FBC BANK LIMITED
versus
AMAN-O-BRIE INVESTMENTS (PVT) LTD
and
LOVEMORE KUTAMAHUFU
and
ACCILIA M. KUTAMAHUFU
and
LUNGISANI NCUBE
and
EMMAH FARIRWI

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 19 July 2017

Civil Trial

T Zhuwarara, for the plaintiff
S Mugoni, for the 4th defendant
T. F Nyathi, for the 5th defendant

FOROMA J: This is a matter in which plaintiff instituted action against the first, second, third, fourth and fifth defendants claiming against all the defendants jointly and severally the one paying the others to be absolved payment of (a) the sum of $79 371.94 (b) interest on the sum of $79 371.94 at the rate of 35% per annum calculated from the 3rd September 2013 to the date of payment in full (c) collection commission in terms of the Law Society of Zimbabwe By Laws 1982 and (d) costs of suit on the attorney and client scale.

All the defendants initially defended plaintiff's claim. First, second and third defendants consented to judgment at the commencement of trial and fourth and fifth defendant defended the matter up to trial.

Fourth defendant's defence to plaintiff's claim was that he did not owe plaintiff any amount as he never provided any personal guarantee in favour of plaintiff for payment by first

defendant of any banking loan facility granted to first defendant by plaintiff. He also denied having caused the registration of a Mortgage Bond Number 486/2013 over a certain piece of land situate in the district of Bulawayo being Subdivision "A" of stand 986 Bulawayo Township held under deed of transfer no. 2093/2008. Fifth defendant's defence as pleaded is that she discharged the liability to plaintiff in respect of the personal guarantee she provided on behalf of 1st defendant in respect of a loan of $40 000.00 which was paid up. Fifth defendant denied liability arising from a subsequent facility of $75 000.00 which she claimed no one informed her about.

The case against 5th defendant proceeded as a stated case on the basis of a statement of agreed facts filed by the parties in terms of r 204 of Order 29 of the High Court Rules 1971. The fourth defendant's case was a fully fledged trial.

At the trial plaintiff's witness one Tizirai Utanda the Assistant Account Relationship Manager in summary testified that fourth defendant signed a personal guarantee in terms of which he guaranteed payment of the loan facility advanced to first defendant by plaintiff.

The introductory portion of the guarantee by an individual on page 24 of Exhibit A reads as follows. "In consideration of FBC Bank Ltd allowing Aman-O-Brie Investments Pvt Ltd (herein after 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 further facilities, subject to the conditions herein after mentioned, I the undersigned Lungisani Ncube do hereby guarantee and bind myself 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 its successors or assigns whether such indebtedness be incurred by the debtor in its own name or in the name of any firm in which the debtor may be trading either solely or jointly with others in partnerships or otherwise……" Tizirai Utanda urged upon the court that fourth defendant is indeed the one who signed the document on page 24 of Exhibit A. Second, third and fifth defendant signed similarly worded guarantees by an Individual in favour of plaintiff and none of them disputed having done so save fifth defendant who disputed the extent of the liability in terms thereof.

The fourth defendant never led any evidence challenging his signature except his bare denial that he did not sign same.

Plaintiff's case is buttressed by the fact that fourth defendant had his immovable property hypothecated as additional security for the payment of the loan to first defendant by plaintiff though fourth defendant disputed having provided such security and sought to suggest that someone forged his signature to procure the mortgaging of his property.

Once the plaintiff established by production of documentation proving that fourth defendant had provided the two forms of security i.e personal guarantee and mortgage bond on fourth defendant's property in the circumstances of this case a prima facie case is considered as having been established shifting the burden of rebuttal on the fourth defendant. See *Niemand* v *Van Heerden* [1998] 3 All SA 616 NC. Fourth defendant did not call any expert evidence to prove that the signature on the personal guarantee was not his or probably not his. He could also have done this by calling the witnesses who had witnessed the signing of the personal guarantee to confirm that the person whose signature they witnessed was not fourth defendant if indeed that was the position.

Plaintiff's criticism that fourth defendant never sought to cancel the personal guarantee on discovery of the alleged forgery is therefore well grounded. Indeed silence *in casu* implies acquiescence.

It is significant to note that fourth defendant is also a director of first defendant and it would not be anything unusual if he was called upon to provide additional security required by first defendant for loans advanced to it for its capital requirements. Fourth defendant's claim that he was made a director of first defendant without his knowledge and that he only became aware of his status as director of first defendant when plaintiff was pursuing payment of the debt does not persuade this court. This particularly because he did not take any action to have his name removed from the CR 14 of the company at the Registrar of Companies office on discovery of this membership of the first defendant company.

Fourth defendant also denies having authorised the use of his property held under deed of transfer 2093/2008 as security for a loan to first defendant by plaintiff yet he did not take any action to have the mortgage bond cancelled. It is also significant to note that fourth defendant's defence was throughout a bare denial until he took the witness stand when he started making allegations as to who had forged his signatures on the personal guarantee and mortgage bond. I find his defence to be totally unreliable. His testimony at trial was no less than a pack of recent

fabrications. Nowhere before had 4th defendant suggested that there was some collusion between plaintiff's employees and second defendant to procure securities from him without his knowledge or consent. Fourth defendant has clearly failed to rebut the prima facie case made against him by the plaintiff.

The plaintiff's claim as against fifth defendant.

The court's task in regard to the plaintiff's case against fifth defendant has factually been made easy. Plaintiff and fifth defendant agreed on the material factual background in the statement of agreed facts. In its closing submissions despite the statement of agreed facts fifth defendant's counsel sought to argue that both ZADT loan facilities advanced to first defendant were illegal as being in contravention of the following statutory provisions:- (a) Guarantee by an individual signed by fifth defendant was claimed to be in contravention of s 12 (1) of the Money Lending and Rates of Interests Act (Chapter 14:14). The said guarantee was thus considered null and void as not complying with peremptory provisions of the Act in that the money lent ought to provide the rate of interest to be charged in respect of the loan.

The second loan facility of $75 000.00 was also considered to be null and void on account of the facility having contained a false statement in contravention of s 12 (3) of the Money Lending and Rates of Interest Act aforesaid.

Fifth defendant raised the defence of illegality for the first time in its closing submissions. There was no application to amend its plea in order to aver illegality either in the alternative or additionally. The rules of court do not permit this manner of conducting one's case. I propose to ignore the new defence brought up as a red hering. Fifth defendant's substantive defence as pleaded is that it duly provided security for the initial loan facility of $40 000.00 which was due to expire on the 30th June 2013. She claims that she was not party to the second facility of $75 000.00 and that the facility is therefore not binding on it. Plaintiff on the other hand argues that 5th defendant admits having signed an unlimited guarantee by an individual which appears on page 25 of Exhibit A. According to the plaintiff the admission seals his fate considering the contents of such guarantee. The opening paragraph of the personal guarantee quoted herein above has the following operative part also found in fifth defendant's personal guarantee. "In consideration of FBC Bank Ltd allowing Allan O-Brie Investments Pvt Ltd …. 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 herein after mentioned 1 the undersigned Emmeh Farirwi do hereby guarantee …" It is common cause that the facility would expire on the 30 May 2013. It is clear that until the expiry of the facility any indebtedness be it based on the initial facility or new or further facilities would be binding on the fifth defendant as surety. It is also common cause that the $75 000.00 facility was provided to the first defendant by the plaintiff on 6 June 2013 during the subsistence of the first or initial facility.

A correct reading of the personal guarantee that the fifth defendant signed did not limit the fifth defendant's liability, to the sum of $40 000.00 or its extension beyond $40 000.00 conditional upon 5th defendant being given notice of new or further facilities. Thus it does not affect the matter that the fifth defendant was not informed of an extension of the liability. It is also common cause as agreed upon in the statement of agreed facts that the total value advanced to the first defendant came to the sum of US$115 000,00. It is important to note that the facility of the 6 June 2013 was granted subject not only to existing securities but subject to additional securities. The fifth defendant clearly bound herself to an unlimited guarantee by binding herself to unspecified current and future debts see *Eva Muzuva* v *FBC Bank Ltd* SC 67/15. It should be noted that the fifth defendant did not limit her suretyship to $40 000,00 which of course she could easily have done. Unfortunately for the fifth defendant the personal guarantee she gave is not susceptible to be given the meaning she is contending for and the court is bound to give effect to the document which evinces the agreement between the parties. So rigorous is the law on this that in the case of *Magodora & Ors* v *Care International* S 24-14 it was reiterated that it is not open to the courts to re-write a contract entered into between the parties or to excuse any of them from the consequences of the contract (barring illegality or immorality) that they have freely and voluntarily accepted even if they are shown to be onerous or oppressive.

As pointed out on behalf of the plaintiff, the fifth defendant was not released by the discharge of the 1st facility (of $40 000) from the subsequent indebtedness of the first defendant to the plaintiff and as surety she could not have unilaterally terminated her liability under the guarantee except in terms of the agreement that she had signed with the plaintiff – see *Tsaperas and Ors* v *Boland Bank* 1996 (4) ALL SA 312 (A).

In the circumstances the plaintiff has proved its case against both fourth and fifth defendants.

It is therefore ordered that:

1. 4th defendant and 5th defendant pay plaintiff the sum of $79 371,94 jointly and severally the one paying the other to be absolved
2. 4th and 5th defendant jointly and severally pay plaintiff interest on $79 371,41 at 35% pa from 3 September 2013 to date of payment in full the one paying the other to be absolved.
3. The 4th and 5th defendants jointly and severally pay the plaintiff collection Commission in terms of the Law Society of Zimbabwe By-Laws the one paying the other to be absolved.
4. The 4th and 5th defendants jointly and severally pay plaintiff costs of suit on the higher scale of attorney and client the one paying the other to be absolved.

Mawere Sibanda, plaintiff's legal practitioners
Messrs R Ndlovu & Company, 4th defendant's legal practitioners
Messrs Vundhla – Phulu and Partners, 5th defendant's legal practitioners