MUNYUKI ROBERT ARMITAGE CHIKWAVIRA
VERSUS
PRODUTRADE (PRIVATE) LIMITED
and
REGISTRAR OF DEEDS, HARARE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 31 August and 10 November 2010

Opposed Court Application

D Ochieng, for the applicant
C Venturas, for the first respondent

GOWORA J: At the commencement of this matter, both parties applied to have supplementary affidavits admitted. Neither counsel objecting to the admissions, both were admitted by consent

The facts that are common cause between the parties are the following. In January 2005 the applicant was one of the shareholders in an entity called Continental Bakeries (Pvt) Ltd ("the company"). On 14 January 2005 the company placed an order with the first respondent for the supply by the latter to the company of 142.74 metric tons of baking flour for a unit price of Z$3.4 million per ton making a total of Z$485 316 000-00. For the due payment of the cost of flour the first respondent required that the company provide security. The applicant, in the hope of doing business in future with the first respondent then put up his immovable property as security for the debt. In the event a mortgage bond was registered by the applicant over his immovable property in favour of the first respondent on 28 January 2005. On 2 February the applicant 'parted company' with the company and set up his own bakery business after an exchange of shareholding between himself and his co-shareholders in the company. The applicant ceased all participation in the business of the company after he gave up his shareholding therein. After his departure however, the company disposed of all its assets and liabilities to Harambe Holdings (Pvt) Ltd on 17 March 2005.

Later that year the applicant received summons from the first respondent wherein it claimed payment of the monies in respect of which the applicant had given security for the due

payment of the debt by the company. He defended the matter all the way to the Supreme Court but decided not to proceed with the appeal. On 22 March 2007 on his instructions his legal practitioners addressed a suitable letter to the first respondent's legal practitioners offering to settle the debt in full together with accrued interest. A cheque in the sum of Z$970 632 000 representing the amount of $485 316 000 as the capital debt and an equal sum as accrued interest accompanied the accompanied the letter. Although the court had ordered that the applicant pay costs on a legal practitioner client scale, he did not pay the costs when the cheque for settlement of the debt was sent to the legal practitioners for the respondent, presumably on the advice of his own legal practitioners. It also appears that the respondent on its part, has not given the applicant a computation of the amount of costs owing to it.

The payment made by the applicant was accepted on a without prejudice basis and the applicant was informed that the respondent reserved the right to sue for further accrued interest in an amount equal to the amount of the cheque that had been sent to its legal practitioners. No further action was taken by the respondent or its legal practitioners at the time.

On 21 August 2007 the applicant instructed his legal practitioners to demand in writing the cancellation of the mortgage bond. The respondent's legal practitioners responded to the letter on 5 September 2007 by a letter which was to the following effect:

> "Thank you for your letter to us dated 21st August 2007. As you are aware our client disputes the fact that your client has liquidated its debt to ours due to the fact that his defence to our summons was *mala fide*. This is noted in the Honourable Mr Justice HLATSHWAYO's judgment and is corroborated by the fact that you have now withdrawn your Notice of Appeal which proves that it was only noted to delay matters. Our client requires that your client pays the capital owed plus accrued interest to date. As you are well aware public policy cannot protect your client who has used the court's procedure to unnecessarily delay finalization in this matter.
>
> Please may we have payment within the course of the next 10 (ten) days."

No payment was made and as a result the respondent, on 3 August 2009 caused summons to be issued against Continental Bakeries (Pvt) Ltd, the applicant and Harambe Holdings (Pvt) Ltd wherein it claimed damages in the sum of US $148 800-00 representing the cost of two hundred and forty metric tons of flour together with interest on the said sum at the applicable rate in the courts of United States with effect from 1 November 2008 to date of payment. The respondent obtained judgment on 9 September 2009 and issued a writ of execution against the company and the applicant. An earlier application wherein the

respondent sought payment of interest against the applicant was decided in favour of the respondent. The applicant claims that he did not see the summons wherein the respondent was claiming damages and only became aware of the suit after he was served with a writ of execution. He has since applied for rescission of that judgment. The default judgment has since been rescinded.

The applicant contends that the *in duplum* rule on interest is no longer applicable to judgment debts in this country following the promulgation of the Prescribed Rate of Interest Act which was promulgated in 2007. The applicant contends that the new s 9 in the Act can only apply to judgments debts from 8 January when the Act was promulgated and that it does not have retroactive effect. He contends further that he has paid in full what he owed the respondent except for costs. He contends further that the issue of costs should not be a reason for the respondent to continue holding onto his Deed of Transfer and the refusal to cancel the mortgage bond granted in its favour.

The respondent opposes the granting of the relief being sought by the applicant. The opposing affidavit was deposed to by the respondent's managing director who states that the applicant had mistaken the import of the claim for damages. He avers that the claim is predicated on the loss caused to the respondent by the deliberate delay on the part of the applicant to settle his indebtedness timeously which payment when it finally came, was insufficient to meet the cost of the flour supplied to the company. In respect of the mortgage bond the contention by the respondent is that it provided security for money owing or claimable by it from 'any cause or debt whatsoever' and that in the event the respondent was entitled to retain the title deeds and to decline to cancel the bond until such time as the court determines in Case No HC 3518/09 whether or not there are any monies owing to the respondent. The deponent states further that were this court to grant the relief sought any judgment under the damages claim in respondent's favour would be a brutum fulmen. The respondent's view is that the applicant stood surety for flour worth almost US $150 000-00 but has paid less that $100-00 towards the debt.

In his answering affidavit the applicant contends that he has not misunderstood the import of the damages claim and maintains that what the respondent in that matter is payment for the cost of the flour albeit in United States dollars. He contends further that he has discharged his indebtedness to the respondent and as he is a businessman he cannot await the determination of the damages claim and he requires the return of his title deeds. He states

further that the fact that the security provided in the bond was in respect of indebtedness arising from any cause or debt whatsoever did not mean that the quantum of the indebtedness was without limit. He stated that in fact the mortgage bond limited his indebtedness to Z$500 000 000-00 together with interest thereon and that clause 1 (d) of the mortgage bond provided for a limit of Z$125 million for securing the bond and that therefore his indebtedness was Z$650 million excluding interest. He stated that he had paid the capital debt in full and that the respondent had no justification to continue holding on to his title deeds.

In this application the applicant seeks relief in the following terms:

1. That the first respondent be and is hereby ordered and directed to cancel the registration of Mortgage Bond No 911/2005 dated 28 January 2005 registered in the second respondent's registry by the applicant in favour of the first respondent within thirty (30) days of the granting of this order.
2. That the first respondent be and is hereby ordered and directed, within thirty (30) days of the granting of this order, to return and surrender to the applicant Deed of Transfer No 2942/2003 dated 23 May 2003 relating to a certain piece of land situate in the district of Salisbury called Stand 91 Park Meadowlands of subdivision B of Makavusi and that the said Deed of Transfer be free of the endorsement of the mortgage bond referred to in (1) above.
3. That the first respondent pays the costs of this application

In order for me to grant the relief sought by the applicant in terms of the draft order I would have to be satisfied that indeed the applicant has paid his indebtedness to the respondent. The respondent had out of caution insisted on the applicant granting it security in the form of a mortgage bond to put the applicant and the company on terms to pay the debt. The applicant did not pay when called upon to do so and even after he was hauled to court for an order for him to pay the debt he defended his obligation to pay taking the matter on appeal which was then abandoned more than two years after the debt would have been due. It cannot be denied that the applicant resisted any attempt to make him pay and only paid when it seemed convenient to him. Although he acknowledges that an amount of $125 million was due and payable for securing the mortgage, it appears that even that has not been paid. The costs ordered against him by HLASTSHWAYO J were not paid. His explanation is that he or his legal practitioners were never appraised of the amount of those costs. It seems to me that in

order for him to satisfy this court that he has settled his indebtedness and that he has attempted to pay the costs but that the respondent's legal practitioners refuse to divulge the sum of the costs. There is no letter from either the applicant or his legal practitioners demanding a breakdown of those costs and an offer to settle them.

The essence of the right in a mortgage bond is that the mortgagee is able to retain his hold or security over the mortgaged property until the obligation is discharged when due and where it is not so discharged to have the property sold and from the proceeds to recover the money owed by the mortgagor. The mortgagor on the other hand has the right to have his property freed from the mortgage upon payment of the monies owed in respect of the mortgage bond. A valid mortgage confers a *jus in re aliena* on the mortgagee who may retain his security as long as his debt remains unpaid.[1] This right is effective not just against the mortgagor but also his creditors. A mortgage is extinguished when the debt secured by the mortgage bond is satisfied in full together with interest and the costs for cancellation of the bond. A partial payment does not satisfy the obligations of the debtor to pay the debt in full. Thus the duty of the creditor is cancel his bond and the duty of the debtor is to pay the amount due and the authorities are agreed that the duties are reciprocal and cancellation should take place *pari passu* with payment.[2]

It is correct as contended by the applicant that he had, by executing the mortgage bond in favour of the respondent, undertaken the obligation of surety and co-principal debtor with the company and further that this obligation was for the due payment of costs related to the purchase of flour by the company. In *Trans-Drakensberg Bank Ltd* v *Guy* 1964 (1) S.A. 790 MILLER J put the obligations of a surety thus:

> "It is of the essence of a contract of suretyship that it is "accessory to the main contract"; the surety undertakes that the obligation of the principal debtor will be discharged, if not by the principal debtor, by himself. (*Corrans* v *Transvaal Government*, 1909 T.S 605 AT P 612). Where the surety concludes a contract of suretyship with the creditor in respect of a particular obligation, he undertakes to discharge that obligation and no other:
>
> > 'Where the surety has expressed what sum or what cause he engages, his obligation only extends to the sum or to the cause which is expressed…'."

On the basis of this authority it is the contention of the applicant that he did not undertake to discharge any other claims by the first respondent save for the contractual

[1] See National Bank of SA Ltd v Cohen's Trustee 1911 AD 235.

[2] Nulliah v Harper 1930 AD 141

obligation arising out of the purchase of the flour, and that in the event, the first respondent's claim for damages was therefore outside the purview of what the applicant bound himself to perform. The contention by the first respondent however, is to the effect that the applicant has not discharged his indebtedness. The first respondent argues further that the damages claim is covered by the mortgage bond executed by the applicant in that it covers-

"……. arising from and being monies lent and advanced by the mortgagee to the mortgagor, acts of suretyship or from any other cause of debt whatsoever and as continuing security for money which may hereafter be lent and actually paid or become owing to or claimable from any cause whatsoever.."

The duration of a surety's liability depends on the terms of the deed of suretyship. In general a suretyship agreement is meant to cover a single credit and transaction but others, referred to as continuing guarantees are meant to cover a series of transactions. In the absence of a clear indication to the contrary a continuing is terminable by the guarantor on notice to the creditor that he will not be responsible for any liability incurred after receipt of the notice or the guarantee will relate to a particular obligation, in which case it will continue until the obligation is fully discharged. See *Lennard Clothing Manufacturers* (*Pvt*) *Ltd* v *Van Rhyn Interiors* (*Pvt*) *Ltd* 1974 (1) RLR 207.

As to what the applications obligations as a surety under the contract he signed I am of the view that is the dispute that has been brought to court by the respondent in damages claim filed against the applicant. It seems to me that the interpretation of the suretyship agreement has not been placed before me for determination by the applicant. In view of the wording which suggests a continuing guarantee by the applicant for the due payment of the sums that the company would be found to owe arising from the purchase of the flour, I am unable to accept the position put forward by the applicant that he has discharged his obligations under the deed of suretyship.

As for his contention that I should find that the *in duplum* rule applies to judgments, I am of the view that the issue was dealt with in the judgment of CHATUKUTA J and that I need not concern myself with it. In any event, it had not been sufficiently argued before me for me to make an informed decision on the matter. I was not referred to case authority by either counsel and I was not about to embark on a research on an issue which the parties to the dispute appear not to treat seriously. Any *dicta* by me on the issue would be obiter as I have not specifically been asked to determine the same.

In my view, the applicant has failed to satisfy this court that he has discharged his obligations under the deed of suretyship and I am accordingly, unable to accede to his prayer for the cancellation of the mortgage bond and the release to him of his deed of transfer.

Accordingly the application is dismissed with costs

Musendekwa-Mtisi, legal practitioners for the applicant
Samukange & Venturas, legal practitioners for the first respondent