HH 19-2002
HC 2841/97
POSTS & TELECOMMUNICATIONS CORPORATION
versus
D C LAMB

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 22 November, 2000 and 23 January, 2002

Mr *E W W Morris*for plaintiff
Mr *P Nhererе*for defendant

SMITH J: The plaintiff (hereinafter referred to as "the PTC") sued the defendant (hereinafter referred to as "Lamb") for the sum of $24 160,46 with interest. Lamb opposed that claim on the basis that it has prescribed. Since the parties are agreed as to the facts, they have prepared a stated case for determination. The agreed facts are as follows. Mrs Linda Merle Jackson (hereinafter referred to as "Jackson")was indebted to the PTC in the sum of $24 160,46 in respect of telephone services rendered to her. Lamb guaranteed payment of Jackson's debt to the PTC by way of a deed of suretyship. The PTC made a demand against Jackson on 19 June 1992 and thereafter issued summons and obtained judgment on 4 January 1994. Action was commenced against Lamb on 17 March 1997. It is accepted that the prescription period against Lamb commenced running on 19 June 1992. The points for determination are -

Has prescription run against the PTC because it only commenced action against Lamb in March 1997, more than 3 years after l8 June 1992?

Did the judgment taken by the PTC against Jackson novate her indebtedness to the PTC?
Is the prescription period of such novated debt 30 years from the date of judgment, which was 4 January 1994?
Did Lamb guarantee the novated debt or only the original debt?
Has the prescription period of the debt Lamb owed the PTC by virtue of his signing of the deed of suretyship been extended by the judgment taken against Jackson to 30 years from the date of that judgment?

Mr *Morris*argued that the surety agreement entered into by Lamb was an undertaking to pay the debt of Jackson so long as it could be exacted from Jackson. The judgment against her extended the period during which the debt could be exacted to 30 years from the date of judgment. Accordingly, the surety was extended by a like period. Mr *Morris*submitted that the basis of the claim by PTC rests on the following statement in *Voet's*Digest 46.1.36 -

> "But if the principal debtor has been summoned, but the surety never, not even for thirty years, yet the latter could not protect himself by the plea of prescription, because, as the obligation has been perpetuated against the debtor himself by a summons against him, the rule is that the same obligation should be perpetuated against the sureties and the other assessors."

That statement was adopted with approval by WESSELS JP in *Cronin*v *Meerholz*1920 TPD 403 at 406-407 and in *Claim Government*v *Van der Merwe*1921 TPD 318 at 320. See too *Volkskas*v *The Master*1975 (1) SA 69 at 77-78.

Mr *Morris*also argued that the same conclusion could be arrived at by different means. The judgment against Jackson amounted to a *novatio necessaria*. Such a novation is different from a *novatio voluntaria*because it strengthens the original debt instead of totally replacing it as in the case of a *novatio voluntaria*- see *Van Leuween*Censura Forensis 1.4.34.7, *Voet*46.21 and *Skelton*v *Shelooke*21 SC 664. Those authorities were followed and the proposition stated that where a creditor takes a judgment against a debtor in order to enforce the right to payment, that judgment reinforces the original debt and does not supplant it - see *Savadif*v *Dyke*1978(1) SA 928 (A), *Standard Bank*v *Wilkinson*1993(3) SA 822 (c) at 833H and *Metequity Ltd & Anor*v *Heel*1996 (3) SA 431 (w) at 434 H. It has been held in this jurisdiction that an extension of time given to a debtor to perform does not release the surety - see *ZIFA*v *Mafarusa*1985(1) ZLR 144. By parity of reasoning, an extension of the prescriptive period does not release the surety. The law as laid down by WESSELS JP in the *Cronin*case, *supra,* was specifically departed from in *Rand Bank*v *de Jager*1983(3) SA 418 and the decision in the latter case was upheld in *Bank of Orange Free State*v *Cloete*1985(2) SA 859(E). However in *Jordan*v *Balsara& Co Ltd* (4) SA 457 ( )MULLIN J refused to follow the decision in the *Rand Bank*case, *supra,*and followed the reasoning of WESSELS JP in *Cronin's*case *supra*.

Mr *Nherere*argued as follows. The PTC's cause of action arises from contract and therefore the period of prescription is 3 years. The prescription period started to run on 19 June 1992 and therefore the claim became prescribed on 19 June 1995. The institution of proceedings against Jackson did not interrupt the running of prescription against Lamb. The novation of the original debt by the judgment debt did not affect the contract between the PTC and Lamb. While the principal debt and the suretyship are obviously related, the principal contract and the suretyship contract are two separate and distinct contracts that give rise to two distinct obligations - see *Neon and Cold Cathode Illuminations (Pvt) Ltd*v *Ephron*1978 (1) SA 463 (A) at 471, the *Rand Bank*case, *supra,* the *Metequity*case, *supra,* and *Balsara*v *Jordan & Co Ltd (Conshu Ltd)*1996(1) SA 805 (A) at 810. Whilst the service of summons on Jackson did interrupt the running of prescription in relation to her obligation to the PTC, it did not interrupt the running of prescription in relation to Lamb's obligation to the PTC. As the liability of the principal and the surety are two distinct obligations, arising from two separate and distinct contracts, the institution of proceedings to enforce the one contract does not interrupt the running of prescription in the other - see the *Rand Bank*case, *supra*. In the *Bank of the Orange Free State*case, *supra,* it was held that the tacit admission of liability by the principal debtor did not operate to interrupt prescription against the surety. Mr *Nherere*went on to argue that the guarantee provided by Lamb was not a continuing guarantee and did not guarantee any judgment debt against Jackson. Lamb undertook to

> "liquidate all the phone bills due and payable by Mrs M.L. Jackson in the event of the said (M.L. Jackson) failing to pay such bills on demand".

In *E A Gani (Pty) Ltd*v *Francis*1984 (1) SA 462 (T) and the *Bulsara*case, *supra,* which also involved actions against a surety, the plaintiff relied on the judgment debt and not the original cause of action. In both of those cases the court construed the suretyship agreement as including not only the principal debtor's indebtedness but also the judgment debt. In this case the PTC relies not on the judgment debt but on the

failure by Jackson to pay her telephone bills, because that is all that the agreement of guarantee covered.

In *Cronin's*case, *supra*, it was held that both under the common law and under the Transvaal Act 26 of 1908, the obtaining of a judgment against the principal debtor was a perpetual bar to a plea of prescription by the surety. That was before statutory provision reduced the period from perpetuity to 30 years. That principle was followed in *Union Government*v *Van der Merwe*1921 TPD 318 and both cases were approved, without discussion, in *Visser*v *T Sassen & Sons (Edms) Bpk*1981 (4) SA 253 (C). However, in the *Rand Bank*case, *supra*, after an exhaustive review of the authorities, BAKER J concluded that the decision in *Cronin's*case did not reflect correctly the position under common law. At p 498 he said -

> "The statement in *Caney*at 214 that
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> > 'the surety's obligations continue so long as the principal debtor is bound, unless there is stipulation to the contrary'
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> is, with respect, incorrect. The true position is that the surety is bound until released by the completion of whatever period of prescription applies to him. Reliance on common law writers who in turn rely on Roman texts, can be dangerous and misleading, for in the old Roman law there was no prescription of debts - the debt remained until paid (*Van Warmelo*s 7637)."

In the *Bank of Orange Free State , supra*, at p 864F KANNEMEYER J referred to the *Rand Bank*case and said -

> "The judgment of BAKER J was the result of an exhaustive review of the authorities and so, if I may say so, both erudite and convincing. I am in respectful agreement with it".

In *Gani's*case, *supra*, which also dealt with the liability of a surety in a case where judgment had been given against the debtor, the court held that the judgment created an independent cause of action. It then went on to hold that assuming, but without deciding, that the surety's liability for the original indebtedness had prescribed, the new cause of indebtedness created by the judgment fell within the wide undertaking of the surety in the deed of suretyship. The deed of suretyship had created a continuing security for all indebtedness for which the debtor was then, or thereafter might be, liable to the creditor. MULLINS J, in *Jordan & Co Ltd Bulsara*1992 (4) SA 457 (E), was not prepared to accept the conclusions reached by BAKER J in the *Rand Bank*case, *supra*. At p 463-464 he said -

> "These principles, which were referred to and criticised by BAKER J in the *Rand Bank*case, appear to me to be far more convincing and in accordance with our accepted common-law principles than the contrary view arrived at in that case. At 455E-F of the *Rand Bank*case, BAKER J expressed the view that
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> '*on Voet's*rule, where sureties are involved, the creditor can saddle sureties with 30 years of jeopardy merely by suing the principal debtor, without giving any notice in the sureties at all. For reasons already stated, that is manifestly unfair'.
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> I have, with respect, difficulty in following this argument. A surety undertakes that he will pay if the principal debtor does not pay. A principal debtor might delay payment indefinitely by admitting liability within each period of three years. He does not have to tell the surety he has so admitted liability, nor is the

creditor required to do so.

Furthermore, in assuming the liabilities of a surety, one of the possibilities that he must foresee is that the principal debtor might default and that judgment might be taken against such principal debtor. It is far more unfair to the creditor that the surety should escape liability while the principal debtor remains liable than that the surety's obligations should remain in force until the debt is paid, whatever the period involved".

When Bulsara appealed against the determination of MULLINS J, with which JANSEN J concurred, the appeal court held that the correctness or otherwise of the judgments in the *Rand Bank*case and the *Bank of the Orange Free State*case did not arise for decision in the appeal. JOUBERT JA, at p 809 D, said -

> "Counsel were *ad idem*, in my view correctly, that this question has to be decided exclusively with reference to the interpretation of the deed of suretyship",

After listing the main provisions of the deed of suretyship, he continued, at p 809 H-J -

> "It is clear from the wording of the deed of suretyship as a whole that the intention of the parties was not to limit the liabilities in respect of goods sold and delivered by the creditor to the principal debtor since the wording was very widely stated to include 'any other causes of debt arising out of such transactions', i.e. out of transactions of sale and delivery of goods which would include judgment debts in respect of such sales. The deed of suretyship read as a whole supports the interpretation that the parties intended to include a judgment debt against the principal debtor for goods sold and delivered to the latter by the creditor as the subject of the suretyship. In other words, the deed of suretyship evinces an intention of the parties to cover both the original cause of debt as well as a judgment debt".

In the deed of suretyship entered into by Lamb, he undertook to liquidate all the phone bills due and payable by Jackson in the event of her failing to pay such bills on demand. It is clear that he did not undertake to pay any other causes of debt arising out of her transactions with the PTC.

If the court adopts the reasoning of BAKER J in the *Rand Bank*case, *supra*, then the liability of Lamb has become prescribed. If, on the other hand, the court finds that the conclusions of MULLINS J in *Jordan*v *Bulsara*are more convincing, then his liablity has not become prescribed.

I consider that the views expressed in the *Rand Bank*case are more compelling.

Accordingly, the answers to the points stated for determination are -

1. Prescription, in respect of the PTC's claim against Lamb, has run because it commenced action against him more than 3 years after l8 June 1992.

The judgment taken by the PTC against Jackson did novate her indebtedness to the PTC.
The prescription period of such novated debt is 30 years from 4 January 1994.

Lamb guaranteed only the original debt and not the novated debt.

The prescription period of the debt Lamb owed the PTC by virtue of the deed of suretyship has not been extended by the judgment taken against Jackson to 30 years from the date of that judgment.

Coghlan,Welsh & Guest, legal practitioners for plaintiff
Calderwood, Bryce Hendries & Partners, legal practitioners for defendant