

FBC BANK LIMITED
versus
GESMA PVT LTD
and
LETCIA MARERE
and
EDMORE TOME
and
GIFT TICHAFU MARERE
and
MAPERTON TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 28 March 2019 & 9 October 2019

Opposed Application

K. Kachambwa, for the Plaintiff
T. Mudambanuki, for the Defendant

FOROMA J: Plaintiff sued the five defendants for provisional sentence claiming against all the defendants jointly and severally, the one paying the others to be absolved the following:

- (a) payment in the sum of \$12 803.61; and
- (b) Penalty interest on the sum of \$72 803.61 at the rate of 35% per annum with effect from 30th April 2015 to date of payment in full and
- (c) costs of suit on a legal practitioner and client scale and collection commission as prescribed by the Law Society of Zimbabwe Tariff and
- (e) an order declaring certain piece of land situate in the District of Salisbury called Lot 583A Greendale measuring 4 522 square metres and Held under Deed of Transfer No. 9573/2003 to be specially executable.

The claim for provisional sentence is based on two liquid documents namely

- (1) Certificate of indebtedness dated 22 June 2015 and
- (2) Deed of Hypothecation or first Mortgage Bond. In respect of the Certificate of indebtedness second and fourth defendants who signed guarantees in favour of

Plaintiff on behalf of first defendant each agreed explicitly in terms of clause 11 of their respective guarantees that they would be bound by the certificate of indebtedness which would be deemed a liquid document for purposes of obtaining provisional sentence. Clause 11 of the Guarantee by an Individual signed by the second, third and fourth Defendants reads as follows:

“11. The amount of the indebtedness of the Debtor and my indebtedness hereunder to the said Bank at any time (including interest and the rate of interest) shall be determined and proved by a certificate signed by any Manager or Operations Manager of the Bank. It shall not be necessary to prove the appointment of the person signing any such certificate and such certificate shall be binding on me and shall be conclusive proof of the amount of my indebtedness hereunder and shall be valid as a legal document against me in any competent Court for the purpose of obtaining provisional sentence or summary judgment against me thereon.”

Both clause 11 of the individual guarantees and clause 23 of the loan agreement binding on first Defendant provide that in the event of first defendant breaching the loan agreement a certificate of indebtedness signed by any two authorized signatories of Plaintiff (the bank) shall be a valid liquid document sufficient to sustain provisional sentence proceedings against the defendants. It is therefore plaintiff's case that by agreement of the parties themselves the certificate of indebtedness entitles the plaintiff to mount a claim for provisional sentence against the defendants for the recovery of the debt.

The second basis for provisional sentence is a first deed of hypothecation (mortgage bond) which it is trite is recognized as a liquid document as it is a record of an acknowledgement of indebtedness by the mortgagee.

Some background to the mortgage bond is appropriate as it will be necessary in resolving the defence proffered on behalf of fifth Defendant. On the 31st December 2010 fifth Defendant mortgaged its property namely lot 583A Greendale measuring 4 522 square metres in favour of plaintiff as security for a composite facility granted to first defendant by the bank to cover existing and future indebtedness up to but not exceeding the sum of US\$166 000 at any one time. In terms of clause (d) of the said bond it was recorded expressly as intended to cover debts generally, including both existing and future indebtedness up to but not beyond the said sum of US\$166 000 at any one time and in addition to cover interest. The mortgage bond also provided that the security afforded to the bank by the said bond shall be a continuing one notwithstanding any fluctuation in the amount or even temporary extinction of indebtedness to the Bank.

It is common cause that first defendant's liability in respect of the sum of \$166 000 was discharged but before the bond was cancelled and in March 2014 first Defendant applied and was granted a further composite facility by Plaintiff namely

- (i) Revolving acceptance Credit Facility
- (ii) Cash Advance Overdraft Facility
- (iii) Short term loan facility all of which amounted to US\$ 100 000.

The introductory paragraph of the banking facility addressed to first defendant's creditors was couched as follows:

"We are pleased to advise that we are agreeable to placing at the disposal of your company, the undermentioned banking facilities on the following terms and conditions"

In terms of clause 10 of the said facility letter first defendant was required to provide security to cover the indebtedness as follows

10.1 Security already held –

10.1.1 First Deed of hypothecation for US\$166 000 by Maperton Trading (Pvt) Ltd over Lot 583 A Greendale

10.2 Security required

10.2.1 Unlimited guarantee by Gift Tichafa Marere.

10.2.2 Unlimited guarantee by Edmore Tome

10.2.3 Unlimited guarantee by Leticia Marere

10.2.4 Unlimited guarantee by Maperton Trading (Pvt) Ltd

10.2.5 Cession of fire policy over the hypothecated property in clause 10.1.1

In terms of clause 11 of the composite facility letter the facilities would be made available after receipt by the bank of signed and registered security documents required in clause 10 above. Effectively the documents that are referred to in paragraph 10 (receipt of which were a condition precedent) were those under paragraphs 10. 2.1 -10. 2.5 as the first Deed of Hypothecation for US\$166 000 by Maperton Trading (Private) Ltd was already in plaintiff's possession.

On being served with the summons for provisional sentence the defendants filed opposing affidavits in terms of which they raised the following defences:

- (1) That plaintiff's claim as against the first to fourth defendant had prescribed and

(2) That plaintiff had no cause of action against fifth defendant and thus denied that fifth defendant is a surety to the 2014 debt as it did not provide the unlimited guarantee as required in terms of clause 10.2.4 as aforesaid.

Plaintiff filed an answering affidavit wherein it essentially disputed that the debt was prescribed arguing that in fact the debt secured as it was by a mortgage bond could only be prescribed at the end of 30 years in terms of section 15 (a) (i) of the Prescription Act. Plaintiff's argument regarding prescription was premised on the contention that it had expressly been agreed between plaintiff and defendants in terms of para 10.1 of the Composite Facility Agreement that as security for the debt the parties would rely on the extant mortgage bond. (First Deed of Hypothecation over Lot 583A Greendale measuring 4522 square metres valued at US\$166 000.)

Plaintiff in the alternative to the foregoing argument regarding the prescriptive period of a debt secured by a mortgage bond argued that because the first defendant continuously acknowledged its indebtedness to the plaintiff prescription was thus continuously interrupted. In this regard it is worth noting that the last letter written in terms of which the debt was acknowledged was dated 1 February 2016.

It is important to note that paragraph 12 of the provisional sentence summons incorrectly suggests that "the fifth defendant in accordance with clause 10.1.1 of the Loan Agreement caused a first deed of hypothecation to be executed over the Immovable Property. It would appear that this error arose from a miscast of Clause 10 of the loan agreement in paragraph 10.4 of the provisional sentence summons which is pleaded as follows-

10.4-In terms of Clause 10 the debt owed to the plaintiff would be securitized *inter alia* by way of (i) a first deed of hypothecation (first mortgage bond) in the value of US\$166 000 which would be registered over the fifth defendant's immovable property, namely certain piece of land situate in the District of Salisbury called Lot 583A Greendale measuring 4522 square metres and held under Deed of Transfer No. 9573/2003 (Immovable property)

Nothing turns on this miscast of the plaintiff's case as defendants at all material times have contended and maintained that the fifth defendant did not register a mortgage bond in favour of the plaintiff and that the one attached in the plaintiff's provisional sentence summons is an expired security in respect of a 2010 loan which had been discharged. In this regard it is pertinent to note that in paragraph 7.1 of the first defendant's opposing affidavit Edmore Tome deposed as follows-

7.1 “I am aware that the plaintiff sought to mislead the court by attempting to state that the 2015 debt was covered by a mortgage bond which was passed consequent to the loan facility agreement appearing as Annexure I to the summons for provisional sentence. Regrettably this is not true and is vehemently denied. No bond was ever passed consequent to the signing of the loan facility agreement in fact. The mortgage bond attached to the summons for provisional sentence was passed in December 2010 way before the contract wherein the plaintiff’s cause of action rest arose (underlining is mine for emphasis) The position is made clearer when reference is made to paragraph 8 of Edmore Tome’s affidavit which reads – “8 – “I would not want to leave this honourable court craving for details of what actually transpired thus will put into full perspective. Sometime in 2010 the first defendant made an application for the plaintiff to pass a Bank Guarantee in favour of the Ministry of Public Works for US\$ 166 000. Consequent to this application the fifth defendant offered security being its property which was then hypothecated to facilitate the trade transaction. I attach hereto a copy of the Bank Guarantee as Annexure B hereto.”

It is common cause between plaintiff and defendants that the Bank guarantee in favour of the Ministry of Public Works expired in January 2011 consequent upon performance of its obligations. Clearly therefore defendants stand to suffer no prejudice on account of the miscast. If anything fifth defendant has understood clearly the basis of the plaintiff’s reliance on the deed of hypothecation (mortgage bond) hence its argument that plaintiff cannot lawfully rely on it as security for the loan under discussion. Besides, plaintiff in its answering affidavit deposed to by Bernard Mutambara put the plaintiff’s position beyond doubt in paragraphs 5-8 of the opposing affidavit when it states-7. “I must say, it is most astounding that the defendants’ only defence to plaintiff’s claim is a point *in limine* on prescription. The allegations made in these paragraphs are completely denied. Firstly, it was expressly agreed between the plaintiff and the first defendant in terms of para 10.1 of the Loan Agreement that as security for the debt, the parties would rely on the extant mortgage bond registered over the Immovable Property for the sum of US\$ 166 000.”

Defendants sought to defend the summons for provisional sentence on the following bases:

- (a) that no mortgage bond was registered to secure the debt.
- (b) the debt had prescribed at the expiration of 3 years from its due date i.e. the 30th April 2015 .

- (c) that in light of there being no mortgage bond registered in favour of the plaintiff an order declaring fifth defendant's immovable property specially executable would be incompetent.

I proceed to deal with the issues arising from the defences raised.

It is common cause that the mortgage bond secured over fifth defendant's property namely Lot 583A Greendale measuring 4 522 square metres was originally meant to secure a bank guarantee by plaintiff on behalf of first defendant and was duly authorised by fifth defendant's directors one of whom Tichafa Marere signed the power of attorney. It is further common cause that although first defendant's liability under the said bank guarantee was fully discharged in 2012 the said bond was never cancelled and was still in existence as at 2014 when the loan the subject of this summons for provisional sentence was taken by first defendant.

A perusal of the loan agreement clearly shows that under para 10.1.1 thereof the mortgage bond was agreed upon as constituting existing security for the 2014 loan. Any interpretation of the loan agreement supporting the view that a fresh deed of hypothecation (mortgage bond) had to be registered would not be supportable for two reasons namely

- (i) the 2010 mortgage bond was intended to be a continuing cover in terms of clause (d) on page 30 which for the avoidance of doubt provides that:

“(d) that this bond is intended to cover debts generally, including both existing and future indebtedness, up to but not beyond the said sum of US\$ 166 000.00 at any time, and, in addition to cover interest as aforesaid, and the security afforded to the bank by this bond shall be a continuing one notwithstanding any fluctuation in the amount even temporary extinction of indebtedness to the bank.”

- (ii) As the mortgage bond of 2010 remained the first and extant until cancelled if any subsequent mortgage bond had to be registered on this property such bond could then not be a first deed of Hypothecation because the extant bond was intended to be a continuing cover. Plaintiff was already in possession of adequate cover by the mere fact that the 1st mortgage bond had not been cancelled and fifth defendant's directors had consented to the said bond being treated as plaintiff's security.

It is indeed an act of desperation for fifth defendant to argue that it never signed any security agreement to the 2014 debt between plaintiff and first defendant thus liability cannot be

imputed on it (fifth defendant). It is clear that the mortgage bond is the basis of fifth defendant's liability to plaintiff and such mortgage bond's validity is not conditional upon fifth defendant signing a deed of suretyship or signing an unlimited guarantee by fifth defendant in terms of para 10.2.4 of the loan agreement as the parties never contemplated that the validity of an already and existing security (mortgage bond) be re-endorsed by an unlimited guarantee.

With regard to the certificate of indebtedness constituting a liquid document first and fourth defendants have raised the defence of prescription. As highlighted above the applicable prescriptive period of prescription is that of a debt secured by a mortgage bond namely 30 years in terms of s 15 (a) (i) of the Prescription Act. Even if the appropriate period of prescription was agreed to be 3 years as contented by defendants the debt would remain valid and not prescribed by virtue of the interruption to the remaining period of prescription as a result of acknowledgements of indebtedness by defendants the latest of which was on 16 February 2016.

It is ludicrous for defendants to suggest that the acknowledgements of debt were not by the defendants but by Germa Technical Services P/L a company which was not in existence at the time as it was only incorporated on the 19 October 2017.

It is clear that the defences raised by the defendants are not available to them for purposes of defeating plaintiff's claim for provisional sentence except the claim for collection Commission which plaintiff abandoned. Plaintiff is clearly in possession of two liquid documents namely a binding Certificate of indebtedness and the mortgage bond as pleaded. Its claim for provisional sentence is unassailable.

It is therefore, ordered that :

- (1) provisional sentence is granted to plaintiff against the first, second, third, fourth and fifth defendants jointly and severally the one paying the others to be absolved for payment of
 - (i) the sum of \$72 803.61
 - (ii) penalty interest thereon calculated at the rate of 35% per annum reckoned from 30 April 2015 to date of payment in full.
 - (iii) costs of suit on a legal practitioner and client scale.

- (2) Certain piece of land situate in the District of Salisbury called Lot 583A Greendale measuring 4 522 square metres and held under Deed of Transfer No. 9573/2003 be and is hereby declared to be specially executable.

Dube, Manikai & Hwacha, plaintiff' legal practitioners
Jarvis Palframan, defendants' legal practitioners