

PHILLIP ELLSE
vs
MICHAEL JOHNSON

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & UCHENA JA
HARARE: SEPTEMBER 22, 2016 AND JULY 27, 2017

T. Sibanda, for the appellant

R. Stewart, for the respondent

UCHENA JA: This is an appeal against the decision of the High Court. Judgment No. SC 49/17
Civil Appeal No. SC 37/16

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The appellant borrowed US\$40 000-00 from the respondent. The loan agreement was reduced to writing in the form of a promissory note dated 1 December 2010. They agreed on an interest rate of 7 percent per month on the unpaid balance. The appellant as borrower agreed to stand surety for his own debt in his “own personal capacity”. He signed the loan agreement as the borrower.

The appellant made some payments but failed to pay back the loan by 31 January 2011 as had been agreed. The parties entered into an extension of payment agreement. The appellant was to pay by the end of August 2011. The appellant again signed as the borrower. He again made some payments but failed to fully repay the loan.

The appellant and third parties who later got involved unsuccessfully negotiated with the respondent for a settlement. Part of the loan therefore remained unpaid.

The respondent issued summons against the appellant in the High Court claiming payment of the sum of US\$80, 000-00 which included the agreed interest at the rate of 7 per cent per month up to the limit of the *duplum* rule. The court *a quo*, relying on the parole evidence rule, and the evidence in the two agreements, found the appellant liable and ordered him to pay US\$80,000-00 to the respondent. The appellant now appeals against the court *a quo*'s decision to this court.

The appellant raised a point of law for the first time in his Heads of Argument. He alleged that the agreement between him and the respondent was illegal because the respondent charged interest at a rate above the prescribed interest rate. The respondent did not object to the point of law being raised for the first time on appeal and instead made detailed submissions in heads of argument on the provisions of the Money lending and Rates of Interest Act [Chapter 14:14].

It is trite that a point of law can be raised at any stage even on appeal if it will cause no prejudice to the other party. See the cases of *Austerlands (Pvt) Ltd v Trade & Investment Bank & Others* 2006 (1) ZLR 372 (S) @ 378 B-F, *Gazi v NRZ* SC 60/15, *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC), *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (SC) @ 571 D- 572 E and *Zesa v Bopoto* 1997 (1) ZLR 126 (SC) @ 131 E – 132 C. The respondent, who has not opposed the raising of the point of law on appeal, will not suffer any prejudice as both parties have presented argument on the effect of the rate of interest charged.

The appellant's grounds of appeal raise the following issues for determination: -

1. Whether the court *a quo* misdirected itself on the facts?
2. Whether the court *a quo* misdirected itself in applying the parole evidence rule?
3. The effect of the appellant contracting as borrower and surety of his own debt.
4. Whether or not the interest rate charged renders the whole loan agreement a nullity?
5. Whether the court *a quo* erred in awarding punitive costs against the appellant?

Whether the court *a quo* misdirected itself on the facts?

The factual dispute between the appellant and the respondent was narrowed down to whether or not the appellant was the principal debtor. In his pleadings the appellant pleaded that he was a surety for a loan advanced to a third party. He argued that the respondent should first recover from the principal debtor before he seeks payment from him in his capacity as the surety.

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In evidence he admitted that he signed the two promissory notes as the borrower after agreeing to be the borrower and surety of his own debt in his personal capacity. The appellant later admitted under cross examination that the loan would not have been granted if he had not presented himself as the borrower. The following exchange took place between him and Mr *Stewart* who represented the respondent in the court *a quo*: -

- “Q. Mr Ellse you indicated that you had requested that the loan be in Kapp Jack’s name’ but this was not possible correct?
- A. Correct.
- Q. Notwithstanding that fact and the fact that the agreement was put in your name, you still went ahead with the transaction, correct?
- A. Correct.
- Q. I reiterate that you therefore signed the promissory note as the borrower?
- A. Correct that was the only avenue I had to access the funds because there was a mutual agreement between myself, (sic) so it was borrower surety as per what I signed, it was not just for borrower, it was also to do with surety.”

Under further cross-examination the appellant conceded that no other party besides him and the respondent signed the agreement on the two promissory notes. He further conceded that the borrowed money was paid into his Bank account. Mr *Sibanda*, for the appellant, in spite of the appellant's concessions submitted that the appellant was not the principal debtor. Mr *Stewart* for the respondent submitted that he was.

The appellant's admission that he had no option but to sign as borrower for him to be granted the loan settles the factual dispute. He twice signed for the loan as the borrower. This means he borrowed the money and then stood as surety for his own debt. In his own evidence he admitted that his request for the debt to be in the name of Kapp Jack was rejected by the respondent. The loan could only be granted to him personally. The court *a quo* therefore correctly found that he was the principal debtor.

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Whether the court *a quo* misdirected itself in applying the parole evidence rule?

The appellant signed the two promissory notes as the borrower. The loan amount was deposited into his personal account in Mauritius. His attempt to bring in evidence of the subsequent involvement of third parties is against the parole evidence rule.

Subject to the exceptions to the parole evidence rule, which are not applicable in this case, where an agreement, has been reduced to writing, whether as required by the law or at the instance of the parties, the only admissible evidence about the terms of the agreement is the written document. No evidence of other agreements may be adduced to indicate that the agreement was different, or to explain precisely what the parties intended.

In the case of *Union Government v Vianini Fero Concrete Pipes (Pty) Ltd* 1941

AD 43 at page 47 Watermayer JA said:

“-this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents nor may the contents of such a document be contradicted, altered, added to or varied by parole evidence.”

The court *a quo* therefore correctly found the appellant was bound by the contents of the promissory notes. In his own words the appellant said he had to sign as the borrower for him to get the loan.

The emails tending to show that the respondent subsequently got to know and communicated with persons the appellant had, subsequent to their agreement, further loaned the borrowed money to, does, not affect the original agreement. The respondent remained entitled to sue the appellant for the recovery of the money the latter borrowed from him.

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It is trite that when a borrower borrows money for onward lending to a third party he remains the original lender's principal debtor even if the original lender subsequently gets to know about the third party to whom the borrower lends the money. The third party would not be privy to the agreement between the appellant and the respondent.

The effect of the appellant, contracting as the borrower and surety of his own debt.

Mr *Sibanda*, for the appellant, submitted that the agreement was senseless and invalid because the appellant contracted as the borrower and surety of his own debt in his personal capacity.

Mr *Stewart* for the respondent submitted that the appellant could not be a surety for his own debt but argued that this does not invalidate the loan agreement.

A suretyship is an accessory agreement between the surety and the creditor of the principal debtor in terms of which the surety makes himself liable to the creditor for the proper discharge by the debtor of his duties to the creditor. In the case of *Orkin Lingerie Co. (Pty) Ltd v Melamed & Hurwitz* 1963 (1) SA 324 (W) at 326 G-H Trollop J commenting on the definition of a suretyship agreement said: -

“Various definitions of suretyship have from time to time been given. They are collected in Wessels on Contract 2nd ed, paras, 3774, 3785 to 3793, and Caney on Suretyship, pp 11, 17 and 18. I think that, having regard to them, a contract of suretyship in relation to a money debt can be said to be one whereby a person (the surety) agrees with the creditor that, as accessory to the debtor’s primary liability, he too will be liable for that debt.

The essence of suretyship is the existence of the principal obligation of the debtor to which that of the surety becomes accessory.”

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This means a suretyship agreement can only be entered into if there is an agreement between the creditor and principal debtor. It is therefore an additional agreement to the one between the creditor and principal debtor. They are two separate agreements entered into between the creditor and principal debtor and between the creditor and the surety.

A surety, therefore, agrees to make himself liable to the creditor for the principal debtor’s debt. He cannot stand surety for a debt in which he is the principal debtor. It does not make sense that a borrower can be both the borrower and the surety. One cannot say if I fail to pay you as the principal debtor I will pay you as a surety. Failure to pay as the principal debtor will result in failure to pay as surety because the resources of the same person will be used to satisfy the debt. I am therefore satisfied that a borrower cannot secure his own debt as

a surety. It is not legally possible for a borrower to stand as the surety of his own debt. See the cases of *Standard Bank of SA Ltd v Lombard and Anor* 1977 (2) SA 808 (W) at 813 F-H and *Litecor Voltex (Natal) (Pty) v Jason* 1988 (2) SA 78 D.

In the case of *Standard Bank* (supra) doubt was raised on the propriety of a partner standing surety for a partnership's debt. In my view that situation can be arguable. It is different from that of a debtor being the surety of his own debt.

In the case of *Litecor Voltex (Natal) (Pty) v Jason* (supra), Didcot J, at page 81 B, commented on a debtor standing surety for his own debt as follows: -

“To guarantee the payment of your own debt is a futile exercise, to say the least, neither underwriting nor reinforcing the obligation to pay it rests on you in any event. Failing the basic test for a suretyship, it does not amount to such. Nor does it accomplish anything else. It is not worth, in short, the paper on which it is written.”

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Mr *Sibanda* for the appellant argued that the fact that the appellant was both the borrower and surety renders the loan agreement and surety agreement nullities. Mr *Stewart* for the respondent submitted that the suretyship agreement is a nullity but the loan agreement is valid. I agree.

As already said a suretyship agreement is entered into to secure the debt of the principal debtor in an agreement already entered into. In this case the appellant borrowed US\$40 000-00 from the respondent. He received the money and used it.

The appellant cannot benefit from having promised to be the surety of his own indebtedness to the respondent. He cannot be allowed to benefit from his wrong doing by

arguing that they entered into a single agreement for both the loan and the suretyship agreements.

The fact that the suretyship agreement is a nullity does not affect the loan agreement. The loan agreement was perfected by the payment of the money into the appellant's Bank account. The suretyship agreement is a subsequent agreement. The fact that the two agreements were rolled into one document does not affect their separate existence.

Whether or not the interest rate charged renders the whole loan agreement a nullity?

Mr *Sibanda* for the appellant submitted that the loan agreement was invalidated by the interest rate of 7 per cent per month which is above the prescribed rate of interest. He submitted that the interest rate of 7 per cent per month contravenes statute law. He further submitted that the interest rate is far above the interest rate of 5 per cent per annum prescribed by the Minister of Justice in terms of Statutory Instrument 164/2009.

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Mr *Stewart* for the respondent agreed that the interest rate of 7 per cent per month is above the prescribed rate of interest, but argued that the respondent was, in terms of Statutory Instrument 53 of 1985, entitled to charge an interest rate of 17 per cent per annum. He argued that the charging of an interest rate above the prescribed rate does not invalidate the whole agreement.

The parties entered into the agreement in dispute on 20 November 2010. This was after S. I. 164 of 2009 had come into force. S. I. 53 of 1985 had been replaced by S. I. 164 of 2009. The interest rate which was applicable at the time of the agreement is therefore 5 per cent per annum.

The identity of the respondent in terms of the Money Lending and Rates of Interest Act [*Chapter 14:14*] (“The Act”), and the provisions of the Act will determine whether or not the agreement is valid.

In terms of s 2 of the Act a lender is defined as:

“any person making a loan of money, the cessionary of any right arising under any contract of loan of money and the holder of any instrument of debt, and includes a moneylender;”

A money lender is defined as:

“any person who carries on a business of moneylending or who advertises or announces himself or holds himself out in any way as carrying on such business, but does not include—

- (a) any person engaged in any transaction exempted by section *twenty* or by regulations made in terms of section *twenty-two*, in so far as any such transaction is concerned; or
- (b) any person exempted by section *twenty* or by regulations made in terms of section *twenty-two*, to the extent that he has been so exempted.”

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In my view the use of the words “any person making a loan of money” in the definition of a “lender”, includes the respondent. He is therefore a lender.

Mr *Stewart* for the respondent in paragraph 8 of his Heads of Argument conceded that the respondent is not a money lender. In view of the definition of a “money lender” under (a) and (b) of the definition section of the Act, the concession was properly made as the respondent is not in the business of money lending. According to the facts of this case he is an occasional lender.

Therefore s 20 which exempts money lenders from the provisions of the Act does not apply to occasional lenders like the respondent.

Mr *Sibanda* for the appellant submitted that the provisions of ss 8, 9, and 11 invalidate the parties' agreement. Mr *Stewart* for the respondent submitted that these sections do not invalidate the parties' agreement as the prohibition is only against charging interest above the prescribed rate of interest.

Section 8 of the Act provides for the maximum rates of interest as follows:

“8 (1) No lender shall stipulate for, demand or receive from the borrower, interest at a rate greater than the prescribed rate of interest.
(2) Any lender who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment”.

It is apparent that the appellant contravened s 8 of the Moneylending and Rates of Interest Act. He charged interest of 7 per cent per month which is far above the prescribed rate of 5 per cent per annum. He, in terms of s 8 (2), committed a criminal offence. What remains to be determined is the effect of s 8 on the parties' loan agreement.

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Section 9 provides for the prohibition of the recovery of interest above the prescribed rate of interest through the courts as follows: -

“9 (1) No lender shall, under any contract of loan of money, obtain judgment for or recover from the borrower an amount which exceeds a capital amount which, added to any sum already paid in respect of the capital debt, equals the sum actually advanced to and received by the borrower under the contract plus—

(a) interest at a rate not exceeding the prescribed rate of interest; and

(b)-----

(c) -----

and

(d) any costs which have actually been incurred by the lender in the recovery of his debt or any interest payable thereon and which would be recoverable at law from the borrower.

(2) No lender shall in any proceedings against a borrower recover, as for loss, damage or expense alleged to have been incurred in connection with any loan of money, any sum not included in an amount recoverable in respect of such loan under subsection (1).

- (3) No lender shall in any proceedings in insolvency, assignment or liquidation be allowed to prove, in respect of any loan of money, for any sum for which he could not in terms of this section have obtained judgment”.

In summary s 9 (1) to (3) prohibits the court from granting a lender judgment for the recovery from the borrower an amount which exceeds a capital amount which, when added to any sum already paid in respect of the capital debt, equals the sum actually advanced to and received by the borrower under the contract, plus interest at a rate exceeding the prescribed rate of interest. This means where interest has been charged at a rate above the prescribed interest rate, the court should not allow the lender to recover such interest but limit him to interest not exceeding the prescribed rate. This in my view means the court can grant to the lender a judgment which does not offend against the in *duplum* rule and the prescribed interest rate.

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Section 11 provides for the borrower’s right to sue for the recovery of excess payments as follows: -

“11 Any person who, under or in connection with any contract of loan of money, has paid to the lender an amount which exceeds the amount which could upon such contract have been recovered from such person under any provision of this Act shall be entitled, at any time within two years after the date of the payment, to recover from the person to whom he made it a sum equal to the amount of the excess”.

Section 11 entitles the borrower, to within two years of the date of payment, recover any excess payment he would have made to the lender. The excess payment can be in respect of interest above the prescribed rate of interest.

Section 8 of the Act, as read with s 7 of the Prescribed Rate of Interest Act, prohibits a lender other than a moneylender exempted by s 20 of the Act from charging any

interest rate above the prescribed rate of interest. It is therefore clear that the prohibition under s 8 is restricted to interest above the prescribed rate of interest.

In the case of *Funding Initiatives International (Pvt) Ltd v C. Mabaudi* HH 20-07

Patel J (as he then was) commented on ss 8 and 9 as follows:

“The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the act, particularly where it is visited with criminal sanction. See *Schierhout V Minister of Justice* 1926 AD 99 at 109; *Metro Western Cape (Pvt) v Ross* 1986 (3) SA 181 (AD) at 188-189 ---.

Having regard to the direct and unambiguous prohibition spelt out in s 8 of the Act, I am in no doubt that its provisions cannot be waived by agreement and that any contractual stipulation to the contrary must be treated as being null and void ab initio. Moreover, as is made crystal clear in s 9, any interest charged or agreed in excess of the prescribed minimum is unenforceable and irrecoverable, whether through civil proceedings or otherwise.”

I agree with the above observations of Patel J (as he then was).

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I must however examine the effect of ss 8, 9, and 11 on the recoverability of the amount loaned and interest not exceeding the prescribed rate of interest. What s 9 prohibits is the granting of a judgement exceeding the in *duplum* rule and awarding interest exceeding the prescribed interest rate. It seems to me that the court can award judgment within the in *duplum* rule and interest within the prescribed interest rate. The prohibitions in ss 8 and 9 are against granting interest above the prescribed interest rate. This view is supported by s 11 which allows the borrower to only recover payments he would have made in excess of what is permissible under the Act.

This means the courts can only help the borrower to recover interest above the prescribed rate of interest, leaving the lender with what the borrower borrowed plus interest

within the prescribed rate of interest. The court *a quo* therefore can only do what the law permits and not what the law prohibits. It could therefore have lawfully ordered the appellant to pay to the respondent the borrowed amount plus interest within the prescribed rate of interest subject to the *in duplum* rule.

The appellant's appeal therefore succeeds to the extent that the payment of interest above the prescribed rate of interest must be set aside. He must however pay back the loan and interest at the prescribed rate of interest subject to the *in duplum* rule.

The appellant had already paid various amounts and interest at the prohibited rate of interest. These payments must be taken into account in determining what he still has to pay. That cannot be determined by this court. The case must be remitted to the court *a quo* for it to determine how much the appellant should be ordered to pay.

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Costs.

The court *a quo* justified its order of costs on a legal practitioner and client scale on the prejudice the appellant caused to the respondent by refusing to pay back a loan he had received. The refusal to pay and the delay in paying back the borrowed money must have appeared to the court *a quo* to be an abuse of process by the appellant. The appellant's resistance to the respondent's claim is however now partially justified by the illegal interest the respondent had charged. Had the court *a quo* been aware that the interest charged was illegal, it would obviously not have taken the view that the appellant's refusal to pay was not justified. In the result I am satisfied that while an order of costs on the ordinary scale was within the court *a quo*'s discretion, an order of costs on the higher scale was not justified.

In view of the appellant's partial success on appeal and the respondent's success in recovering the borrowed amount and interest at the prescribed rate, each party should bear his own costs.

In the result it is ordered as follows:

1. The appeal succeeds in part with no order as to costs.
2. The judgment of the court *a quo* is set aside and its order of costs is substituted by the following:

“The defendant shall pay the plaintiff's costs”.

3. The case is remitted to the court *a quo* for the quantification of the appellant's outstanding debt to the respondent, originally the sum of US\$40 000-00 taking into consideration payments already made, plus interest at the rate of five percent per annum subject to the *in duplum* rule.

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GARWE JA: I agree

GUVAVA JA: I agree

Chinawa Law Chambers, appellant's legal practitioners.

Wintertons, respondent's legal practitioners.