REPORTABLE (49)

Judgment No. SC 53/03
Civil Appeal No. 337/02

MRS S FORRESTER v

MONTANA MINING CORPORATION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE,SEPTEMBER 23, 2003 & FEBRUARY 3, 2004

H Zhou, for the appellant

A P de Bourbon SC, for the respondent

CHEDA JA: The respondent owned Mangula Farms (Private) Limited ("Mangula"). It sold the entire issued share capital to Nyahondo Estates (Private) Limited ("Nyahondo"), which was owned by Gary James Dodd ("Dodd"), who is the appellant's son-in-law.

The sale took place in January 1996 and a written agreement was signed. In terms of the agreement, Nyahondo was to pay for the shares as follows –

1. $250 000.00 on or before 30 June 1997;
2. $250 000.00 on or before 30 June 1998;
3. $250 000.00 on or before 30 June 1999;
4. $250 000.00 on or before 30 June 2000;
5. $250 000.00 on or before 30 June 2001;
6. $250 000.00 on or before 30 June 2002;
7. $250 000.00 on or before 30 June 2003; and

8. $250 000.00 on or before 30 June 2004.

Nyahondo paid only the first instalment due on 30 June 1997 and failed to make further payments. Nyahondo is now in liquidation and has no assets to make further payments.

The respondent issued summons against the appellant, alleging that the appellant verbally bound herself as a guarantor in favour of the respondent for all the obligations of Nyahondo in terms of the written agreement. The appellant denied liability and the matter went to trial at the High Court. Judgment was given for the respondent with costs. The appellant now appeals against that judgment.

The respondent led evidence from two witnesses. The first witness was Peter Joseph Moore ("Moore"). He said he was a legal practitioner at Winterton, Holmes & Hill ("Wintertons"). He does mainly conveyancing work of that firm and has been heading the conveyancing section for the last twenty years. He prepared the agreement whereby the respondent sold the shares of Mangula to Nyahondo for the sum of $2.1 million. The agreement was produced in court. He said the purchase price was to be paid in instalments of $250 000.00 per year.

Mr Moore said that Mr Ford ("Ford"), who represented the respondent, had requested him to set up a meeting at his (Moore's) office to clarify the terms of the agreement and thereafter prepare an agreement of sale. Clause 7 on p 5 of the agreement provided for security in respect of the balance of the price firstly by registration of a second mortgage bond and secondly by a personal guarantee signed by Mrs S Forrester together with the other shareholders of the purchasing company.

Mr Moore said a meeting took place at his house and was attended by Ford and Mr and Mrs Dodd. He said he believed Mrs Forrester was also at the meeting. He said Ford told him that he had met Mrs Forrester and her daughter and son-in-law and Mrs Forrester had told him she owned immovable property in Strathaven and Avondale in Harare, in addition to owning land in the Lowveld area of Zimbabwe. As such Ford was happy with the security offered.

Mr Moore did not recall taking down any details of Mrs Forrester, but he subsequently saw a file note in his handwriting which recorded Mrs Forrester's details. He said the details were taken from the meeting at his office. He later said he could be mistaken about whether he got the details from Mrs Forrester or her daughter or son-in-law.

Mr Moore said the agreement of sale was signed on 25 January 1996 at his office. Some years later he learnt that Dodd's company, or Dodd himself, had gone into liquidation and there was still a debt owed to Ford's company.

Mr Moore said when Dodd was asked if his mother-in-law was at the meeting he noticed Mrs Forrester shaking her head at him to indicate that the answer should be "No".

Asked why no written suretyship document was prepared and signed by Mrs Forrester, he said Ford was the chief executive in a financial institution and

was well aware of the requirements of a transfer of shares. He did not personally give the matter more thought thereafter.

Under cross-examination Moore said there must be some minutes of the meeting but he did not have the file with him.

When it was suggested that he was not certain that Mrs Forrester attended that meeting, Moore said he did not have a hundred percent recollection of it, but was certain that Mrs Forrester's daughter was at the meeting. He accepted that he could have got the details of the guarantee from someone other than Mrs Forrester and that it could have been either Mrs Forrester's daughter or son-in-law.

Mr Ford also gave evidence. He said he is a chartered accountant who left the profession soon after qualifying and worked for some banks. He is familiar with the concept of security for debts. He became involved when his family decided to sell Mangula. He did not know Dodd before this. Mr Ford said Dodd had no security for the balance but told him that his mother-in-law, who had previously or at that time guaranteed in favour of a member of the family, might be able to provide suitable security for the payment of the balance. Later Dodd said his mother-in-law had agreed to that and they could proceed on that basis. Later Ford said he was not sure who told him that Mrs Forrester owned a house in Harare and a farm in the Lowveld.

Mr Ford also said he thought he had met Mrs Forrester with Mr and Mrs Dodd at his office in Newlands and they discussed the matter. He told the three

to go with him and instruct Moore together. He said he was hazy as to whether Mrs Forrester was there or not at Moore's office.

Asked if he discussed with Mrs Forrester what assets she had, Ford replied:

> "I think I did. I think she recently came in from her farm and I asked her if she owned her house in Strathaven. She indicated that she did. That was the extent of the inquiry."

Ford said he took the issue of the security seriously and it was the key clause in the sale agreement after the purchase price.

Mrs Forrester denied all this in her evidence. She said she never took part in the discussions and negotiations, but was present at one meeting in the very beginning in November or December at Ford's office in Newlands. She went there because her daughter and son-in-law were staying with her and using her car. She denied giving a guarantee at this meeting or any other meeting. Mrs Forrester said she was never consulted about giving security and did not see the agreement. She never gave Moore her address or telephone number. She said she could not guarantee her son-in-law as she was already guaranteeing her own farm and her son. Her son-in-law did not discuss the matter with her.

Mr Dodd said he was asked if he could find a guarantor and he told them that his mother-in-law was not in a position to guarantee him as she had outstanding guarantees to Culsh Enterprises. He also said at the meeting in Ford's office Moore suggested that Mrs Forrester could provide a guarantee for him.

A guarantee is a contract whereby one person binds himself or herself as being responsible for a debt of another person should that other person fail to meet his or her obligation.

In this case, the respondent claims that the appellant bound herself verbally. However, in all their evidence neither of the two witnesses of the respondent could state how the appellant made the guarantee.

Mr Moore obviously relied on what he was told by Ford. At no stage did he claim at the trial that he discussed the guarantee with the appellant. His evidence was cast into doubt as he gave answers such as: "I think she was"; "I believe she did"; and "I cannot be a hundred percent sure". From his evidence he never discussed the issue of the guarantee with the appellant directly. He prepared the agreement of sale but did not even provide for her to sign it. The agreement was not even shown to the appellant. He made no attempt at all to confirm with her that she agreed to provide the guarantee yet there was no separate document providing the guarantee. From his answers to questions put to him, Moore could not recall who gave him the appellant's details of address and telephone number.

Mr Ford's evidence was equally unreliable. He too said several times that he thought certain things had happened but was not certain.

Mr Moore said Ford asked him to set up a meeting at Moore's office to clarify the terms of the agreement. In the absence of any discussion with

Mrs Forrester, it is difficult to see what was clarified. The two witnesses do not even state what was clarified. Mr Moore says he believed Mrs Forrester was at the meeting in his office, but says nothing about any discussion with her concerning the guarantee. No reason is given why they would shy away from discussing the issue if she was indeed at the meeting. Even if one goes by Moore's allegation that Ford told him, if they met to discuss the terms one would have expected him to clarify this particular issue with Mrs Forrester.

Mr Ford's evidence is also unreliable. Mr Ford says the discussion with Mrs Forrester was only to ask her if she owned her house in Strathaven. He says that was all and that that was the extent of the enquiry. He also says he is not certain if he got Mrs Forrester's details from her or from her daughter or son-in-law. It seems everything about Mrs Forrester was obtained from her daughter and son-in-law. Mr Ford then passed all the information to Moore as if he had either spoken to her himself or heard her speak, yet he got all the information from her daughter or son-in-law. In his evidence there is nowhere where he claims to have discussed the guarantee with Mrs Forrester, yet he claims it was the most important issue which he took seriously.

The end result is that the two witnesses for the respondent never got any guarantee from Mrs Forrester either in writing or verbally. Neither of them ever mentioned the guarantee to Mrs Forrester. There is no evidence at all of Mrs Forrester giving the guarantee verbally as alleged.

When, where and to whom was the alleged guarantee given? Neither of the witnesses could say. If she made a verbal guarantee, at least the witnesses should have given an indication of her words to that effect which resulted in the verbal contract being created.

The trial court stated as follows in the judgment:

> "It is in my opinion inconceivable that the (respondent's legal practitioners) would have incorporated a clause in the agreement relating to the plaintiff's surety without the defendant's name having been put forward by the parties to the agreement."

Mr Ford's evidence was that Dodd said that his mother-in-law might provide a guarantee. This shows that she had not agreed and it is not clear whether by then she had been requested to do so or not. There is no evidence that Dodd, neither does he claim to have, asked her to do so as he says he was aware of her commitment already. It seems because Ford heard this, he got this to be included in the agreement without consulting Mrs Forrester on the matter. Either he assumed this to be the position or he had misunderstood Dodd; but, whatever happened, Mrs Forrester never gave any guarantee.

Even if Mrs Forrester, on seeing the letter of demand for payment, did not immediately deny liability, that is not proof that she admitted it. If she was admitting, why would she not say so? Why refer the matter to her lawyers? The fact that the reply from her legal practitioners came six weeks later does not prove anything.

Even considering the issue of credibility, the witnesses may have given their evidence well as the court found, but still neither of them gave evidence that solves the issues of whether Mrs Forrester gave the guarantee. When Moore was asked about the details of the guarantee he replied: "That was never discussed at all". He said this after telling the court that the meeting was to discuss the details of the terms of the agreement.

In order to succeed, the respondent needed to show, through its two witnesses, that the appellant did agree to provide a guarantee.

The evidence of the two witnesses is so unreliable that one cannot come to the conclusion that a guarantee was in fact provided by Mrs Forrester.

Accordingly, the respondent did not prove that the appellant agreed to provide a guarantee.

The appeal succeeds with costs and it is upheld. The order of the court *a quo* is set aside and is substituted by the following –

"1. The plaintiff's claim is dismissed.

2. The plaintiff is to pay the costs of suit."

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners