

CHARTER PROPERTIES (PRIVATE) LIMITED

versus

DELMA LUPEPE

HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 4 OCTOBER 2017 AND 2 NOVEMBER 2017

Civil Trial

J Tsvangirai for the plaintiff

Z Ncube for defendant

MOYO J: The plaintiff issued summons against the defendant claiming:

- 1) judgment in the sum of \$258 230-57.
- 2) Costs of suit at an attorney and client scale.

The basis of the claim is that the defendant agreed to be surety and co-principal debtor of Zimbabwe Express Pvt Ltd in the fulfillment by the company of its rental obligations to plaintiff. Plaintiff therefore seeks judgment against the defendant as surety for the debt.

The plaintiff's representative led evidence to the effect that defendant signed a deed of suretyship before the company (Zimbabwe Express Pvt Ltd) took occupation of the property. The deed of suretyship was tendered into the court record and marked Exhibit 1. It is dated 20 September 2004 and was prepared by CB Richard Ellis who were the property agents at the material time. It is common cause that at the material time a lease agreement was entered between the parties to which the suretyship deed is an accessory agreement.

It is also common cause that another lease agreement was entered into between the creditor and the debtor when CB Richard Ellis ceased to be the property managers and when Knight Frank took over as the property managers.

At this juncture no suretyship deed was entered between the creditor and the defendant.

Unfortunately, this court has not been favoured with the copies of both lease agreements. At the close of plaintiff's case defendant applied for absolution from the instance as defendant's

counsel submitted that the initial agreement expired and therefore the suretyship sought to be enforced before me now also expired with the initial agreement.

Plaintiff's counsel opposed the application for absolution and submitted that the suretyship agreement was valid and enforceable as the requirements for the validity of a deed of surety, were met.

The issue at stake here is whether the surety was discharged from suretyship when the new contract was entered. It is trite that at law, a surety is discharged in the following circumstances, by revocation on notice, by death of surety, by novation, by variance of the terms in the contract, by release of the principal debtor, by arrangement between debtor and creditor, by invalidation of the contract.

From the facts it is clear that a new lease agreement was entered into when the property managers changed from CB Richard Ellis to Knight Frank.

Novation

Is defined as entering into a fresh contract either between the same parties or between other parties. If the parties to a contract agree to substitute it with a new contract, the original contract need not be performed and so the surety stands discharged with regard to the old contract. For the surety too, a fresh contract would have to be drafted.

Variance in terms of contract

Any variance or alteration in terms of the contract made between the principal debtor and the creditor, without the surety's consent, discharges the surety as to the transactions subsequent to the variation.

In the case of *Makuluba v Nat Development Bank and others* 2006 (2) BLR 240 (HC) it was held that novation was the result of an agreement that extinguished the original obligation between the parties and replaced it with a fresh obligation. Its effect was to discharge the old liabilities with all their incidents.

It was further held in that case that a contract of suretyship was liable to be discharged by any event which extinguished the principal debt and by any material variation of the principal contract. In this Botswana case the South African case of *Estate Liebenberg v Standard Bank SA*

Ltd 1927 AD 502, was quoted with approval. I am also persuaded by the *abiter dictum* in HB 152/17 between the same parties.

In the case of *FBC Bank Ltd v Elia Hwenga and others* HH 225/16 the learned judge therein quotes *Milnor v Salisbury City Council* 1949 (1) SA 246 where in it was held that a new agreement constitutes novation and that such novation discharges the surety.

The question was there novation or a variation of the terms and conditions of the original contract in this matter? Under cross examination plaintiff's witness acknowledged that the new lease agreement had a clause that stated that a suretyship agreement should be signed simultaneously with the lease agreement. Asked by the court as to why they entered into a new lease agreement when the property changed hands from CB Richard Ellis to Knight Frank, plaintiff's representative said they had to use their own lease agreement as their lease agreement differs from the CB Richard Ellis one. He said lease agreements differ from one estate agent to another. If the lease agreement differs from one estate agent to another it then follows that a new lease agreement was entered into with a variation to the terms and conditions. It therefore follows that there was novation which discharged the defendant from suretyship entered into at the previous agreement stage. In fact the new agreement itself seems to stipulate that a suretyship agreement should be entered into simultaneously which did not happen. This means therefore that the deed of suretyship signed in 2004 was extinguished by novation or a variation of the initial lease agreement.

I accordingly for these reasons find that there is nothing worth calling upon the defendant to answer.

Absolution from the instance should consequently be granted. I accordingly grant absolution from the instance with plaintiff paying the costs of suit.

Dube-Tachiona & Tsvangirai, plaintiff's legal practitioners
Ncube and Partners, defendant's legal practitioners