ZIMBABWE MICROFINANCE FUND (PVT) LTD
versus
MICHAEL ALLAN BAILEY
and
PETER ALLAN CAMINADA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 2 April 2019 & 10 April 2019

Exception

D Ochieng, for the excipients
L Uriri, for the respondent

MATHONSI J: The plaintiff is a money lending company which, at least according to the pleadings filed of record in this matter, advanced a loan to a company known as Better Agriculture (Pvt) Ltd (the principal debtor), in the sum of US$279 000.00 in terms of a loan facility agreement signed on 5 August 2015. The 2 defendants are directors of the principal debtor who stood as sureties for the due and punctual payment of all the monies advanced by the plaintiff to the principal debtor under the facility agreement dated 5 August 2015.

The plaintiff sued the 2 defendants jointly and severally for payment of US$342 505.97 together with interest, collection commission and costs of suit on an attorney and client scale alleging that the liability arose from two further credit facility agreements which it entered into with the principal debtor on 13 October 2017 after the principal debtor had repaid the initial loan advanced by virtue of the loan facility agreement entered into on 5 August 2015. The plaintiff specifically pleaded in paras 6 and 5 of the declaration:

"6. On or about the 13th October 2017 after repaying the loan of August 2015, the principal debtor entered into two further credit facility agreements with the plaintiff for the sum of Two Hundred and Seventy Eight Thousand Three Hundred United States Dollars (US$278 300.00) and Fifty Five Thousand Six Hundred United States Dollars (US$55 600) and these were also advanced to it by the plaintiff.

7. It was agreed by the parties that the 5th August Directors' guarantee by defendants being security held by plaintiff would remain in force for the loans advanced on or about 13 October 2017."

In other words, the plaintiff's averments are that the defendants stood as sureties for the loan advanced by virtue of the agreement of 5 August 2015 which loan was repaid by the principal debtor. The plaintiff and the principal debtor then entered into fresh loan agreements on 13 October 2017 but did not secure suretyship agreements with the 2 defendants. Instead it was agreed that the suretyship agreement of 5 August 2015 which was security for the initial loan which had been repaid, would be carried forward in order to remain as security for the 2 further loan facilities born out of the agreements entered into on 13 October 2017. There can be no other meaning attached to the pleading in paras 6 and 7 of the declaration.

Indeed when probed further in the request for further particulars filed by the defendants on 6 December 2018 firstly to provide copies of the 2 further credit facility agreements mentioned in para 6 of the declaration and secondly whether there were further agreements as referred to in para 7 thereof, the plaintiff responded by attaching 2 copies of the 2 further agreements dated 13 October 2017 for the sums of US$278 300.00 and $55 600.00 signed by the parties. It specifically pleaded in para 4 of the plaintiff's further particulars:

"4. Ad Para 4 (a)
The agreement was in writing. Refer to para 8.3 of the credit facility dated 5 August 2015 and paras 8.4 & 8.5 of the credit facilities of 13 October 2017."

An examination of those clauses reveals that clause 8.3 of 5 August 2015 facility provides for the lender's right to conduct valuations on properties mortgaged to it and to debit the debtor's account with the valuation fees. Clauses 8.4 and 8.5 of the 13 October 2017 loan facilities read:

"8.4 Security Held
- Director's guarantee covering 150% of the loan amount.
- Cession of stocks valued at approximately US$400 000.00.

8.5 Security Proposed
- Security held to remain in force."

Clearly these provisions are not particularly helpful.

Faced with such claim, the defendants filed an exception making the point that the plaintiff sued them in their capacities as sureties for the debts owned by the principal debtor, but the plaintiff's declaration is bad in law and does not disclose a cause of action. This is because the plaintiff made the averment that the alleged suretyship is contained in a contract with the principal debtor in which the defendants are not parties. As a result, *ex facie* the declaration, there is no privity of contract between the plaintiff and the defendants.

In heads of argument filed on behalf of the plaintiff a point is taken *in limine* that the exception was filed outside the period prescribed by r 119 of the High Court Rules, namely within 10 days of service of the declaration. Reliance was placed on the case of *Sammys Group (Pvt) Ltd* v *Meyburgh N.O and Ors* SC 45 /15 (unreported) in which the court stated that even though there is no sanction for the late filing of an exception, as the provisions of the rules are mandatory, in the absence of condonation of the non-compliance with the rules, an exception filed out of time is invalid.

Mr *Ochieng* for the excipient submitted that this is a case in which a request for further particulars was made and is therefore regulated by r 142 (a). The time within which to file the exception is reckoned from the date on which the particulars were supplied. As the particulars were supplied on 9 January 2019, the excipients cumulatively had up to 22 February 2019 to file their exception. Given that it was filed on 18 February 2019, it was within time. I must say that Mr *Uriri* for the plaintiff did not find it necessary to advance the point *in limine* appearing in the heads of argument which was clearly not well taken. I shall not be detained by it either.

I am required to determine whether the plaintiff's declaration as it stands discloses a cause of action against the defendants. It should be stated from the outset that in an exception the excipient is confined to the four corners of the pleadings because an exception attacks a defect which appears *ex facie* the pleadings. In that regard it is true, as correctly submitted by Mr *Uriri*, that in the case of an exception the facts stated in the pleading must be accepted. See *Edwards* v *Woodnut N.O.* 1968 (4) SA 184 (R).

To the extent that the facts set out in the pleadings are taken as correct, they cannot be disputed in argument and any dispute relating to the factual averments must be reserved for trial. That is however the furthest one can go because, as I stated earlier on, the plaintiff's case is pleaded clearly and the objection to it does not appear to be predicated upon any disputed facts.

Mr *Ochieng* submitted that the defendants were sued as sureties which suretyship is on 2 loan facility agreements they are not privy to. They cannot be sued on documents they are not party to. For that reason, no cause of action is disclosed in the declaration as amplified by the pleadings. That the exception presented the plaintiff with a mammoth task became apparent right from the outset when it filed heads of argument. In those heads of argument the plaintiff appeared to contradict its pleadings which I quoted above. It was argued on its behalf that the defendants are sued on the basis of the guarantee agreement that they signed and that the cause of action is found on those signed "guarantee agreements" This sharply contradicts saying that the defendant's liability arises from the loan facility agreements of 13 October 2017 they signed as directors of the principal debtor.

In his address to the court Mr *Uriri* introduced another dimension to the plaintiff's case, that the liability of the defendants is in the original directors' guarantees which they signed in August 2015 in terms of which they stood as sureties for the due and punctual payment of monies advanced to the principal debtor in terms of the initial facility. He submitted that the liability in question continued because the principal debtor did not settle the initial debt. Again this sharply contradicts the pleading in paras 6 and 7 of the declarations in which the plaintiff made the averment that the principal debtor repaid the first loan before the 2 loan facility agreements of 13 October 2017 were concluded.

I intend to proceed from the stand point that an exception is a procedure which points to a defect which appears *ex facie* the pleading and that the facts stated in the pleadings must be accepted. Those facts are that the defendants are bound as sureties by virtue of the loan facility agreements signed between the plaintiff and the principal debtor on 13 October 2017. Those agreements are now part of the pleadings having been filed as further particulars. The question which arises therefore is whether the plaintiff can found a valid cause of action for the liability of a surety wherein the suretyship arises from an agreement signed between the plaintiff and the principal debtor.

Having identified that question for determination I must also quickly settle the issue arising from the defendants' signing the loan facility agreement on behalf of the principal debtor in their capacity as directors. A distinction must be drawn between the defendants acting as directors of the company and representing the company in concluding the agreement and the defendants in their personal capacities. This is because our law recognizes the separate legal personality of a corporation, namely that it is a fictitious person quite distinct from its members. It is a principle that has withstood the test of time from its parentage in the case of *Salomon* v *Saloman & Co Ltd* [1897] AC 22

When executing agreements on behalf of the company, the principal debtor, the defendants were only creating liability for the company as a separate legal *persona*, which could only act through its directors. They could not possibly assume personal liability from a contract concluded by the company. That then brings me to the legal truism that a suretyship is a separate agreement between the surety and the creditor. It is a stand alone agreement binding the surety to the creditor. The learned authors C.F.Forstyth & J.T Pretorious in their book *Caney's The Law of Suretyship* 6 ed, Juta at p 30 stated that point in more elegant language:

> "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).

See also *KHM Societe Anonyme* v *G Mobile (Pvt) Ltd & Ors* HH 785/15, *African Banking Corporation of Zimbabwe Ltd* v *Pfumojena* HH 546/14.

In *Bricknell Properties (Pvt) Ltd* v *Vali & Ors* HH 727-16, CHAREWA J was confronted with a similar case in which an agreement between the creditor and the principal debtor had a clause which stated: "all present and future directors and shareholders of the lessee shall bind themselves as sureties". The creditor sought to hold the directors bound as sureties even though they had not signed separate suretyship agreements. She reasoned that it was necessary for the directors and shareholders to still enter into a suretyship contract before they could be bound as sureties and that the clause did not amount to a suretyship agreement. I agree with that formulation. See also *Societe Commerciale* v *Peughold and Anor* 1980 (1) SA 109 at 111D-E.

It is therefore settled that a suretyship relationship cannot exit by virtue of a clause in the main loan agreement that the directors of the company which is the principal debtor shall stand as sureties. For liability to attach to them, they must proceed to enter into a separate deed of suretyship in which they personally bind themselves as such. That being the position of the law, it must follow that a pleading couched as the plaintiff's declaration, as amplified by the further particulars, that the liability of the defendants as sureties arises from a loan facility agreement concluded between the principal debtor and the creditor, does not disclose a cause of action against the defendants. They simply cannot be liable on that basis.

It was argued on behalf of the plaintiff, albeit without foundation in the pleadings, that the defendants are liable by reason of the initial suretyship deed they signed on 5 August 2015. I have already said that the submission to that effect flies in the face of the declaration. The matter does not end there. Having pleaded that the debt arising from the loan facility of 5 August 2015 was repaid, it means that the suretyship signed by the defendants as security for that debt could not legally outlive the debt itself. The legal position is that when the principal debtor pays the creditor the principal debt secured by the security of a guarantee or the surety, the guarantor or surety is immediately released from the contract.

I agree with Mr *Ochieng* for the excipient that upon repayment of the August 2015 loan by the principal debtor, the defendants who had stood as guarantors for the due and punctual payment of all the monies due and payable under that facility, the act of repayment discharged the sureties by operation of law. So while it is true that a pleading can only be excipiable at law on the ground that it does not disclose a cause of action if no possible evidence led on the pleading can disclose such cause of action, *Matewa* v *Zetdc* 2013 (2) ZLR 263, I am of the view that indeed no evidence led on the pleading as it stands can possibly disclose a cause of action.

There is merit in the exception filed by the excipients, which ought to be upheld with costs.

It is ordered that:

1. The exception is hereby upheld.
2. The plaintiff shall bear the costs.

Chivore Dzingirai Group of Lawyers, plaintiff's legal practitioners
Kevin Arnott, respondent's legal practitioners