nothing further is stated. Even if the court cannot rely on the without prejudice letter l find that the respondent acknowledged its indebtedness in respect of the US$ 211 314.47.I find the issues raised for the respondent a red herring meant to delay proceedings. It is dishonest to say the least.

The applicant filed communications between the parties which clearly show that admissions were made. These were not challenged. On 15 July 2020, the applicant wrote to the respondent through the second respondent advising of the default and the undertaking made to refund the balance for the outstanding fertiliser including interest and penalties charged by ZIMRA. The response from the second respondent was:

> "I receive the mail and working towards the fulfilment of the commitment as agreed."

On 29 July 2020 another letter was written to the respondent this time with a reminder that the applicant is yet to receive the US$ 211 314.47 as agreed. On 1 September the respondent through the second respondent's response was:

> *"*Sorry for the late reply and update. I had some delays but getting there. I was suggesting if its ok that l give in my house in Glen Lorne as collateral and confirmation of ability to pay your funds back by month end September latest just to allow us time for our liquidation of funds. The house is valued at $700 000-00."

The responses from the second respondent are an unconditional admission of indebtedness. The amount was clearly stated which included the interest and the ZIMRA charges. They were not disputed let alone was the issue of Covid 19 induced lockdown raised. The respondent was willing to refund the plaintiff. It would be a contradiction in terms to deny the admission when the 2nd respondent even indicated that they needed time to liquidate their funds. The funds were to be liquidated to pay the obligation. There would be no need to even consider using the Glen Lorne property as collateral if there was no admission. There can be no reason for the applicant to prove this point which was admitted both in the opposing affidavit and confirmed in the communications between the parties. In any event as correctly stated for the applicant, the claim is not for specific performance but for a refund.

The appropriate order must be guided by r10 of the Rules of this Court which provides,

> "If on the hearing of an application made under this rule it appears (a) that a defendant is entitled to defend and some any other defendant is not so entitled; or (b) that the defendant is entitled to defend as to part of the claim; the court shall – (i) grant leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or (ii) grant leave to defend to the defendant as to a part of the claim, and enter judgment against the defendant as

> to the balance of the claim unless such balance has been paid to the plaintiff or (iii) make both orders mentioned in subparagraph (s) (i) and (ii)."

This is an appropriate case for the application of the above rule. The respondents have shown that they do have a *bona fide* defences in respect of some of the applicant's claims yet in another they have totally failed to show a *bona fide* defence.

In the result the following order is made.

1. The claim for summary judgment against the second, third, fourth and fifth respondents' is dismissed.
2. Summary judgment in respect of the applicant's prayer to have the property described as stand number 997 Glenlorne Township 25 of Lot 30 of Glenlorne declared especially executable is hereby dismissed.
3. Summary judgment is hereby granted against the first respondent, for payment in the sum of US $ 211 314.47 to the applicant.
4. First respondent to pay costs on an attorney client scale.

Mafongoya and Matapura, applicant's Legal practitioners
Kantor & Immerman, respondent's legal practitioners.