

**REPORTABLE (58)**

**D. L MAKGATHO**  
v  
**OLD MUTUAL LIFE ASSURANCE (ZIMBABWE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA JA, GARWE JA & PATEL JA**  
**HARARE, MARCH 13, 2014**

*L Uriri*, for the appellant

*E Jori*, for the respondent

**GARWE JA:**

[1] Following a full trial, the High Court ordered the appellant to pay the sum of Z\$121,52 (revalued) together with interest thereon at the rate of 30% *per annum*, the sum of South African R201 750,08 together with interest thereon at the applicable rate in terms of the law of South Africa and costs of suit. Dissatisfied, the appellant has appealed to this Court.

[2] After perusing the papers filed of record and hearing counsel, this Court was of the unanimous view that the appeal lacked merit. Consequently we dismissed the appeal with costs and indicated that the reasons for the decision would follow in due course.

[3] What follow are the reasons for the decision.

***FACTUAL BACKGROUND***

[4] The appellant is the father to one Fortune Makgatho, now Mojapelo. Fortune Mojapelo, born Makgatho, is, in these proceedings, simply referred to as “Fortune”. In

1995, Fortune applied to the respondent for a bursary to enable him to study for a degree programme in Actuarial Science at the University of Cape Town in South Africa. By letter dated 15 January 1995, the respondent advised Fortune that, out of the many applications it had received, he had been fortunate to have been selected to study for the degree at the University of Cape Town. The degree programme was to cover a period of four years.

[5] One of the conditions for the grant of the bursary was that Fortune had to provide an acceptable guarantor for the due fulfilment of his obligations. On 4 February 1995, the same day that Fortune signed the agreement, the appellant signed as surety and co-principal debtor for the due fulfilment of all obligations by Fortune.

[6] The conditions stipulated by the respondent, and accepted by Fortune, were the following:-

5.1 Fortune was to take all the subjects in which passes at the required level would lead to exemptions from the local equivalent post-graduate intermediate course.

5.2 The bursary was to cover all tuition, residence, examination fees, repatriation and book allowances. All other liabilities were to be for the account of Fortune.

5.3 Fortune was to make satisfactory progress. He was expected to maintain the standard required in order to obtain exemptions from the post-graduate intermediate examinations of the Institute of Actuaries. This meant that first and upper second grades were to be his goal.

5.4 On Fortune obtaining the degree, the respondent could demand that he immediately commences work for Old Mutual Zimbabwe as an

employee for a period equivalent to the academic years in respect of which the bursary would have been provided.

- 5.5 The bursary would be deemed to be a loan until Fortune successfully completed the degree programme and had been employed by the respondent for the required number of years. The indebtedness was to be reduced proportionately taking into account the period worked as an employee.
- 5.6 In the event that, having successfully completed the degree programme and achieved satisfactory academic performance, the respondent did not offer Fortune employment, the loan would not be repayable.
- 5.7 The bursary could be withdrawn because of unsatisfactory progress or failure to fulfil any term stipulated in the agreement.
- 5.8 In the event of the bursary being withdrawn, or Fortune deciding not to fulfil any term of the employment contract, all monies paid under the bursary would be deemed to have been advanced as a student loan.
- 5.9 In the event of the bursary being withdrawn, no offer of employment would apply but the respondent reserved the right to demand immediate repayment of the loan.

[7] Despite averments by the appellant to the contrary, documentation produced during the trial confirmed that Fortune did not perform as expected by the respondent. In October 1998 the respondent wrote to Fortune expressing its disappointment at his half-year results and the fact that he had made no progress to obtain exemptions. He had also failed Actuarial Science (Act Sci). The respondent, in the same e-mail, further warned that unless there was an improvement, the respondent might find it difficult to continue sponsoring the studies. In September 1999, the respondent again wrote expressing its

disquiet over the failure by Fortune to attain the exemption studies in Survival Models. In the letter the respondent also advised that it expected Fortune to commence employment with it in Harare by end of the year.

- [8] Fortune did not commence work as requested. Instead he wrote to the respondent advising that he would not commence work with the respondent in January 2000 because he wanted to set up the Student Enterprise Foundation which he had apparently initiated when he was the President of the Student Representative Council. He also indicated he wanted to enrol for a post-graduate study in Financial Mathematics or Financial Analysis and Portfolio Management. In view of this development, Fortune suggested that the two parties agree on a financial settlement that would have the effect of releasing him from his obligations for at least a year. Nothing came out of this suggestion as Fortune appeared unhappy to pay South African Rand into the respondent's account with Standard Bank, Robert Mugabe Branch, Harare, citing the possibility of a violation of local foreign exchange Regulations. The respondent agreed in October 1999 to defer commencement of his employment to enable him to pursue these other commitments on condition he took up such employment in 2001. The respondent further advised him that it would not provide any financial support unless he wrote professional actuarial examinations or obtained exemptions from those examinations. Despite such accommodation, Fortune did not, in 2001 or at any time thereafter, report for work with the respondent.

#### *PROCEEDINGS IN THE HIGH COURT*

- [9] The respondent issued summons out of the High Court, Harare, on 2 September 2003 claiming payment of the amounts in Zimbabwe Dollars and South African Rand that it had disbursed pursuant to the agreement. In his plea, the appellant denied that his son

had failed to perform in terms of the agreement and stated that in fact it was the respondent which had failed to honour its side of the agreement, resulting in Fortune refusing to work for the respondent.

[10] Following a pre-trial conference in chambers, a judge referred the matter to trial on the following issues:-

- (a) Whether there was a valid agreement between the two parties.
- (b) Whether Fortune performed his part of the agreement or whether it was the respondent that breached the agreement.
- (c) Whether the appellant was liable to pay to the plaintiff the amounts claimed in the summons.

[11] The court found that indeed there was a valid agreement in terms of which Fortune was obliged to work for the respondent, when called upon to do so, for the equivalent number of years for which he had been sponsored. On the second issue, the Court found that Fortune did not perform satisfactorily. In particular he did not obtain satisfactory passes in Acturial subjects that would have enabled him to get exemptions back home and had refused to take up employment with respondent when requested to do so. On the third issue, the court noted the concession by the appellant on both liability and *quantum*. Consequently the court ordered the appellant to pay the amounts claimed, together with interest and costs of suit. It is against that order that the appellant has now appealed to this Court.

#### *GROUNDS OF APPEAL*

[12] In his notice of appeal, the appellant has attacked the judgement of the High Court on the following grounds:-

- (a) That the Court erred in failing to find that the failure by the respondent to advise him, firstly, of the alleged unsatisfactory performance and, secondly, of the failure to report for work on the part of Fortune was a breach of the agreement.
- (b) That the respondent's claim was inconsistent in that, whilst it was alleged that Fortune had failed to perform satisfactorily, the respondent alleged that he had refused to commence work upon completion of his duties.
- (c) That the court *a quo* erred in disregarding the manner in which the respondent had paid for the fees in South Africa, the respondent not having led any evidence on the amounts paid to the university.
- (d) The court *a quo* erred in finding that:
  - (i) The withdrawal of the bursary had been proved.
  - (ii) There was basis for such withdrawal.
  - (iii) In relying on the question whether or not Fortune was invited to work for the respondent.
- (e) The respondent's claim against the appellant was time –barred.
- (f) The court *a quo* erred in not considering that there was a prejudicial extension of time within which to meet the alleged conditions of the contract.
- (g) The appellant had been released from his obligation as surety by virtue of the following:
  - (i) The agreement between the respondent and Fortune had been novated.
  - (ii) The respondent's claim had been compromised.
  - (iii) The obligations between the two had been materially and prejudicially altered.

- (iv) There was a prejudicial agreement not to enforce the agreement as between the respondent and Fortune.

*THE ISSUES ON APPEAL*

[13] Although only three issues were initially identified in the appellant's notice of appeal, the appellant, in an amended notice of appeal, introduced a number of others, some for the first time on appeal. On a consideration of the papers, it seems to me that, in fact, there are seven main issues that fall for determination before this Court. I proceed to deal with each of these in turn.

*WHETHER THE AMOUNTS DISBURSED WERE PAYABLE*

[14] The place to start is the agreement entered into by the parties. Clauses 5, 9 and 11 deal with the repayments of the amounts disbursed by the respondent to the University of Cape Town.

14.1 Clause 5, in particular, provides that Fortune was to immediately commence work for the respondent after obtaining his degree, if requested to do so, and that he was to work for the equivalent number of years sponsored by the respondent.

14.2 The same clause made it clear that the bursary was to be regarded as a loan until such time as Fortune would have successfully completed his degree programme and been employed by the respondent for the requisite period.

14.3 Further in the event of dismissal from employment or disqualification, the bursary or the amount of such bursary "not worked off" would become payable.

14.4 In terms of clause 9, in the event of the bursary being withdrawn because of unsatisfactory performance, or a decision on the part of

Fortune not to fulfil the employment contract, all monies paid under the bursary would be regarded as having been advanced in terms of a student loan, and, in this situation, no offer of employment would apply.

14.5 In terms of both clauses 5 and 11, if, after successfully completing his degree, the respondent failed to offer Fortune employment, the loan would not be repayable.

[15] The agreement therefore makes it clear that any monies disbursed on behalf of Fortune would remain payable except in two terms: firstly, if Fortune, having successfully completed his degree programme worked for the respondent for the period equivalent to the number of years sponsored by the respondent; secondly, if having completed such degree and through no fault on his part, he was not offered employment by the respondent.

*WHETHER FORTUNE PERFORMED IN TERMS OF THE AGREEMENT*

[16] Allusion has already been made to this aspect earlier in this judgment. The exchange of correspondence between Fortune and the respondent demonstrates beyond doubt that Fortune did not perform in terms of the contract. The respondent expressed dismay at his failure to obtain passes at the required level in order to obtain exemptions back home, which exemptions would have fast-tracked his qualification as an Acturial Scientist. Indeed by the end of 1999 both parties were agreed that Fortune had not only failed to obtain passes at the required level but had even failed certain subjects. Since the respondent had disbursed funds for the period of four years in terms of the agreement, it made it clear that it would no longer sponsor him for the year 2000 but would consider sponsoring him purely to ensure that he



obtained passes at the required grade so that he would get the necessary exemptions. Indeed Fortune himself accepted he had not performed and offered to pay the amount of the bursary so that he would be released completely.

[17] Therefore the finding by the court *a quo* that Fortune did not obtain satisfactory passes in actuarial subjects cannot be said to be wrong. The suggestion that he completed his degree and that it was the respondent who refused to offer him employment is therefore not tenable, it being clear that Fortune refused to work for the respondent at the end of the four year academic programme or at any time thereafter.

*THE APPELLANT'S POSITION AS SURETY AND CO-PRINCIPAL DEBTOR*

[18] The appellant bound himself as surety and co-principal debtor for the due fulfilment of all obligations by his son. He has argued that the respondent had an obligation to advise him of the unsatisfactory performance of his son before instituting proceedings. A related issue raised in the grounds of appeal is whether the respondent had an obligation to sue Fortune first before instituting legal action against the appellant.

[19] The position is now settled that the liability of a surety and co-principal debtor is joint and several with that of the principal debtor and is no more, nor less than, nor different from, that of the latter- *Neon and Cold Cathod Illuminations (Pty) Limited v Ephron* 1978 (1) SA 463,473 B-C. *Union Government v Van der Merwe* 1921 7PD 318,322.

[20] I further agree with the submission by the respondent that there is no general legal obligation on a creditor to advise the surety and co-principal debtor of the breach by

the principal debtor, because, in law, they become one and the same, once the principal debtor is put *in mora*. There is no requirement for a separate demand and the failure to make demand on a co-principal debtor may only have an effect on the question of costs, in the event that the co-principal debtor makes payment on receipt of summons. In the result, I am in agreement that there is no requirement in law that a creditor should first proceed against the principal debtor before doing so against the surety and a co-principal debtor.

[21] Additionally, the appellant specifically renounced the benefits of excussion and division in the surety agreement. Given this position, he cannot now be heard to argue that Fortune should have been sued in the first instance.

#### *THE METHOD OF PAYMENT*

[22] The appellant has submitted that it was wrong of the court *a quo* to have determined this matter without enquiring into the manner in which the respondent had paid for Fortune's study at the University of Cape Town.

This submission need not detain this Court for two reasons.

22.1 Firstly, it is not in dispute that the disbursements to the University of Cape Town could not have been made in the now defunct Zimbabwean Dollar, for that is not the currency in use in South Africa.

22.2 Secondly, the fact that the money had been paid was never made an issue throughout the pleadings. Consequently no evidence was deemed necessary to prove either the method of payment or the *quantum*. In these circumstances, it is improper and perhaps unfair

on the part of the appellant to criticise the court *a quo* for not determining a matter that was not before it.

[23] Except where both parties have fully canvassed an issue not covered by the pleadings, and there is no unfairness to either party, the position may now be taken as settled that a trial court must confine itself to the issues raised in the pleadings before it. In this regard, the remarks by the authors Jacob and Goldrein: Pleadings: Principles and Practice at pp 8-9 cited with approval in *Jowel v Bramwell-Jones & Ors* 1998 (1) SA 836, 898 are worth repeating:-

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings ..... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation..... In the adversary system of litigation, therefore, it is the parties themselves who set the agenda of the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.....”

#### *WHETHER THE RESPONDENT’S CLAIM HAD PRESCRIBED*

[24] In his heads of argument, the appellant has submitted that the respondent’s claim had prescribed. In particular the appellant has argued that since the bursary was withdrawn in October 1999, payment would have become due in terms of the agreement at that stage and the right to institute an action for the recovery of the money would have prescribed in October 2002 – almost a year before summons was issued by the respondent in September 2003.

[25] For the reasons that follow I am of the view that this ground of appeal need not detain this Court either.

[26] The defence of prescription must be raised in pleadings in the trial court and not for the first time on appeal. There may be need for the other party to explain the reason for the delay and to prove when the debt – as defined – became due. Prescription may be interrupted by an acknowledgment of liability, which, on the facts of this case, occurred on 12 December 2000 when the principal debtor sent an e-mail to the respondent. Allowing the appellant to raise the issue of prescription for the first time on appeal would clearly result in prejudice to the respondent, particularly because the facts on when the debt became due were never canvassed in the court *a quo*.

This ground of appeal cannot be raised for the first time on appeal and must therefore fail.

#### *THE NATURE OF THE EXTENSION GRANTED TO THE PRINCIPAL DEBTOR*

[27] As already noted earlier in this judgment, the principal debtor had failed to comply with the agreement when the respondent agreed to allow him more time to regularise his studies and thereafter to come back to Zimbabwe and commence employment. The agreement in my view was nothing more than an agreement to extend the time within which the principal debtor was expected to pay the amounts disbursed by the respondent on his behalf. The obligation either to work *in lieu* of payment or to pay back the disbursed amounts remained in place. It should be borne in mind that at that stage the respondent had already financed Fortune's studies for the period of four years envisaged in the agreement executed in 1995. The respondent was under no obligation to finance Fortune for a further year. What is clear is that the respondent, after the agreed period of four years, condoned the unsatisfactory

performance and gave Fortune further time to regularise his results, at his own expense, and thereafter to commence work in January 2001. It is common cause Fortune never did so.

#### *NOVATION AND COMPROMISE*

[28] The position may now be regarded as settled that the mere extension of time within which to fulfil a contractual obligation does not amount to a novation – *National Development Bank & Ors. In re: National Development Bank v Masunga Meat Market (Pty) Ltd & Ors* 2006 (2) BLR 240.

[29] There was therefore no novation of the original agreement. Even after being granted the extension, Fortune refused to come back home and commence work with the respondent.

[30] On the claim that there was a compromise, it is clear there was none, over and above the extension of time that was given to Fortune to comply with the agreement. A compromise is the settlement of disputed obligations, and is a form of novation, replacing the disputed obligation with other obligations. No such dispute arose in this case. The bursary was never withdrawn and the respondent had paid what was due for the period of four years during which it financed Fortune's stay at the University of Cape Town. The parties merely agreed that whatever Fortune should have done in four years be done over five years instead, with no further financial obligations on the part of the respondent during the fifth year.

[31] The issues of novation and compromise must, on the papers, also fail.

*WHETHER THE AGREEMENT WAS MATERIALLY AND PREJUDICIALLY ALTERED*

[32] This issue was never raised in the court *a quo*. Consequently the court *a quo* did not deal with it. Whether the obligations between the parties were materially and prejudicially altered would have been a question of fact. The question cannot be raised for the first time on appeal before this Court. Whether the agreement was altered, and if so, to what extent and the extent of possible prejudice suffered by the appellant are all issues that would require evidence for their resolution.

*IN GENERAL*

[33] Much time was also devoted by the appellant and the court *a quo* on whether the bursary was withdrawn by the respondent and whether there was any basis for such withdrawal.

[34] As already stated earlier in this judgment, there was no such withdrawal, the respondent having met all its obligations for the period of four years during which Fortune studied at the University of Cape Town. The respondent agreed to the deferment of Fortune's obligations for a year to enable him to obtain passes at the required level and to commence work with it thereafter.

*DISPOSITION*

[35] There being no merit in any of the grounds of the appeal raised by the appellant, the court dismissed the appeal with costs.

**GWAUNZA JA:** I agree

**PATEL JA:** I agree

*Messrs Venturas & Samkange*, appellant's legal practitioners

*Wintertons*, respondent's legal practitioners