NU NAKS (PRIVATE) LIMITED

versus

J W JAGGARES WHOLESALERS (PRIVATE) LIMITED

and

EXPORT CREDIT GUARANTEE CORPORATION OF ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

MAVANGIRA J

HARARE, 21, 25 November and 13 December 2011 and 25 April 2012

**Civil Trial**

*D. M. Foroma* for the plaintiff

*J. M. Mafusire* for the second defendant

No appearance for the first defendant

MAVANGIRA J: The plaintiff claims from the defendants jointly and severally the one paying the other to be absolved, the sum of US$98 239-64. The plaintiff claims that during the period extending from 20 August 2009 to 30 September 2010, it sold and delivered goods worth US$98 239-64 to the first defendant. It claims that on 11 August 2010 the second defendant bound itself jointly and severally as a surety *in solidum* and co-principal debtor with the first defendant to repay, on demand by the plaintiff, all sums of money that were outstanding as at that date or became due and payable in future. The plaintiff further claims that on 8 October 2010, being the date when the second defendant cancelled the suretyship, the first defendant was already indebted to the plaintiff in the amount now claimed. Furthermore, that the said amount was covered by the guarantee.

The second defendant on the other hand accepts liability for the sum of US$ 12 124- 56 only and denies liability for US$86 115-08. The basis for the second defendant’s stance is that in terms of the guarantee that it issued, it is not liable for the first defendant’s pre-existing debt and is only liable for the debt incurred by the first defendant subsequent to the guarantee. The second defendant has already paid to the plaintiff the admitted sum of US$12 124-56. In consequence thereof the plaintiff’s prayer as amended, at the time of trial and as confirmed in its closing submissions, is for judgment in the sum of US$86 115-08.

When the matter was referred to trial the following were agreed to be the issues for determination by the trial court:

“1. Whether the second defendant is liable to pay the plaintiff the amount in respect of transactions between the plaintiff and the first defendant prior to the date of the execution of the guarantee?

2. How much is the second defendant liable to pay the plaintiff?”

Clause 1 of the letter of guarantee issued by the second defendant and addressed to the plaintiff reads:

“1. We bind ourselves to Nu Naks Foods (Private) Limited as surety in solidum and co-principal debtor with Jaggers to repay on demand by Nu Naks (Private) Limited all sums of money which may now or from time to time hereafter become owing to Nu Naks Foods (Private) Limited by Jaggers either as principal or as surety and whether solely or with others in partnership or otherwise PROVIDED THAT the total sum recoverable hereon shall be limited to the amount of US $100 000 (One Hundred Thousand United States dollars). (the underlining is mine).

It is the interpretation of the underlined words that is the whole basis of the dispute between the parties. The plaintiff contends that the words mean that the second defendant was guaranteeing debts already existing at the time of its issuance as well as debts incurred after the execution of the letter of guarantee. The second defendant on the other hand contends that the said words mean that pre-existing debts were not covered and that the guarantee was futuristic.

In his closing submissions the plaintiff’s legal practitioner referred the court to Professor R. H. Christie’s book, **Business Law in Zimbabwe** at p 71 where LORD WENSLEYDALE’s golden rule is quoted as follows:

“In construing wills and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further.”

The second defendant’s legal practitioner in his closing submissions cited the case of *Century Insurance Company Limited & Anor* v *Grain Marketing Board* 1961 R & N 803 at 807D-E where CLAYDEN FCJ quoted lord WESTBURY in *Blest* v *Brown* (1862) 4 de G.F. & J. 367as follows:

“It must always be recollected in what manner a surety is bound. You bind him to the letter of his agreement. Beyond the interpretation of that engagement you have no hold on him, ... He is bound, therefore, merely according to the proper meaning and effect of the engagement that he has entered into.”

The question then is what the plain, ordinary grammatical meaning of the words now the cause of this dispute is. In my view, the words under consideration define the class or classes of debts covered by the guarantee. The crucial words or phrase in my view read: “which may now or from time to time hereafter become owing.” One class refers to debts which may “now ... become owing”. The other class refers to debts which may “from time to time hereafter become owing”. That, in my view, is the plain ordinary grammatical meaning to be attributed thereto. I see no absurdity created thereby. Neither do I see a reference to past or pre-existing debts. The plain meaning of the words does not, in my view, appear to lead to or create any repugnance or inconsistency.

The consistency of the above interpretation of the words in terms of their plain, ordinary grammatical sense, with the rest of the instrument, is further fortified by the clauses following immediately thereafter. I can do no better than quote para(s) 11 and 12 of the second defendant’s closing submissions:

“11 Clearly the guarantee was futuristic because:

11.1 apart from the intrinsic words of clause 1, clause 2 placed an obligation upon plaintiff to notify second defendant of any default by first defendant beyond the 30 day period, something that would be unworkable if pre-existing debts, some as old as one year, were covered,

11.2 clause 3 stressed the plaintiff’s obligation to stop any further supplies in the event of any invoice being overdue; again something that would be unworkable if one year old debts are said to have been covered,

11.3 clause 4 was to the same effect; the guarantee would automatically lapse in the event of any claim being made against an overdue invoice (i.e. “invoice default”),

11.4 in terms of clause 7 the guarantee was valid for ninety (90) days “from the date noted above” which, in evidence, plaintiff’s own witness said without any hesitation, meant the date of signature of the guarantee.

12 But above all, if the guarantee was meant to cover pre-existing debts it should have simply said so, especially given that the amount was known between the plaintiff and the first defendant and was not in dispute at any time before or after the guarantee.”

The bulk of the evidence adduced at the trial does not, in my view, render much assistance to the court as to the proper interpretation to be given to the words discussed above. As rightly submitted by the second defendant’s legal practitioner, the facts germane to this matter were not in dispute. It was the interpretation to be given to the letter of guarantee, with particular reference to the highlighted words that was in issue. The witnesses’ views of what the words mean or what was intended cannot and do not in my view, override the clear grammatical ordinary meaning of the words, and particularly so when that meaning creates no absurdity, repugnance or inconsistency. In his closing submissions the plaintiff’s legal practitioner after quoting the passage from Professor Christie’s **Business Law in Zimbabwe** (already quoted earlier in this judgment) aptly submitted:

“Professor Christie proceeds to explain that the reason for concentrating on the grammatical and ordinary sense of the words is to exclude consideration of what each party claims to have had in mind when agreeing to those words as a dispute arising from such claims would usually be impossible to resolve satisfactorily.”

I however differ with the plaintiff’s legal practitioner when he submits in para 14 (5) that the words “may now” as used in clause 1 of the guarantee letter should be understood to mean any amount that is (already) owing at the time that the guarantee is executed. In my view, such fragmentation of such a clause is itself grammatically absurd and it also creates a hitherto non-existent absurdity and inconsistency. The word “become” that follows thereafter cannot be ignored or wished away or read separately. I do not see any cause or justification for the invocation of the *contra proferentem* or *contra stipulatorum* rule as urged by the plaintiff’s legal practitioner. In my view, the word “become” is the operative word applicable to the two identified classes of debts; being debts which may now become owing and debts which may from time to time (hereafter) become owing. Pre-existing debts did not become owing at the execution of the letter of guarantee. They had already become owing before then.

In the event that the plaintiff had sold and delivered goods to the first defendant thirty days before the date of the letter of guarantee, that is 11 August 2010, with the result that payment for such would be due 11 August 2010, I would have no hesitation in finding that that particular debt or class of debt became owing on 11 August 2010 and was therefore covered by the letter of guarantee. I base this deduction on the content of the first paragraph of the letter which reads:

“Reference is made to the understanding reached between Nu Naks (Private) Limited and J W Jagger Wholesalers Private Limited (*sic*) (“Jaggers”), wherein Nu Naks Foods (Private) Limited has been mandated to supply goods to Jaggers under a (“the Contract”) on open account terms of Thirty Days (30) from the date of delivery.”

However, the plaintiff’s first witness, one Washington Tendai Charama, who is also the plaintiff’s Sales Manager, was to the effect, *inter alia,* that the plaintiff stopped supplying the first defendant with goods in May 2010, by which date the first defendant’s debt was in the sum of about US$84 000. He further confirmed that by the time of the issuance of the letter of guarantee, the said debt was well beyond the 30 days agreed period for payment. Furthermore, supplies to the first defendant were only resumed after the letter of guarantee had been issued.

In my view, the witness’ evidence confirms that no debt, in any event, became owing on that date. The US$84 000 did not become owing on that date. It had become owing long before that date. Payments for goods supplied after the letter of guarantee would, in view of the thirty days terms stipulated in the first paragraph of the letter only become due and or owing on dates well after 11 August 2010.

For the above reasons the plaintiff’s claim cannot, in my view, succeed. The second defendant’s legal practitioner has urged the court to order the plaintiff to pay costs on the legal practitioner and client scale on the basis that the plaintiff unreasonably persisted in having a full trial when the sole issue for determination was a matter of interpretation and the matter could properly and most economically have been disposed of by referring it as a special case for the opinion of the court in terms of Order 29 rule 199 or 204.

The plaintiff’s legal practitioner on the other hand has made the counter submission that it is the second defendant which ought to be mulcted in costs on a punitive scale for wasting the court’s time in defending an indefensible claim by the plaintiff.

As it turns out I have found in favour of the second defendant on the merits of this matter. As regards the course of action taken; that of a full trial, whilst it may be tempting to accede to the second defendant’s submission in this regard, it appears to me in the exercise of the discretion reposed in the court on the issue of costs, that although only a small fragment of the evidence that was adduced has been of assistance in the determination of this matter, that in itself is an indicator that the scale, albeit marginally, be tilted in favour of the plaintiff. Thus, while costs will follow the cause, the award will be on the ordinary scale.

In the result, the plaintiff’s claim is dismissed with costs.

*Sawyer & Mkushi*, plaintiff’s legal practitioners

*Scanlen & Holderness*, second defendant’s legal practitioners