ROBERT MORLEY
versus
ZB BANK LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 22 October 2015 & 25 November 2015

Trial Action

L. Madhuku, for the plaintiff
O. Mtero, for the defendant

DUBE J: The plaintiff seeks an order declaring the plaintiff discharged from liability as a surety and co-principal debtor in respect of a loan facility between the defendant and Oxford Agro Chemicals (Pvt) (Ltd). Secondly, an order for cancellation of a surety bond guaranteeing the company's obligations to defendant.

The basis of the plaintiff's claim is as follows. On or about 24 July 2009, the defendant entered into a contract with Agrochemicals (Pvt) Ltd, (the company), in terms of which the defendant granted a loan facility to the said company. As security for the repayment of the facility, the plaintiff signed a guarantee to the loan. As further security, the plaintiff passed a surety bond in favour of the defendant and mortgaged a property in Mount Pleasant. The company failed to service the debt. The defendant sued the company and obtained judgment against it resulting in an amount of $$214 525-00 being paid to the defendant. The plaintiff claims that the suretyship contract was limited to $250 000-00 being the maximum value of the loan facility. The plaintiff avers that the defendant allowed the principal debtor to exceed the maximum limit on the loan facility to the plaintiff's prejudice. Further that the defendant has already received payment in respect of the principal debt in excess of the loan value of the facility contemplated by the suretyship contract and the plaintiff's liability has been discharged. The plaintiff's position is that he is not liable, as surety and co-principal debtor, for the repayment of any amount beyond the maximum value of the loan facility which is owed by the principal debtor to the defendant. The plaintiff maintains that the

payment made discharged him from liability as surety and co-principal debtor and automatically entitles the plaintiff to a cancellation of the mortgage bond passed in favour of the defendant.

The defendant defends the claim. The defendant claims that the plaintiff entered into a revolving credit facility with the company for up to $250 000-00 at a given time. The company defaulted on making repayment of the advanced funds, interest and charges resulting in the defendant instituting legal proceedings. The defendant obtained judgment against the company. In terms of the guarantee signed by the plaintiff, the defendant's liability is limitless and he is liable for all amounts due to the defendant by the company. The defendant maintains that the company is in terms of the court order, still indebted to defendant in the sum of $403 157-97 as at 30 April 2014 because the suretyship has not been discharged and plaintiff is indebted to the defendant.

The defendant has filed a claim a counterclaim. The defendant's claim is based on a court order obtained against the company. The plaintiff claims,

a) $223903-15

b) $147 153-73

c) $32 101 -09

d) interest on the capital sum at the plaintiff's maximum overdraft rate.

The defendant claims that by virtue of the suretyship agreement and the guarantee executed around July 2009, the defendant in reconvention is liable for repayment to the plaintiff in reconvention an amount of $403 157-97 together with interest and legal costs. The defendant maintains in the counter claim that liability was not limited to $250 000-00 and the defendant received payments in excess of $250 000-00 which the defendant in reconvention is required to pay. At the pre-trial conference the following issues arising from both claims were referred to trial,

1) Whether plaintiff is entitled to release from both the surety bond and guarantee executed in favour of the defendant.
2) Whether the defendant is indebted to the defendant as per defendant's claim in reconvention or at all.

The plaintiff was the sole witness in his case. The salient features of his evidence are as follows. He is the technical director of the company and his focus as the technical director was product development, quality control. Mr Lawrence Onamusi was the director in charge

of finances and liaised with the bank with respect to the loan. The company is not currently operating. The company obtained a loan limited to of $250 000-00 from the defendant and he signed the agreement. The company defaulted in paying the loan. He was not aware of the exact amount advanced to the company. The bank did not inform him about what was happening with the account. He was unaware that the company was behind in payments. No board meetings were held over the issue. The bank refused with statements of the account.

He signed a guarantee and a surety bond and mortgaged his house in Mt Pleasant. The surety bond overrides the guarantee which he signed on an earlier date. The extent of his liability is $85 000-00 and $17 000-00 totalling $102 000-00 which is reflected in the surety bond. He only guaranteed payment of $102 000-00. The witness admitted under cross-examination that the loan facility taken by the company is a revolving fund. He also conceded that the company still owes the defendant. Although he was not sure of the exact amount owing, he challenged the interest rates used by the defendant after the company defaulted in paying. He acknowledged that the monies realised from the sales of the properties sold as well as cash payments made did not clear the debt outstanding.

He insisted under cross-examination that because he signed the surety bond after the guarantee, the surety bond supersedes the guarantee and hence he is not liable for other monies accessed by the company and over and above the $102 000-00 he gave security for. He sought to distance himself from the debt by professing that he was not involved in the management of the debt and that the defendant did not advise him regarding what was happening to the account. Further that the transactions were the preserve of the financial director. He insisted under cross examination that whilst he guaranteed payment of the debt, the board of directors of the company never sat and discussed the loan. Further that he was unaware of the amounts outstanding because he was denied access to a bank statement by the defendant. He insisted that he was not involved in negotiating for time to pay the debt after the defendant defaulted. The plaintiff evaded most questions posed at him in cross examination. He did not appear to be truthful and honest when he gave his answers. The witness did not impress me as a very good witness.

The defendant called Memory Kumirai as its witness. Her evidence is as follows. She is the head of the Recoveries Department of the plaintiff. On 24 July 2009 the company entered into a revolving facility with a limit of up to $250 000-00.The facility was granted as bankers acceptances with a lifespan of a maximum of 90 days. The interest rate applicable is

6% per annum above the libid rate of 0.32% above the base rate of 6.32%. If the borrower exceeds the limit and thereafter the facility became due and payable, the maximum overdraft penalty rate of 45% would apply. The amount disbursed was $223 903-15 which is the capital sum. The plaintiff and Mr Onamusi ran the account and did all the negotiations with the bank. No repayments were made towards the facility. When the company failed to pay, they requested for time to pay and an extension was granted on 7 May 2010. By the time summons were issued, the plaintiff and the company had not paid anything towards the loan and only did so after an order was granted against the company. The plaintiff knew what was happening with the account as all communication was done by Mr Onamusi and him. He even came to her office to request for more time to pay.

The facility was secured by a guarantee together with a security bond for $102 000-00 000-00 by plaintiff. Other guarantees and surety bonds in the same amount by Rolet and Varitech were signed. In the guarantee signed by the plaintiff, he undertakes to pay all amounts outstanding on the account together with interest and charges. It is an all liabilities guarantee. The amounts payable under the surety bond are $85 000-00 plus $17 000-00 and any other amounts that may arise on the account since the bond is a continuing covering surety bond. It is not correct that the plaintiff is not bound by the guarantee signed in August 2009 on the basis that he signed a surety bond limited to $102 000-00 earlier on. The surety bond was additional security. There is no basis upon which the surety can be released as there is still an amount that is due and payable. The order granted against the company has not been settled. The balance outstanding is $403 157-97 plus interest and other charges. Only $214 525-00 has been paid to the bank so far. A net amount of $239 250-00 was realised from the sale of assets. Under cross-examination the witness insisted that plaintiff still owes the defendant monies under the facility. The defendant is entitled to continue charging interest and other charges after the order sought against the company and until the amount due and payable is paid up. She testified that that the plaintiff is entitled to exceed the capital debt in charged and interest because it has already obtained an order. She also insisted that the plaintiff was aware of the maximum penalty rate of 45%. Their records show that the plaintiff was part of the negotiations when the facility was obtained. The witness maintained that the guarantee does not override the surety bond over the liability. She maintained that the plaintiff came to her office and negotiated an extension of time to pay after the default. The witness gave her evidence well. She maintained her evidence and was not shaken under cross

examination. She gave a clear and straightforward narration of the transactions that took place.

For ease of reference, the plaintiff and defendant in reconvention will be referred to as the plaintiff and the defendant and plaintiff in reconvention as the defendant.

The plaintiff submitted in closing as follows. The surety bond was automatically discharged at the time that the defendant was paid back any amount in excess of $102 000-00 in terms of the surety bond. In any event the suretyship was discharged owing to the defendant's material variation of the obligations of the principal debtor without the consent of the surety. The material variation consisted of extending to the principal debtor additional time to pay after the first default. The guarantee executed by the plaintiff in favour of the defendant does not cover the judgment debt and was discharged at the point the defendant was paid in excess of the capital amount. The surety bond substituted the guarantee because the surety bond was executed subsequent to the guarantee and that the suretyship is automatically discharged by operation of law.

The defendant submitted as follows. The guarantee is continuing cover and covers all liabilities and has no limit. It is continuing cover and remains in force until all the company's obligations have been paid in full. The guarantee is valid without prejudice to any other securities held. The surety bond is additional security. The defendant was entitled to give the company time to pay. There was no variation or novation of the credit facility caused by granting the company time to pay. The plaintiff's liability has not been discharged. He is liable to pay all the outstanding amounts.

The following facts are common cause. The plaintiff was at all material times a director and beneficial shareholder of Oxford Agro-chemicals (Pvt) Ltd. The company entered into a revolving credit facility of $250 000-00. The plaintiff and one Mr Onamusi, another director signed the facility on behalf of the company. The plaintiff executed a guarantee in favour of the defendant on 5 August 2009 and further passed a surety bond in favour of the defendant on 9 October 2009. The plaintiff passed a mortgage bond in favour of the defendant on 9 October 2009. The plaintiff became a surety and co-principal debtor. The total capital amount paid to the principal debtor in terms of the facility is $223 903-00. There is a judgment against the company in favour of the defendant which has not been settled in full.

Novation involves the adding or replacement of an existing obligation to perform with

another obligation. It may in other situations involve the replacement of a party to an agreement with a new party. Variation of a principal obligation occurs when there is a variation to the contract of suretyship without the consent of the surety. Where it has been shown that there has been a material variation prejudicing the surety, the suretyship is automatically discharged.

Where the existing obligation is discharged, the issue then is whether the new contract was intended to replace the older or whether it was intended merely to provide additional cover in which case the old contract remains enforceable. Once the existing obligation is discharged a new contract comes into being. A novation is valid only with the consent of all parties to the original agreement. Novation is not a unilateral contract mechanism and allows for negotiation. See R.H Christie Business Law in Zimbabwe p 107 and 108. *Milner* v *Webster 1938 TPD 598, Ballenden v Salisbury City Council* 1949 (1) SA 246.

In the case of *Estate Liebenberg* v *Standard Bank of South Africa Ltd* 1927 E AD 502,where Wessels JA stated at 507:

> "It must at once be conceded that by our law every extension of time is not considered to effect a novation. It seems quite clear that if the extension of time is given after the debt becomes payable and when the debtor is in *mora*, then a failure to sue the debtor, or even the actual granting to him of an extension of time, cannot be regarded as a novation, and therefore the surety is not discharged."

The general rule is that a surety may be released from his obligations where time to pay has been granted by the creditor to the principal debtor. See *Century Insurance Company Limited ND Anor* v *Grain Marketing Board (GMB)* v 1961 R&N LR 205 for that proposition. In *Zimbabwe Football Association (ZIFA)* v *Mufurusa* 1985910 244" the court considered the effect of granting time to pay to the principal debtor and remarked:

> "this narrow rule has been widened over the years, particularly by the judgment of VAN WINSEN AJ in the case of *Beer v Roach 1950 (4) SA 370 (C).* In this case, while the learned judge expressed the view that the dictum of WESSELS JA in the *Liebenberg case* was authority for the proposition that an extension of time given after due date does not *per se* release the endorser or surety, the learned judge went on to state that it [the dictum] should not be read as intending to lay down that an extension of time so granted can never release the endorser or surety. After considering this and other authorities, the learned judge held that, apart from cases of novation, a surety would be released by reason of an extension of time granted after due date if in addition he can show that he himself had been prejudiced thereby."

The court emphasized that the surety must show that he has been prejudiced by the extension of time to pay. The court also discussed the case of *Miller* v *Muller* 1965 (4) SA

458 (C) where the court held that a surety is entitled to release where he can show that the grant of time to pay was done after due date where it was made without his knowledge or consent and that it prejudiced him. The court in *African Banking Corporation of Zimbabwe Limited* v *Pfumojena,* HH 546/14 reviewed the same cases and followed the same reasoning in the *ZIFA case* and held that the onus was on a surety to particularise how the extension of time had prejudiced him.

My understanding of the law is that a surety who has shown that a creditor has granted time to pay to the principal debtor after the due date of payment of the debt, is entitled to be released from his own obligation to pay where he has been shown that the extension of time to pay was effected without his knowledge or consent and in addition to that, that he has been prejudiced by the grant of time to pay to the principal debtor.

The plaintiff's submission that the credit facility was varied by the defendant's granting of time to pay was not pleaded. It is an afterthought. This defence is not part of the plaintiff's claim. A claim succeeds or fails on the basis of its pleadings. However, an analysis of the evidence is not supportive of the plaintiff's defence.

Evidence is clear that a request for time to pay was made by the plaintiff and Mr Onamusi when the debt was due. Mrs Kumirai was clear in her evidence that time to pay was granted at the specific request of the plaintiff and that the plaintiff participated in the request for time to pay which was granted when the debt was already due. The extension of the time to pay does not constitute a variation of the contract. The evidence led discloses that the plaintiff was involved in the application of the credit facility. He together with the finance director signed for the facility. The plaintiff sought to distance himself from the facility by saying that he was unaware of the amounts withdrawn and that he was not responsible for financial issues. He submitted that he was not advised that the company was not servicing the loan and that he was not involved in the request and negotiations by the company which is the principal debtor, of time to pay the outstanding amounts.

The plaintiff was aware of the default as he was involved in the negotiation of time to pay. The defence witness was emphatic that the plaintiff came to her office to negotiate the time to pay and participated in meetings that addressed the debt rollover which resulted in the extension of time to pay. The witness also testified that the plaintiff was aware of the maximum default rate of 45% which was discussed at the meetings. It is clear from the evidence that the plaintiff was aware of what was going on with the facility and he did in fact

request for the time to pay. It is inconceivable that having mortgaged his house, he would not be interested in what was going on with the facility. The guarantee authorised the defendant to grant time to pay without prejudice to the defendant's rights. None of his rights were prejudiced. There is no suggestion that the plaintiff was prejudiced by the time to pay, in fact he benefitted from the extension of time to pay as the property he gave as security for the debt was not sold at that stage. There is no evidence to suggest that there was a variation of the company's credit facility entitling release of the plaintiff from the surety. In *African Banking Corporation* v *Pfumojena* the court dealt with a similar case and the defence under consideration was dismissed. This point fails.

The guarantee was the first to be executed. The plaintiff bound himself jointly and severally as surety and co-principal debtor with the company for the repayment on demand of all sums of money due now or from time to time from monies advanced ' howsoever' owing .The guarantee covers all liabilities and has no limit. It is an open guarantee and it offers continuing covering security. Because the guarantee has no limit and covers advances of all monies' howsoever 'owing, the clause is wide enough to cover a judgment debt. The surety bond is also authority for this proposition. It provides in clause 5 (i) that it "shall be continuing covering security for all and any sum or sums or money which shall now or may in the future be owing to or claimable by the mortgagee from whatsoever cause arising".

The plaintiff submitted that the surety bond was automatically discharged at the point that the defendant was paid back any amount in excess of $ 102 000-00.The surety bond signed by the plaintiff provides in part as follows:

> "And whereas the mortgager has guaranteed as surety and co-principal debtor, the payment by the principal debtor of monies advanced to it and interest thereon in an amount not exceeding the value of this bond,"

This clause gives the impression that the bond is only limited to the sum of $102 000-00. Nevertheless, Clause 5 (i) of the bond provides as follows:

> "That this bond shall be a continuing covering security to the amount of the capital, and the additional sum hereinbefore for costs and charges; for all and any sum or sums or money which shall now or may in the future be owing to or claimable by the mortgagee from whatsoever cause arising, for money lent and advances or which may hereafter be lent and advanced by the mortgagee and for future debts generally including any payments made by the mortgagee under the provision of this bond."

The clause that guarantees payment of monies advanced in an amount not exceeding the value of the bond should be read in conjunction with clause 5. Clause 5 (1) is clear that the bond shall be continuing covering security to the amount of the capital, and additional sums

for costs and charges "for all and any sum or sums of money which shall now or may in future be owing to or claimable by the mortgagee." from whatsoever cause arising. It is limitless. The bond is not limited $102 000-00 which is the amount of the bond. It is to remain in force until all the company's liabilities are paid. I do not agree with the plaintiff that the surety bond was automatically discharged at the point that the defendant was paid back any amount in excess of$102 000-00.

It is clear from the provisions of the two that the surety bond was additional security. The guarantee was entered into without any prejudice to any other securities held or to be held in the future. The surety was in no way a substitution of the guarantee. The guarantee remains in force as a continuing covering security. The cover under both the surety bond and guarantee was continuing cover. The surety bond was additional to and not a substitution of the guarantee. The plaintiff has not shown that he is entitled to be released from the surety or guarantee on the basis that the surety bond superseded the surety bond. The debt was at no time discharged.

The defendant claims in reconvention for payment of the amounts due by the company under a judgment. This claim is based on a provision of the guarantee which states that the signatory to the guarantee shall be liable to pay "all or any such sum or sums of money which the said debtors may from time to time hereafter owe or be indebted to the said bank" "and where it says that the signatory shall be liable to pay the amounts owing "howsoever" the debt arises. There is no ambiguity over the import of those words. What the defendant is doing is to seek to recover the amount outstanding from the debt, which the company has not paid. It is entitled to do so in terms of the guarantee. The surety bond also covers all liabilities "howsoever" arising. That is the essence and purpose of a guarantee as found earlier on, evidence reveals that both the guarantee and surety bond cover all liabilities arising and include judgments. The judgment already obtained may be enforceable against the company, and there is nothing to stop the bank from pursuing the plaintiff for the debts which he guaranteed. The amounts due under the judgment are,

a) $223 905-15
b) 23 299-30
c) 27 742-05

Interest was chargeable at the maximum overdraft rate was brought to the attention of the plaintiff and is provided for and are easily ascertainable. The Sheriff's sale realised $239 250-00. The company paid only paid $214 525-00 to the defendant after costs for the Sheriff

and legal practitioners were deducted. I am not persuaded that because the company was advanced $223 903-14 and paid an amount in excess of that to the defendant, it discharged the debt. The defendant's claim was well explained and tabulated. The plaintiff claims that there is an excess of $ 25 1132.87 above the capital amount. He forgets that the defendant was entitled to payment of interest and charges over and above the capital amount. The plaintiff is liable for the judgment debt even though he is not a judgment debtor and despite that there are five different judgment debtors. The defendant was entitled to sue him.

The defendant has proved its case on a balance of probabilities. The defendant entitled to the order sought. The plaintiff's claim is dismissed. The defendant's counter claim succeeds. The surety bond provides for costs for costs on a higher scale.

In the result it is ordered as follows:

1. The plaintiff's claim is dismissed
2. The defendant's counter claim succeeds.

The plaintiff is to pay

(a) US$223 903-15 being capital

(b) US$147 153-00 being interest

(c) US$32 101-09 being bank charges

(d) Interest on the sum of US$223 903-5 at plaintiff's overdraft rate with effect from 1 May 2014 to date of payment.

(e) Costs on a legal practitioner and client scale and collection commission.

Mundia & Musharraf, plaintiff's legal practitioners
Sawyer & Mkushi, defendant's legal practitioners