

FIRST MUTUAL LIFE ASSURANCE SOCIETY
OF ZIMBABWE
versus
BUSINESS ASSOCIATES (PRIVATE) LIMITED
and
FRANCIS HALE
and
SHINGAI J. MTEZO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 8 March 2011 & 1 JUNE 2011

T Pasirayi, for applicant
S.J Mtezo, in person as 3rd respondent

MTSHIYA J: On 1 may 2003 the applicant entered into a lease agreement with the first respondent in respect of the ground floor of premises known as Building No. 3 Located on Lots 24 and 26 Arundel Office park, Norfolk Road Mount Pleasant, Harare (the property). The lease agreement was for a period of three years, terminating on 30 April 2006. The lease agreement was, in terms of clause 2, renewable. Clause 2 of the lease agreement provides as follows:-

“2 LEASE

- 2.1. The Lessor lets to the Lessee who hires the premises for the lease period.
- 2.2. At lease three calendar months prior to the last day of the lease period the Lessee shall advise the Lessor in writing whether –
 - 2.2.1 the Lessee intends to vacate on the termination date in which event the Lessee undertakes to vacate on such date; or
 - 2.2.2 the Lessee wishes to renew the lease in which event a written agreement of renewal shall be entered into by the Lessor and Lessee on such terms as may be agreed.
- 2.3. If the Lessee fails to give notice as provided in clause 2.2 hereof the Lease will continue from the termination date of the lease or option period on the same terms and conditions other than the rent payable but subject to two months’ written notice of termination of either side being given”.

In terms of clause 1.7 of the lease agreement the lessee (applicant) was to provide three sureties. The said clause provided as follows:-

"1.7 The Lessees shall provide three sureties with a traceable financial history who will bind themselves as sureties and co-principal debtors for the Lessee's due performances of its obligations in terms of this Lease Agreement".

On 1 May 2003, the date on which the first respondent signed the lease agreement, the second and third respondents, as directors of the first respondent, signed Deeds of Suretyship as sureties and Co-Principal Debtors of the first respondent. The relevant Deeds of Suretyship provided as follows:-

"I/We under renunciation of the legal exception – *beneficium ordinis seu excussionis*, with the meaning and effect which I/We am/are fully acquainted do hereby bind myself/ourselves jointly and severally as surety and co-principal debtor for the due and faithful performance by the Tenant, **BUSINESS ASSOCIATES (PRIVATE) LIMITED** of all obligations imposed in terms of the Agreement of Lease entered into between the TENANT and the LANDLORD in respect of premises being **the land known as Lots 24 and 26, Arundel Office Park, Norfolk Road, Mount Pleasant, Harare** and the improvements thereon".

There can be no doubt that the sureties were for the lease agreement signed on 1 May 2003.

There is no documentation in the file relating to renewals of the lease agreement after 30 April 2006. However, on 3 February 2009, a Mr John Ndere, representing the applicant, wrote the following letter to the first respondent.

"03 February 2009

Business Associates
1st Floor, Building 3
Arundel Office Park
Mt Pleasant
HARARE

Att: Mr Mahaka

Dear Sir/Madam

RE: FEBRUARY 2009 RENT

Your rentals for the month of February 2009 shall be an equivalent of 1419USD units at 6.00 units per square metre (**incl vat**). This is payable on or before the first day of the month (1 February 2009).

We would like to thank you in advance for your cooperation.

Yours faithfully

John Ndere
PROPERTY PORTFOLIO MANAGER"

The letter was addressed to a Mr Mahaka, who, on 27 February 2009, accepted the proposed rental on behalf of the first respondent. In para 10 of the founding affidavit, the applicant states as follows:-

“In breach of the lease agreement first respondent failed to pay rent and accumulated arrears for rent from January, 2009 to August, 2009 in the sum of US\$14 054.74”

Clearly the arrears refer to the period after 30 April 2006 when the three year lease agreement under which the second and third respondents had bound themselves jointly and severally as sureties and co-principal debtors had expired.

In August 2009 the first respondent vacated the property on its own accord. At the time of vacating the property some arrear rentals were still outstanding for the period after February 2009.

On 25 August 2010 the applicant filed this application seeking the following relief:-

“IT BE AND IS HEREBY ORDERED THAT:-

The respondents shall pay to applicant jointly and severally one paying the other to be absolved:-

- (a) The sums of US\$14 884,41 and US\$3 381.28.
- (b) Interest on the above sums at the rate of 5% per annum from August, 2010 to date of payment in full.
- (c) Payment of collection commission on all amounts claimed herein calculated in accordance with By-Law 70 (2) of the Law Society of Zimbabwe By-Laws 1982.
- (d) Costs of suit at Legal Practitioner and Client Scale.”

On 3 September 2010 the third respondent filed a notice of opposition to the relief sought.

The first and second respondents did not file any opposing papers.

In his opposing affidavit the third respondent states, in part:

“I do not dispute that indeed I bound myself as surety and co-principal debtor for the obligations of first respondent. My obligation as surety and co-principal debtor for the first respondent terminated when the attached lease agreement terminated on 30th April 2006. After the expiry date of this lease agreement I was no longer bound as the surety and co-principal debtor.

The Deed of Suretyship I signed on 1st of May, 2003 was signed during the Zimbabwe Dollar era and thus was valid for that period. The applicant and the first respondent indeed entered into a new United States Dollar agreement for rent on the 27th of February 2009. At the relevant time of the signature of the new agreement I was on longer the surety and co-

principal debtor for the first respondent as I had long parted ways with the said company in 2006.”

In court, the third respondent, who appeared in person, stuck to the above defence and urged the court to dismiss the application. He said his obligations terminated at the end of the lease period (i.e 30 April 2006). He further stated that he had nothing to do with the renewed lease agreement whose terms and conditions he did not know.

In response to the submissions made by the third respondent, Mr *Pasirayi*, for the applicant, argued that in terms of clause 2.3 of the lease agreement, the third respondent could not escape liability because all terms and conditions on the renewed lease still subsisted. He said that there was no evidence that the lease had been terminated.

With respect to the law relating to suretyship Mr *Pasirayi*, in his heads of argument, opined:

- “9. The duration of a contract of Suretyship is a matter of construction. Broadly speaking, a Suretyship is likely to be either of a fixed period, in which case it cannot attach to a debt incurred after the period has elapsed; or to be a continuing guarantee, in which case, in the absence of some clear indication to the contrary, it is terminable by the Surety by notice to the Creditor that we will not be responsible for any liabilities incurred after receipt of the notice, or it will relate to a particular obligation in each case it will continue until the obligation is fully discharged. See *Christie, Business Law in Zimbabwe at page 457*.
10. In the case of *Rauf Haroon Mhandu v Sctfin Limited 64/03* it was held that to determine the extent of a sureties liability, regard must be made to the contract of suretyship and its interpretation as a whole.
11. In applying the law to the facts the argument is that the contract of Suretyship that appears on p23 of the Court application is a continuing Guarantee by third respondent for the payment of rent to the applicant by the first respondent as the third respondent bound himself for the due and faithful performance by the first respondent of all obligations imposed in terms of the lease agreement entered into with the applicant. On this basis it is clear therefore that:
 - 11.1 First respondent had an obligation to pay agreed rent in United States dollars to the applicant. First respondent failed to pay the rent and operating coats thereby accumulating arrears. Therefore this obligation is still outstanding and on that basis third respondent is liable for the obligation of the first respondent to pay the arrears for rent and operating costs.
 - 11.2 No evidence has been placed on record by the first respondent to show that he terminated the Suretyship or that it was for a fixed period”.

The above submissions are helpful in the determination of this matter. In constructing the proper import of the Deed of Suretyship that was signed by the third respondent, I come to the conclusion that what he was binding himself to were obligations that fell under the lease that was signed on the date he also signed the Deed of Suretyship namely 1 May 2003. That is the lease

referred to in the Deed of Suretyship and that is the lease that expired on 30 April 2006. The Deed of Suretyship did not extend to renewals. It does not state so. My view is that the financial obligations that the third respondent was aware of at the time of signing the Deed of Suretyship were as expressed in clause 1.8.

“1.8 the rent for the leased premises for the first year as provided in Clauses 3 and 4 of the Lease is made up of a “basic” rent and an “operating cost” rent and is broken down as follows:-

1.8.1 The basic rent is:

\$477 200 per month from 01/05/2003 to 30/04/2004

1.8.2 The proportionate share of the property’s operating costs having been estimated as:

\$102 800 per month from 01/05/2003 to 31/12/2003

Operating Costs for the 2nd and 3rd year will be reviewed in January of each year

1.9. the rent review date is 31 January 2005;

1.10 the authorised use of the leased premises is for offices;

1.11 the additional charges are electricity, contents and plate glass insurance and internal maintenance and repairs;

1.12 the common areas are the steps, entrances, passages, services, servitudes and loading bays in the Building;

1.13 the deposit is \$580 000 or one month’s rent, including operating costs, whichever is the greater

1.14 the place of payment is CB Richard Ellis, 8th Floor, Beverley Court, 100 Nelson Mandale Avenue corner Fourth Street, Harare or such other place in Zimbabwe designated in writing by the Landlord.

1.15 The Directors of the Company are
FRANCIS HALE
SHINGAI MTEZO”

The above provision in the lease agreement should be read together with all other financial clauses therein. It would, in my view, be absurd to reason that the third respondent would guarantee what he did not know. It was therefore the applicant’s obligation to ensure that clause 1.7. of the lease agreement was complied with at each time of any renewal. Any renewal, in my view, brought in different financial obligations. It was therefore imperative that the surety should agree to the new financial obligations. There is no evidence of that in the papers before me. There is, however, evidence that the third respondent bound himself as surety for financial obligations of a

lease that commenced on 1 May 2003 and expired on 30 April 2006. Indeed, the third respondent would, in terms of the Deed of Suretyship, be liable for “all obligations” of the first respondent falling under that fixed period. In the circumstances I find merit in the third respondent’s submissions. The relief sought against him must fail.

I am unable to say the same with respect to the second respondent because his Deed of Suretyship does not form part of the papers before me. I therefore do not know how it was worded.

In view of the foregoing, the application, as it relates to the third respondent, should fail. The first and second respondents did not oppose the application. I therefore believe the applicant is entitled to default judgment against the first and second respondents.

I therefore order as follows:-

1. The application, against the third respondent be and is hereby dismissed with costs.
2. The first and second respondents be and are hereby ordered to pay the applicant jointly and severally the one paying the other to be absolved, US\$14 884-41 and US\$3 381-28 in respect of rent and operating costs.
3. The first and second respondents be and are hereby ordered to pay jointly and severally the one paying the other to be absolved, collection commission on all amounts claimed in accordance with By-law 70(2) of the Law Society of Zimbabwe By-Laws 1982, and
4. The first and second respondents shall pay, jointly and severally the one paying the other to be absolved, costs of suit on a Legal Practitioner and Client Scale.

Gill, Godlonton & Gerrans, applicant’s legal practitioners
Business Associates (Pvt) Limited, 1st respondent, 9 Delamere Crescent, Avondale, Harare
Mr Francis Hale, 2nd respondent, 5 Sunningdale Court, Avondale West, Harare
Mr Shingai J. Mtezo, 3rd respondent, 445 Wickham Road, Waterfalls, Harare