BRICKNELL PROPERTIES (PRIVATE) LIMITED
versus
ZANE VALI
and
NORAH BABBAGE
and
MARY ADA VALI

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3, 27, 28 October & 23 November 2016

Civil Trial

T Tandi & T Kativu, for the plaintiff
D Ochieng & Z Makorie, for the defendant

CHAREWA J: The plaintiff issued summons against the defendants, jointly and severally, the one paying the others to be absolved, for the payment of $38 495.41, interest thereon at the prescribed rate from 14 October 2014 to date of payment in full and costs, "*arising from the defendants' fraudulent and reckless conduct in running the affairs of Vali's Auto Electrical Services (Private) Limited"*[1]**.**

The issues distilled at the pre-trial conference were:

i. Whether the defendants were sureties and co-principal debtors with Vali's Auto Electrical Services (Pvt) Ltd (hereinafter called "the company"),
ii. Whether the defendants operated the company recklessly, fraudulently and negligently so as to attract personal liability in terms of the Companies Act [*Chapter 24:03*],
iii. And if so, whether the defendants are liable to plaintiff and to what extent.

On the first day of the trial, the parties agreed as follows:

a. That the plaintiff abandons all claims against the defendants based on fraud, reckless and negligent conduct,
b. Further that the plaintiff abandons all claims against the second and third defendants based on suretyship in favour of the company,

[1] The last sentence of paragraph (i) of the summons

c. And finally that the matter would only proceed as a stated case against the first defendant with regards to whether he is liable as a surety to the company and if so, to what extent,
d. The issue of costs *vis-à-vis* the abandoned claims would be subsequently resolved.

STATED CASE

Issue

One single issue was therefore placed before me summarised as follows:

"Whether or not, in terms of clause 18 of the Lease Agreement, first defendant is liable, as surety, for the debt owed to plaintiff by Vali's Auto Electrical Services (Pvt) Ltd".

Agreed facts

The agreed facts were that the plaintiff and the company entered into a lease agreement wherein the company leased plaintiff's property known as Factory no 3, 72 Craster Road, Southerton, Harare for one year with effect 1 February 2013. First defendant represented the company in negotiating for and signing the lease agreement.

In terms of the lease agreement, the company was obliged to pay monthly rentals of $1 795 as well as rates, water and electricity charges. In breach of the lease agreement, the company failed to pay the rentals and ancillary charges amounting to $38 495.41. The company was subsequently placed under liquidation and the debt remained outstanding.

The divergence arises out of Clause 18 of the lease agreement which provides that:

> "The LESSEE further agrees that all present and future directors and shareholders of the LESSEE shall bind themselves as sureties in *solidium* and co-principal debtors under renunciation of the normal benefits for the due and punctual performance and fulfilment of all terms and conditions of this agreement."

Parties' submissions

According to the plaintiff, this clause automatically means that by the mere act of signing the lease agreement on behalf of the company, with the knowledge of the import of Clause 18, first defendant bound himself as surety and co-principal debtor with the company. There was therefore no need for first defendant to enter into a separate suretyship agreement

with the plaintiff as the *caveat subscriptor* principle applied. The plaintiff based this argument on the statement of MOYO J[2] when she said:

> "In terms of the rule of *caveat subscriptor*, a party who signs a document is bound by his or her signature whether he or she read the document or not."

While conceding that first defendant's signature on the lease agreement was in fact, the company's signature, plaintiff insisted that since the intention of the parties was to make directors and shareholders sureties, first defendant's signature on the lease agreement meant that he was personally bound by its terms, and at common law, was therefore deemed to have subjected himself to an oral acknowledgement of suretyship. For this assertion, plaintiff relied on *The Mercantile Law of South Africa* 17th ed @ p344.

For his part, first defendant submitted that he was not a party to the lease agreement and cannot be bound by it as he only signed it in a representative capacity. And while agreeing that a suretyship agreement can be oral, he submitted that that was not the basis of plaintiff's claim against him. He argued that plaintiff's basis for suing him being Clause 18 of the lease agreement, rather than any oral contract, that clause was a decision of the principal debtor which does not bind him unless he specifically enters into his own agreement with the creditor, which he did not do. Further, first defendant submitted that, that the company made certain undertakings in terms of Clause 18 cannot bind him in the absence of his own juristic act[3].

He pointed out that a surety agreement is an accessory contract whereby a surety binds himself to perform the obligations of the debtor to the creditor in the event of the debtor's default. In the absence of such independent agreement the plaintiffs claim must fail.

In response, plaintiff argued that *Societe Commerciale* (*supra*) was distinguishable, it being based on South African Law which requires a suretyship agreement to be in writing. Further, plaintiff urged a purposive rather than a literal or grammatical interpretation of clause 18.

The law

A contract of suretyship, like all other contracts, arises from agreement between parties, and in this case, between the creditor and the surety. And like all contracts, there must

[2] *Gorden Mutsamba* v *Mrs E Dube* HB 190-15(HCA 30-14)
[3] *Societe Commerciale v Peughold and Anor* 1980(1)SA 109 (TPD) at 111 D-E

be offer and acceptance, emanating from the creditor and surety agreeing to each other's terms.[4]

Therefore, whether the contract is in writing, as required under South African Law, or oral, as is possible in our jurisdiction, is, in my view, immaterial. What is important is that there is agreement between the creditor and surety, that the principal debtor will perform his obligations to the creditor, and in the event of the principal debtor failing to fulfil his obligations to the creditor, the surety will perform them or indemnify the creditor.[5]

Therefore, the surety's obligation arises from his entering into a suretyship contract. There must thus be an agreement between the surety and the creditor by which each is bound to the other. As pointed out in Caney's (*supra*), there rarely is a tripartite contract between the creditor, principal debtor and surety. Rather there are two separate transactions, the first being the transaction by which the principal debtor is bound to the creditor, and the second being the contract between the creditor and surety.[6]

It follows that the surety's obligations arise from an undertaking made by the surety himself/herself. Certainly, the surety's obligations cannot arise from undertakings made by a third party, unless the surety has endorsed or given the impression that he/she has personally accepted those undertakings.

Indeed, it is trite that a person is contractually bound by his signature to a document. However, this rule is not absolute. There are always exceptions permitting one to avoid liability arising from one's signature as correctly pointed out by MOYO J.[7] In particular, one is always bound where one has given or created the impression that one has agreed to the terms and conditions of the document and has signed it with the intention of being personally bound thereby.

Analysis

In the present case, I cannot agree with plaintiff that Clause 18 of the lease agreement amounts to a suretyship agreement between the plaintiff and first defendant. In my view, such an interpretation goes beyond being "purposive" to actually being tantamount to creating a contract for the parties.

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[4] See *Mercantile Law of South Africa* 17th Ed. @ p344, second paragraph
[5] See definition of contract of suretyship at p28-29 of *Caney's Law of Suretyship* 5th Ed.
[6] *Caney's* (supra) p 31.
[7] See *Gorden Mutsamba* (supra) at p. 4

Firstly, it is clear from the lease agreement that first defendant signed it in a representative capacity on behalf of Vali's Auto Electric Services (Pvt) Ltd. The *caveat subscriptor* rule cannot therefore apply in this case. In fact, it seems to me that plaintiff was misguided in the interpretation of MOYO J's judgment. The judgment is actually more relevant to the defendant's argument that first defendant clearly signed for Vali's Auto Electrical Services, and his signature cannot on any account be deemed to bind him personally as a surety.

Secondly, Clause 18 was a decision of the company, that its directors and shareholders should, subsequent to the lease agreement being signed, be required to provide surety for the company's obligations. I cannot interpret the phrase "**all present and future directors and shareholders of the LESSEE shall bind themselves as sureties"** in its ordinary grammatical sense to mean anything other than a future act by the directors and shareholders following upon the execution of the lease agreement.

I agree with the defendant that the reasonable interpretation of Clause 18 is that the plaintiff and the directors and shareholders of Vali's Auto Electrical Services still had to give effect to it by entering a suretyship contract.[8] Clause 18 on its own could not create contractual obligations for first defendant as a surety. It was for the plaintiff to ensure that the company's obligations to it where properly secured by ensuring that the surety documents were signed by the directors and shareholders. This the plaintiff failed to do.

Plaintiff itself, in urging a purposive approach to the interpretation of Clause 18, requested the court to address the question: what was the intention of the parties? Clearly, the parties intended that Vali's Auto Electrical Services (Pvt) Ltd's obligations should be secured by a suretyship agreement. The follow on question which then logically arises is: whether such suretyship agreement was executed? The answer to this is a resounding "No". To therefore request the court to interpret the intention to have surety provided as a positive act that such suretyship agreement immediately came into existence merely from the intention of the parties, is, in my view, quite unreasonable and untenable.

Consequently, I find that Clause 18 did not amount to a suretyship agreement between the plaintiff and first defendant, nor that a suretyship agreement can be inferred therefrom.

[8] See *Societe Commerciale* (supra) at p. 111 D-E

COSTS

With regards to costs, first defendant submitted that in the face of the wholesale abandonment of the claim against all three defendants based on fraud, reckless and negligent conduct as well as the claim against second and third defendants based on suretyship, plaintiff ought to be ordered to pay costs on the higher scale as its claims are patently untenable and ought not to have been pursued.

Plaintiff submitted that the prayer for costs on the higher scale is unwarranted as, firstly, it has not been prayed for in the plea. Secondly, plaintiff was not intent on wasting the court's time, but genuinely sought an interpretation of Clause 18 for the benefit of both parties.

While I have found that plaintiff's claim is patently untenable, I note that the plea never raised a claim for costs on the higher scale. It is trite that a party's defence must be made in its plea, in the same manner that a plaintiff's claim must be made in the summons.

Further, even though the defendant abandoned a large part of the basis for its claim, I want to believe that the plaintiff suffered from a genuine error in the interpretation of what amounts to an oral suretyship agreement and the import of the *caveat subscriptor* rule, leading to a *bona fide* misjudgement of the pronouncements in *Gorden Mutsamba* (supra) case and the Mercantile Law of South Africa.

In the result I am not convinced that this is a case where punitive costs on the higher scale are warranted.

However, since the parties left it to me to resolve the issue of costs with respect to the abandoned claims, I am of the view that it is only fair and reasonable that plaintiff be ordered to pay the costs for second and third defendants up to the time it abandoned its claims against them. Further, it is just and equitable that plaintiff should pay first defendant's entire costs in their entirety.

DISPOSITION

Consequently, it is ordered that the plaintiff's claim is dismissed in its entirety. Further, plaintiff is ordered to pay the first defendant's costs of suit in their entirety, and second and third defendants costs of suit up to 27 October 2016.

Kantor & Immerman, plaintiff's legal practitioners
Coghlan, Welsh and Guest, defendants' legal practitioners