CONNECT MICROFINANCE ZAMBIA LIMITED
Versus
ELISHA TSINDIKIDZO

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHIRAWU-MUGOMBA J

Harare, 26, 31 January, 03 February 2023

A *Moyo* with *N. Chidembo,* for the applicant
R.G Zhuwarara, for the respondent

OPPOSED MATTER

CHIRAWU-MUGOMBA J: This matter was placed before me as an application in which the applicant seeks payment of the sum of US$714 000 (seven hundred and fourteen thousand United States Dollars). The background to the matter is as follows.

The respondent is the registered owner of two properties namely stand 504 and stand 12085 located in Zimbabwe. Sometime in 2019 an entity called Transafrica Investment Holding SA ("Transafrica") secured a credit facility from the applicant on specific terms.

The respondent guaranteed, as surety and co-principal debtor, payment by Transafrica of the money advanced to it by the applicant. This was through the registering of two surety mortgage bonds over the properties mentioned in paragraph one above. Transafrica has since failed, refused or neglected to pay the said amount and remains indebted to the applicant. Being a co-principal debtor, the applicant therefore seeks relief against the respondent including an order that the hypothecated properties be declared specially executable.

The respondent strenuously opposes the matter and raises the following preliminary issues.

a. That he is domiciled in the Republic of Zambia, ("Zambia"). The applicant is also domiciled in Zambia and the claim ought to have been instituted in the courts of Zambia.

b. Despite the registration of the surety bonds in the Republic of Zimbabwe ("Zimbabwe") the cause of action arose within the jurisdiction of Zambia, as all negotiations occurred in Zambia.

c. His suretyship guaranteed due performance by Transafrica of its obligations to the applicant. In terms of clause 17 of the loan agreement, any dispute shall be resolved by reference to a competent court sitting in the Republic of Zambia in terms of Zambian law. It follows that this court has no jurisdiction in the matter.

At a case management meeting held on the 9th of November 2022, the legal practitioners were directed to file supplementary heads of argument to address the preliminary issues identified as (1) jurisdiction and (2) choice of law.

It is common cause that the loan novation agreement between the applicant and Transafrica contains the following clauses.

15. GOVERNING LAW AND JURISDICTION

15:1 This agreement shall in all respects be construed by and in accordance with the laws of the Republic of Zambia.

15:2 The parties hereby agree to submit any dispute to the non-exclusive jurisdiction of the Zambian courts.

17. DISPUTE RESOLUTION

17.1 For the purposes of this clause 'dispute' means any dispute, difference of view, disagreement, controversy or claim arising out of or relating to this agreement or the breach, termination or validity thereof, which the parties are unable to resolve by mutual agreement within a reasonable time.

17.2 Any dispute shall be resolved by reference to a competent court sitting in the Republic of Zambia.

There being no dispute about the respondent binding himself as surety and co-principal debtor, what remains for contestation between the parties is the interpretation of the two cited clauses in the loan agreement and whether they are binding on the respondent.

In motivating the court to find that it has no jurisdiction to hear the matter and that the choice of law as selected by the parties is that of the law of the Republic of Zambia, Mr *Zhuwarara* for the respondent made the following submissions in the heads and in oral submissions. That the court has no jurisdiction to determine the matter owing to the choice of law and jurisdiction. The intention of the parties was to resolve all disputes arising from the loan novation by reference to the law of Zambia. The filing of the application before the courts of Zimbabwe violates the principles of the sanctity of contract - *Magodora and ors,* v *CARE International Zimbabwe*, SC 24/14. The suretyship agreement cannot be divorced from the principal obligation and therefore the argument by the respondent that suretyship bonds should be treated separately is not legally sound. The law expects that the parties should follow the dispute resolution that they chose for themselves – *Cargill Zimbabwe* v *Culvenham Trading (Private) Limited,* HH42/06. Even if clause 17:2 of the loan agreement were to be disregarded, the circumstances of the matter dictate that it ought to be determined in Zambia. The cause of action arose in Zambia and the respondent is domiciled in Zambia. There is also a difference between jurisdiction to hear the matter and execution. The latter even if the courts of Zambia decide in favour of the applicant, can have the judgment registered in Zimbabwe for purposes of execution. The court ought therefore to decline jurisdiction.

Mr *Moyo* for the respondent submitted as follows. The respondent is not a party to the loan novation agreement. He is a party to the surety mortgage bonds and these form the subject of this matter. The applicant's cause of action is premised on the surety mortgage bonds and not the loan novation agreement. These therefore constitute separate agreements to the loan novation agreement *Ellse* v *Johnson* 2017 (2) ZLR 86(S). Neither of the bonds contain a choice of law or jurisdiction clause. The loan and suretyship bonds cannot be conflated. Upholding such a position will mean re-writing the contract between the parties.

The following factors favour the applicant's position that this court has jurisdiction, the surety mortgage bonds were drawn up, executed and registered in Zimbabwe. The property that was hypothecated is situate in Zimbabwe. In *Delta Beverages (pvt) Ltd* v *Blakey Investments (Pvt) Ltd,* SC 59/22, the court was concerned with the choice of law as agreed to by the parties in their agreement as being that of the Republic of South Africa. This was explicitly incorporated. In *casu*, the choice of law does not appear in any of the surety mortgage bonds.

In my view, in order to resolve this matter, the following issues arise;

a. What is the cause of action?

b. What is the relationship between the loan novation agreement and the suretyship mortgage bonds?

A reading of the applicant's claim reveals that the basis of its claim against the respondent is that Transafrica is indebted to it in the sum of US$714 000. That the respondent guaranteed payment of this amount by binding himself not only as surety but also co-principal debtor and renouncing the usual exceptions. Further that the principal debtor, has failed to honour its obligation hence the liability of the respondent who entered into two surety mortgage bonds. If one were to follow the argument by the applicant, it means that essentially what it is claiming is that there are two separate agreements, the loan novation and the surety mortgage bonds. The immediate question that arises is whether the surety can exist on its own without the loan agreement. It is trite that every suretyship agreement is conditional on the existence of a principle obligation – see *Mtandwa* v *Zimbabwe Banking Corporation Limited*, 1999(1) ZLR 445 (H). In discussing the relationship between a surety and co-principal debtor, the Supreme Court in *Makgatho* v *Old Mutual Life Assurance (Zimbabwe) Ltd,* 2015(2) ZLR 711 (S) had this to say;

> "The position is now settled that the liability of a surety and co-principal debtor is joint and several with that of the principal debtor and is no more, nor less than, nor different from, that of the latter, *Neon and Cold Cathod Illuminations (Pty) Limited* v *Ephron* 1978 (1) SA 463,473 B-C. *Union Government* v *Van der Merwe* 1921 7PD 318,322. I further agree with the submission by the respondent that there is no general legal obligation on a creditor to advise the surety and co-principal debtor of the breach by the principal debtor because in law ***they become one and the same,*** once the principal debtor is put *in mora* (my emphasis)".

As cited by the applicant in its heads of argument, from *ELLSE* v *Johnson* (supra) at 89-90;

> "A suretyship is an accessory agreement between the surety and the creditor of the principal debtor in terms of which the surety makes himself liable to the creditor for the proper discharge by the debtor of his duties to the creditor".

In the case of *Orkin Lingerie Company (Pvt) Ltd* v *Melamed & Hurwitz* 1963 (1) SA 324 (W) at 326 G-H Trollip J commenting on the definition of a suretyship agreement said;

> "Various definitions of suretyship have from time to time been given. They are collected in Wessels on Contract 2nd ed, paras, 3774, 3785 to 3793, and Caney on Suretyship, pp 11, 17 and 18. I think that, having regard to them, a contract of suretyship in relation to a money debt can be said to be one whereby a person (the surety) agrees with the creditor that, as accessory to the debtor's primary liability, he too will be liable for that debt.
>
> The essence of suretyship is the existence of the principal obligation of the debtor to which that of the surety becomes accessory.
>
> This means a suretyship agreement can only be entered into if there is an agreement between the creditor and principal debtor. It is therefore an additional agreement to the one between the creditor and principal debtor. They are two separate agreements entered into between the creditor and principal debtor and between the creditor and the surety".

Therefore, it follows that essentially in a suretyship agreement there is the 'main' agreement between the principal debtor and creditor and the second one between the creditor and the surety.

What therefore are the legal implications regarding the two agreements? In *Bakari* v *Total Zimbabwe (Pvt) Ltd,* SC 21/19, the court stated as follows;

> "According to Caney LR, Forsyth CF and Pretorious JT*, Caney's The Law of Suretyship in South Africa,* (Juta and Co, 2010) a suretyship involves three parties; the creditor, the principal debtor and the surety. It is a contract between the surety and the creditor in terms of which the surety binds himself to perform the obligations of the principal debtor to the creditor, if the principal debtor fails in whole or in part to fulfil his obligations. Suretyship is a contract and as such the principles of contract law apply to suretyships. The requirements of the suretyship are as follows; the identity of all parties (that is creditor, principal debtor and surety); and the nature and amount of the principal debt. It is important to note that all three parties must be different parties as a person cannot stand surety for his own debt."

It therefore follows that the cause of action is the suretyship agreement and not the loan agreement between the applicant and Trans Africa. The only obligation of the surety and co-principal debtor is to pay the amount due to the principal creditor upon failure by the principal debtor to make payment. It follows that the respondent is not bound by the terms of

the loan novation agreement which is a separate contract. In other words, he is not bound by the clauses relating to jurisdiction and choice of law.

I agree therefore with the submissions by Mr *Moyo,* that the issues of jurisdiction and choice of law only apply to the applicant and the principal debtor and not to the applicant and respondent. I am fortified in my view by the words of MATHONSI J (as he then was) in *KHM Societe Anonyme* v *G Mobile (Pvt) Ltd and ors*, HH785/15 as follows;

> "A suretyship is a separate agreement between the surety and the creditor. It is a stand-alone agreement binding the surety to the creditor: *Trinity Engineering (Pvt) Ltd* v *Karimazondo & Ors* HH 672/15".

That point was made emphatically by the learned authors *C.F. Forstyth* & *J T Pretorious* in *Caney's The Law of Suretyship*, 6th Ed, Juta at p 30 where it is stated;

> "Although there are three parties involved, there is not necessarily a tripartite agreement or contract; indeed, in practice there seldom is. There is the transaction, as a result of which the principal debtor is bound to the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus, the principal debtor is bound to the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus, the principal debtor is not necessarily a party to the contract between the surety and the creditor, but nonetheless, there comes into existence the obligation of the principal debtor to reimburse the surety what he pays to the creditor…… <u>The surety's obligation arises from the making of the contract of suretyship, from then he becomes bound to the creditor</u> and from then he becomes a conditional creditor to the principal debtor in relation to his right of recourse against the latter." (the underlining is mine).

The respondent has contended that he is resident in Zambia and that the cause of action arose there. It is noted that the application was served on his legal practitioners in Zimbabwe. They did not raise any issues. In my view, this constitutes implicit consent to the jurisdiction of the court. Further, the property that the applicant seeks to be declared executable and that is the subject of the two surety mortgage bonds is situated in Zimbabwe. The respondent has therefore failed to make a case for the upholding of the preliminary points taken.

As for costs, I can perceive of no reason why an award should not be made against the respondent.

<u>DISPOSITION</u>

1. The preliminary point raised by the respondent in relation to jurisdiction and choice of law be and is hereby dismissed.
2. The respondent shall pay costs of suit.

Kantor and Immerman, Applicant's Legal Practitioners
Mbidzo, Muchadehama and Makoni, Respondent's Legal Practitioners