

CENTRAL AFRICA BUILDING SOCIETY
versus
ZIMSLATE QUARTZITE (PVT) LIMITED
and
ARMINCO INVESTMENTS (PVT) LIMITED
and
TINASHE ABLE CHIMANIKIRE
and
BEAVER PAMHIDZAI CHIMANIKIRE
and
MOHMED IQBAL MAHMED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 28 September 2015, 23 November 2015
20 January 2016

Trial

R Moyo, for the plaintiff
O Takaendesa, for the 1st defendant
R Bwanali, for the 2nd – 4th defendants
E Samukange, for the 5th defendant

MTSHIYA J: On 13 November 2013, the plaintiff issued summons against the defendants for the following relief:

- “(a) Payment of US\$324 815.49 plus interest thereon at the rate of 20% per annum from the 24th of October 2013 such interest calculated monthly in advance on the said sum and capitalized to date of payment in full;
- (b) Costs of suit at legal practitioner and client scale.
- (c) A declaration that the immovable property being a certain piece of land situate in the district of Marandellas called Stand 130 Marandellas Township, measuring 3, 1474 hectares held by 2nd Defendant under Deed of Transfer number 4905/2002 be declared executable in the recovery of the sums claimed in this matter”.

The above amount, demanded by the plaintiff, arose from a loan facility granted in favour of the first defendant, who at all material times was represented by its director, the third defendant.

On 25 July 2011 the first defendant applied for a loan of US\$280 000.00 from the plaintiff. The loan was not immediately granted but for it to be granted the second, third, fourth and fifth defendants stood as sureties and co-principal debtors. The second defendant also executed a mortgage bond over its immovable property, namely, stand 130 Marandellas Township, measuring 3,1471 hectares, as security for the said loan.

In addition to the amount of US\$28 000.00 applied for, there was also a contingent amount of US\$56 000.00 and hence the total sum of US\$336 000.00.

The *in duplum* schedule provided by the plaintiff shows that the amount applied for was indeed advanced to the first defendant. This is not denied but the first defendant argues that the money it received was not the loan it had applied for but a bridging overdraft facility granted to him by the plaintiff's senior management after the delay in the processing of the loan he had applied for. Furthermore the first defendant argued that it did not agree with the loan terms as presented to it by the plaintiff in its offer of 5 October 2011, leading to it refusing to sign the loan papers. In short the first defendant's position is that it never entered into any loan agreement with the plaintiff. However, first defendant accepts owing the plaintiff some money but in the form of an overdraft facility.

At the commencement of the trial, the plaintiff withdrew its claim against the fourth defendant who is late. It was also agreed that the bundles of documents from the plaintiff, the first to third and fifth defendants be admitted as exh(s) 'A', 'B' and 'C' respectively.

The plaintiff led evidence from Petrus Marthinus Koen (Koen) who is its Head of the Platinum Club, which club he described as an exclusive department in the plaintiff catering for high earned clients.

Koen testified that members of the Platinum Club are given preferential treatment and enjoy various favourable privileges. The first, second and third defendants were members of the Platinum Club. He confirmed that the plaintiff's application for a loan was accepted and that the plaintiff started withdrawing money from the loan account as from 7 October 2011. He went further to state that although the first defendant did not sign the actual offer of a loan from the plaintiff, the other documents (i.e. sureties and mortgage bond) were executed for the security of the loan. The witness said he did not know the reason why the first defendant never signed the offer letter. However, he confirmed that the surety documents in respect of the loan were signed. In his evidence, he went on to say:

"We knew the Platinum Club member so we allowed withdrawals before formalities. We had platinum Accounts for 1st, 2nd and 3rd defendants. These are people recognised as important to CABS and we extend special privileges where business can be conducted."

The witness said although the fifth defendant resigned from the directorship of the plaintiff, his request for the revocation of the surety agreement he signed on 18 October 2011 was refused. Koen said the terms of the loan, incorporated in the Mortgage Bond, were final. The plaintiff closed its case after Koen's evidence.

The first and second defendants testified through one witness namely, Tinashe Able Chimanikire, (Chimanikire), the third defendant, who also testified on his own behalf. It is common cause that the third defendant is the proprietor of the first and second defendants.

Chimanikire, to a large extent, confirmed Koen's evidence but insisted that the money he withdrew from the plaintiff was not a loan. He said he had rejected the terms of the loan offer dated 5 October 2011 and hence his refusal to sign it. He had subsequently been granted an overdraft facility by senior management of the plaintiff. He said the surety agreement and the mortgage bond were executed in anticipation of the loan he had applied for on 25 July 2011. He therefore disputed the existence of a loan agreement.

The fifth defendant, Mohmed Iqbal Mahmed (Mahmed) testified on his own behalf. He said he was a Director in the plaintiff until the end of September 2011 when he resigned. He owned up to an undated surety agreement which he signed before resigning. He had later asked for the surety agreement to be revoked or cancelled, but without success. He said he would only be liable if there was a loan agreement between the plaintiff and the first defendant. He said he did not know if the loan was ever granted. The fifth defendant did not call any other witness.

The joint pre-trial conference minute filed on 24 November 2014 lists the issues for determination as:

- “1.1 Whether or not Plaintiff and 1st Defendant entered into a loan agreement.
- 1.2 If the answer 1.1 is in the affirmative, what were the terms and conditions of the loan agreement between Plaintiff and 1st Defendant?
- 1.3 If the answer to 1.1 is in the negative what was the nature of the agreement entered into between the Plaintiff and 1st Defendant.
- 1.4 Whether or not 1st, 2nd, 3rd, 4th, and 5th Defendants are liable to the Plaintiff jointly and severally the one paying the others to be absolved from the amounts claimed in the Summons or indeed for any amount arising from the arrangement entered into by the Plaintiff and 1st Defendant”.

Prior to the commencement of the trial, the parties had intimated that they wanted the matter to be heard as a stated case. However, for some unknown reason, the parties could not

come up with a statement of agreed facts and hence the collapse of what, I believe, was the correct way of handling this matter – i.e the stated case route. This is so because most of the facts herein are common cause. The only issue being: “whether or not the money advanced to the first defendant was a loan on agreed terms”.

Notwithstanding the absence of a formal loan agreement, documentary evidence placed before the court by the plaintiff do, in my view, clearly point to the existence of a loan agreement on agreed terms. However, the first defendant, whilst admitting receipt of the money from the plaintiff, wants this court to treat the transaction as an unrecorded over-draft facility which was given as bridging finance pending the finalization of a formal loan agreement. There was, however, no written evidence to support that overdraft facility arrangement.

A lot was said in this case but I truly believe, as stated above, that the real issue for determination is ‘whether or not the plaintiff and the first defendant entered into a loan agreement’ on the terms of the plaintiff’s offer of 5 October 2011.

It is the first defendant’s position that in anticipation of the finalization of that loan, it agreed to put in place the securities required by the plaintiff, namely Surety Agreements and a Mortgage Bond.

It is not denied that the mortgage bond executed by the second defendant on 25 October 2011 incorporates the loan terms in the plaintiff’s offer letter of 5 October 2011. The mortgage bond captures the loan amount of US\$280 000-00, the contingent amount of US\$56 000-00 and the interest rate of 20% *per annum*. True, the monthly instalments indicated in the two documents differ. The offer letter refers to monthly instalments of US\$16 410-00 whilst the mortgage bond gives monthly instalments of US\$25 936-00. Nothing, in my view, turns on that because the funds were finally released to the first defendant and accepted. The plaintiff was, prior to releasing the money, satisfied with the securities provided or to be provided..

The first defendant was a member of the Platinum Club and was entitled to preferential treatment. One of the privileges attaching to membership of the club, included being advanced funds pending the execution of the requisite documentation. That kind of preferential treatment was confirmed by the third defendant in his evidence. The executed mortgage bond, in my view, contained the final loan terms agreed to by the first defendant.

Apart from testifying that the amount received under the so called ‘temporary facility’ (i.e. bridging finance) was US\$257 196-85, the third defendant did not dispute the fact that

drawdowns were made only after the requisite securities had been agreed to. It is also significant to note that draw downs on the loan commenced two days after the plaintiff's offer of 5 October 2011.

It is important to note that the figure of US\$ 257 196-85 was never put to the plaintiff's witness who confirmed the figures on the *in duplum* schedule. I agree that the drawdowns preceded the signing of both the surety agreements and the mortgage bond but that was a result of preferential treatment granted to Platinum members. I find it near impossible that the plaintiff would release funds without being assured of adequate security.

It is further significant to note that the processes were concluded soon after 5 October 2011 when the offer was made. Because of the special treatment given to platinum members, that offer never lapsed. A loan arrangement was definitely put in place. That arrangement had nothing to do with the earlier loan of US\$295 000-00 for which the plaintiff obtained judgment on 28 August 2013. Separate securities for that loan had been put in place and therefore the attempt to link documents used under that loan with documents relating to the loan of US\$280 000-00, is misleading.

Both the second and third defendants never entertained the idea that withdrawals were from a temporary facility. That is so because as late as 12 September 2012, the first defendant, in a letter to the plaintiff, signed by the third defendant, referred to an 'overdraft loan facility of US\$280 000-00'. It wrote:

- "2. As Mahomed Iqbal Mahmed is no longer involved in the activities of Zimslate Quartzite, kindly cancel the Act of Surety by him with respect to the overdraft loan of US\$280,000-00, A/ct No. 6090035675 granted to Zimslate. I enclose a letter from Mahomed to the same effect".

Reference to 'loan' in the above statement portrayed the correct position.

The 'Act of Security' referred to in the above statement also quoted the loan amount guaranteed by the fifth defendant who, I believe, knew what he was guaranteeing. Furthermore, the power of attorney signed by the third defendant on 13 October 2011 in respect of the mortgage bond correctly makes reference to the total sum of US\$336 000-00 (i.e made up of the actual loan of US\$280 000-00 and the contingent amount of US\$56 000-00) . Clearly the parties were fully conscious of the fact that they were executing loan documents.

It was pointed out that whereas the offer letter depicted the loan account number as 8016018029, the in *duplum* schedule gave the loan account number as 6090035675. The third defendant testified that upon receipt of the offer letter, further negotiations ensued leading to the first defendant being granted what he termed a “temporary facility”. I want to believe that the negotiations were bound to result in changes, including new account numbers.

Given the fact that the third defendant testified that the first and second defendants ran a number of accounts with the plaintiff, I do not find it amiss that the final account became different from the one indicated in the offer letter. Withdrawals attaching to the loan of US\$280 000-00 commenced on 7 October 2011 under loan account number 6090035675 as reflected under the in *duplum* schedule.

It is true that under normal circumstances the surety agreements and the mortgage bond would have been anchored on a distinct loan agreement concluded on the basis of the offer letter of 5 October 2011. However, in *casu*, we have a situation where the conduct of the parties clearly shows that their true intentions are confirmed through other instruments. The plaintiff has demonstrated, on a balance of probabilities, that those other instruments speak to an existing loan agreement, from which the first defendant has already benefited. The first defendant was not able to place written evidence before the court to support its assertion that the withdrawals reflected in the in *duplum* schedule related to some bridging finance.

It is most improbable that the plaintiff, a reputable finance institution, would have disbursed funds to the first defendant without any written instrument. Unlike the first defendant, the plaintiff was able to lay before the court written evidence reflecting the true intentions of the parties. I therefore fully agree with the plaintiff’s submissions that:

- “79. The Defendants suggestion that Plaintiff’s claim is founded on the suretyship mortgage bond at page 93 is wrong and misplaced. The surety mortgage bond is but one of several pieces of evidence confirming that Plaintiff and 1st Defendant concluded a loan agreement. As it takes root from the loan agreement it expresses, repeats and confirms the terms and loans of the agreement. The surety mortgage bond could not express a capital debt, interest and terms at variance to the loan agreement.
84. In this instance the Defendants’ conduct of accessing the loan and meeting all the Plaintiff’s security requirement confirms Plaintiff’s version of events. The courts have always considered the parties’ conduct where an allegation is made that no agreement was reached. See *South African Railways and Harbours vs National bank of South Africa Limited* 1924 AD 704 at 715-716 where Wessels JA had the following to say:

‘The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore is from a philosophical stand point the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look into their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement’”.

We have, in *casu*, a business entity that has benefitted from a loan agreement but, in order to avoid early payment directs that the plaintiff gives another status to the transaction. I say ‘to avoid early payment’, because the first defendant says it is prepared to pay as long as the plaintiff ‘converts’ the loan agreement into an overdraft facility. However, as already indicated, the conduct of the parties and the documentary evidence placed before the court by the plaintiff clearly establishes the existence of a loan agreement whose terms are no different from the plaintiff’s offer letter of 5 October 2011.

If indeed a borrower does not accept the lender’s terms, such borrower should reject the loan. It is not for the borrower to accept the loan and then dictate terms to the lender. That cannot be.

In *Munyanyi v Liminery Investments and Another* HH 38/10, Makarau JP, as she then was, said:

“It is a trite principle of the law of contract that where, by word or deed, one party to a contract gives out to the other a certain position and that position is accepted, both parties are bound. This is referred to as the quasi-mutual assent doctrine that is an intrinsic part of objectively establishing consensus ad idem between the parties to a contract...The doctrine of quasi-mutual assent has been a part of our contract law from time immemorial...”.

What the plaintiff asked for as security for the loan was put in place and funds were loaned to the first defendant. The first defendant accepted and used the funds loaned. The first defendant must pay back.

It is a pity that in order to avoid their obligations under the transaction the second, third and fifth defendants have, despite their own conduct as well, taken the same stance with the first defendant (i.e. arguing that there was no loan agreement). Given the attributes attaching to Platinum Club members and the privileges flowing therefrom, the conduct of the first, second and third defendants was a betrayal of the trust bestowed on them by the plaintiff.

It is therefore compelling to agree with Mathonsi J, when, in *African Banking Corporation of Zimbabwe Limited t/a Banc ABC v PWC Motors (Private) Limited and Others*, HH 123/13, he observed:

“A pattern is manifesting itself where business people will stop at nothing to avoid to pay legitimate claims and in the process play havoc to investor confidence.... I find it utterly deplorable that business people are very quick to receive money from banks undertaking to pay on certain terms. When they have expended the money and have enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay piper has come”.

The above observation applies to what obtains *in casu*.

My finding in this judgment is that the plaintiff has, on a balance of probabilities, proved that, in October 2011, it granted a loan of US\$280 000-00 to the first defendant on terms contained in its offer of 5 October 2011. That finding is binding on the second, third and fifth defendants who guaranteed the first defendant’s obligations under the loan agreement. That loan was not fully repaid and to that end the plaintiff is entitled to the relief it seeks herein.

It is therefore ordered as follows:

1. The first, second, third and fifth defendants be and are hereby ordered, jointly and severally, the one paying the others to be absolved, to pay the plaintiff the sum of US\$324 815-49 plus interest thereon at the rate of 20 per cent *per annum* from 24 October 2013, such interest calculated monthly in advance on the said sum and capitalized, to the date of payment in full.
2. The immovable property, being a certain pieces of land situate in the district of Marandellas called Stand 130 Marandellas Township, measuring 3, 1474 hectares, held by the second defendant under Deed of Transfer Number 4905/2002, be and is hereby declared executable in the recovery of the sum of money mentioned in para 1 above; and
3. The defendants, jointly and severally, the one paying the others to be absolved, shall pay costs of suit on a legal practitioner and client scale.

Gill, Godlonton & Gerrans, plaintiff’s legal practitioners
Musarira Law Chambers, 1st, 2nd & 3rd defendants’ legal practitioners
Venturas & Samkange, 5th defendant’s legal practitioners