BARCLAYS PENSION FUND
versus
PIUS MATAMBANADZO

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 29 October 2013, 5 September and 15 October 2014

Civil Application

N. Bvekwa, for the applicant
P. Matambanadzo, for the respondent

TAKUVA J: This is an application in which the applicant seeks to have respondent declared personally liable for debts incurred by Zimlantic (Pvt) Ltd.

On 18 November 2010, the applicant which was the lessor of Zimlantic (Pvt) Ltd at Delken Complex, Mount Pleasant instituted proceedings for Zimlantic eviction and payment of arrear rentals, holding over damages and arrear operating costs. The applicant obtained a default judgment against Zimlantic on 23 February 2011 under case number HC 8408/01. Pursuant to this judgment the applicant executed on that order but realised that Zimlantic had no assets when the Deputy Sheriff remarked that defendant had no movable property worth attaching.

The applicant then instituted these proceedings seeking the following relief:

> "(a) The respondent be and is hereby declared personally liable for Zimlantic's debts.
>
> (b) The respondent shall pay USD 5 889-00 for outstanding operating costs and USD 4 770-00 outstanding arrear rentals.

(c) Respondent shall pay a sum of USD 4 025-00 for holding over damages incurred from 1 April 2010 to 1 October 2010 (date of eviction) together with interest at the prescribed rate per annum on the amounts in (b) and (c) from 30 November 2010 the date of which summons was served on Zimlantic to date of full payment.

(d) Respondent pays costs of suit on the level of legal practitioner and client together with collection commission in terms of the Law Society of Zimbabwe by laws."

The basis of the application is that the granting of a judgment against a principal debtor does not prohibit a creditor from claiming the same amount on the judgment against the surety. Secondly, it was argued that respondent is liable in terms of s 318(1) of the Companies Act [*Cap 24:03*] in that he traded recklessly and with an insolvent company.

As regards the first point reliance was placed on *R.H. Christie The Law of Contract in South Africa* at p 447 where it is stated that:-

> "The effect of proper performance or payment is to release the party from his contractual obligations, INNESS CJ expressing the principle thus in *Harrismith Board of Executors* v *Odecidaal* 1923 AD 530 at 539.
>
> > 'Payment is the delivery of what is owed by a person competent to deliver to a person competent to receive. And when made it operates to discharge the obligation of the debtor…….. Proper performance of a party's obligation discharges not only that obligation but also any obligation accessory to it, such as contracts of suretyship or pledge."

The applicant also relied on *Mhandu* v *Scotfin* Ltd 2003 (1) ZLR 476 (H) where the court at p 479H to 480E stated that:-

> "The position now seems settled that, in the final analysis, regard must be had to the contract of suretyship and the interpretation of that contract. In particular, there is need to ascertain whether the intention of the parties was to limit the liability of surety and in particular whether such liability would extend to a judgment debt which remains unsatisfied……From the wording of the deed of suretyship, it is clear the intention was not to limit the applicant's liability to the hire purchase agreement executed in 1993……It seems to me that a judgment debt arising from the failure to

> honour the terms of the hire purchase agreement was contemplated. Accordingly, my finding is that the applicant remains liable in terms of his suretyship to pay sums arising out of a court judgment."

In my view, *Christie* laid down legal principles which do not assist the applicant's case. Equally unsupportive of the applicant's argument is the legal principle in Mandhu's case in that, that case is distinguishable. In Mandhu, the respondent issued summons against the surety whereas *in casu* the applicant has not done so. In Mandhu, the surety was served with summons commencing action, while *in casu* the applicant has not done so arguing that this is not necessary. Quite obviously the applicant has breached the *audi alterum partem* rule by not serving the respondent with summons commencing action. The respondent has a right of audience, which right applicant seeks to unprocedurally curtail on the basis of a default judgment against the principal debtor. In fact the applicant can institute an action against the respondent as surety and co-principal debtor for payment of the amount specified in the judgment granted against Zimlantic (Pvt) Ltd.

The applicant has also relied on s 318 of the Companies Act. The section reads:-

> "If at any time it appears that any business of a company was being carried on –
> (a) recklessly; or
> (b) with gross negligence; or
> (c) with intent to defraud any person or for any fraudulent purpose;
>
> the court may, on application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability for all or any of the debts or other liabilities of the company as the court may direct."

Essentially the applicant is alleging that the respondent traded recklessly as a director of Zimlantic. It should be noted that the applicant made a broad generalized allegation against the respondent. But more importantly the applicant has not given the respondent an opportunity to defend himself in clear violation of the *audi alterum partem*

rule. Certainly, the court is not here dealing with an application in terms of s 318 (1) of the Companies Act [*Cap 24:03*].

For these reasons, the application is dismissed with costs.

Bvekwa Legal Practice, Applicant's Legal Practitioners
Chikumbirike & Associates, Respondent's Legal Practitioners