

ZIMBABWE DEVELOPMENT BANK
versus
GENERAL ACCIDENT INSURANCE COMPANY

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
HARARE, 27 September 2001

Opposed Matter

Mr *Girach*, for the applicant
T. Biti, for the respondent

CHIWESHE J: At the hearing of this matter the plaintiff bank was in default. Mr *Biti*, for the defendant, sought and was granted leave to argue the matter on the merits. Judgment on the merits of the case was granted in favour of the defendant with costs. I indicated that my reasons for judgment would follow.

At the pre-trial conference it was declared that this matter be referred to trial as a stated case. The agreed facts were as follows.

1. On 14 February 1992, plaintiff and African Savanna Touring (Pvt) Ltd entered into an agreement in terms of which the plaintiff lent to African Savanna the sum of Pound Sterling 102 063,00 which sum was repayable on certain terms and conditions which are not mentioned in the instant case.
2. By way of written guarantee dated 27 August 1992, defendant guaranteed the indebtedness of African Savanna Touring in an amount not exceeding Z\$600 000.00.
3. African Savanna Touring having breached the agreement entered into between itself and plaintiff, plaintiff instituted legal proceedings and obtained judgment in the sum of Z\$2 300 743.90. This judgment remains unsatisfied.
4. By way of letter dated 21 June 1994, defendant gave plaintiff notice of termination of the said guarantee with effect from 21 July 1994.
5. On 11 October 1994, Northridge (Private) Limited (Insurance Agents) representing African Savannah Touring Company wrote to plaintiff requesting a copy of the old Financial Guarantee Bond 6260327187.

6. By way of letter dated 20 October 1994, plaintiff forwarded to Northwood (Private) Ltd a copy of the guarantee. Plaintiff retained the original guarantee.

Plaintiff sues the defendant for payment of the sums indicated in the guarantee in satisfaction of the judgment it obtained against African Savanna Touring. Plaintiff contends that as the guarantee is a guarantee in respect of only one transaction, and not a continuing guarantee, defendant was not entitled at law to withdraw from the said guarantee and is therefore liable to effect payment.

On the other hand, the defendant contends that it was entitled, as of law, to withdraw from the said agreement and that even if it was not, the plaintiff in any event accepted the defendant's termination of the suretyship. Further defendant contends that, in any event, the plaintiff's claim is prescribed.

At the pre-trial conference the parties adopted the following issues:

1. Was the defendant entitled at law to terminate the guarantee on notice?
2. Did the plaintiff accept the termination?
3. Has plaintiff's claim prescribed?

The guarantee under consideration relates to a single transaction. As such at law the defendant cannot resile from the arrangement. In *Lennard Clothing Manufacturing (Pvt) Ltd v Van Rhyn Interiors (Pvt) Ltd 1974 (1) RLR 207* the principle was established that where the obligation of a guarantor relates to a single contract, such guarantee cannot be terminated upon due notice. The answer to the first issue therefore is that at law the defendant was not entitled to terminate the guarantee.

The guarantee was for an indefinite period. In other words, it would hold for as long as the plaintiff remained indebted. For that reason, the question of prescription cannot arise. In my view, the third issue must therefore be decided in favour of the plaintiff, namely that the guarantee could not have prescribed.

However, the plaintiff would appear to have accepted the cancellation of the guarantee and must therefore be held to have waived any rights he might have legally exercised in enforcing the same. The letter of termination dated 21 June 1994 was forwarded to the applicant and, it would appear, was received by them on 23 June 1994, as evidenced by their date stamp that appears on a photocopy of that letter. In addition, applicants were duly advised by their agents, Northridge Insurance Agents, of the cancellation. The plaintiff's conduct in not challenging the purported cancellation and, indeed, in returning the old

guarantee, which had been requested as a result of the purported cancellation, indicates that they had indeed accepted the fact of cancellation.

It was for these reasons that judgment was granted in favour of the defendant with costs.

Sawyer & Mukushi, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners