

PROFERT ZIMBABWE (PRIVATE) LIMITED  
versus  
PIONEER HI-BRED (ZIMBABWE) LIMITED  
and  
DANIEL MYERS  
and  
STANLEY KANEMBIRIRA

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 11 September 2018

**Civil Trial**

*D. Ochieng*, for the plaintiff  
*A.B Chinake*, for the 1<sup>st</sup> defendant  
*C.R.G Sithole*, for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants

FOROMA J: At the close of the plaintiff's case the second and third defendants made an application for an absolution from the instance on the basis that the evidence adduced is not such that the court might make a reasonable mistake and grant judgment in favour of the plaintiff against them.

The plaintiff's case against the second and third defendants consists *inter alia* of an application for rectification of a Suretyship agreement signed on 28 September 2012 in order to record a common intention of the parties that both the second and third defendants stood surety as co-principal debtors in favour of the plaintiff on behalf of the first defendant.

Mr P.G Tate the only witness who testified on behalf of the plaintiff was clear in his testimony that the rectification sought was the deletion of the principal as currently recorded i.e the first defendant and substitution in its place of second and third defendants in the Suretyship Agreement. There was no further amendment or correction that the plaintiff was seeking to the Suretyship agreement.

The effect of the amendment that Mr Tate testified to if granted would result in an unsigned Suretyship agreement as the execution page shows that the agreement was only signed by the two defendants as witnesses even though Mr Tate considered that the 2

defendants signed as surety/co-principal debtor each. The Suretyship agreement clearly was not signed by the surety.

The only amendment sought does not support the alleged common intention of the parties i.e that the first, second and third defendants and the plaintiff agreed that they the (second and third defendants) would in their personal capacities guarantee performance of the credit agreement between the plaintiff and the first defendant. Clearly the grant of the amendment sought without further ado would not rescue the agreement. There is no prayer that the first and second defendants each sign it as surety and co-principal debtor.

The claim of a common intention that the parties intended the second and third defendants to stand as surety in their personal capacity is not borne by the remainder of the evidence which is common cause namely documents on pp 11-20 of the bundle exh 1 as required by the plaintiff on p 10 of the exh 1.

None of the 2 defendants produced their identity documents or particulars or copies of their utility bills to show that they were acting in their personal capacities. The documents produced under exh 1 pp 11-20 relate to the first defendant.

No explanation has been given through evidence as to how the document sought to be rectified was found to be compliant with the alleged common intention pleaded by the plaintiff considering that the document is riddled with patent errors and cannot pass the test of security or co-lateral.

In the circumstances the court is satisfied that the plaintiff's claim against the second and third defendants in so far as it is based on rectification has not proven to the required standard at the close of the plaintiff's case. The evidence adduced on behalf of the plaintiff does not justify on a *prima facie* basis that there was a common intention to have the second and third defendants stand as sureties and co-principal debtors for and on behalf of the first defendant in favour of the plaintiff. On the evidence adduced no court might make a reasonable mistake and find that the parties harboured a common intention to have the second and third defendants stand as sureties and co-principal debtors in their personal capacities on behalf of the first defendant in favour of the plaintiff. I accordingly grant the third defendant absolution from the instance. The second respondent is put on its defence by reason of the undertaking he made in the application for credit facility on behalf of the first defendant which became a contractual term when the credit application was granted/accepted by the plaintiff see p 4 of the application.

*Kevin J. Arnott*, plaintiff's legal practitioners  
*Kantor & Immerman*, 1<sup>st</sup> defendant's legal practitioners  
*Mapfidza & Rutsito*, 2<sup>nd</sup> & 3<sup>rd</sup> defendants' legal practitioner