FBC BANK LIMITED
versus
DUNLETH ENTERPRISES (PRIVATE) LIMITED
and
DUNCAN MUKONDIWA
and
SINIKIWE MUKONDIWA
and
MARIAN SMEMELWANI MAPANDA
and
EVA MUZUVA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 9 & 30 September, 3 October 2013 & 22 October 2014

Civil trial

P. Nyeperayi, for the plaintiff
Ms *B. Mtetwa,* for the 5th defendant

ZHOU J: The plaintiff, a commercial bank, instituted an action against the five defendants jointly and severally the one paying the others to be absolved, for payment of a sum of US685 442.42 together with interest thereon, costs of suit and collection commission. The claim arose from certain banking facilities extended to the first defendant by the plaintiff. The second to fifth defendants were cited on the basis that they executed guarantees in favour of the plaintiff for the performance by the first defendant of its obligations to the plaintiff arising from the facilities. The first, second, third and fourth defendants did not oppose the claim. Judgment was accordingly given against them on 28 February 2012. Only the fifth defendant entered appearance to defend and filed a plea in which she denied that her liability in terms of the guarantee which she executed was unlimited. Her contention was that her liability was limited to a maximum amount of US$150 000 which amount, according to her, has already been paid by the principal debtor.

In support of its claim the plaintiff called Bernard Mutambara, its Credit Services Manager. His evidence was that the first defendant was given a facility by the plaintiff in March 2011. The terms of the facility were reduced to writing. It was a composite facility in

terms of which a limit of US$500 000.00 applied in relation to revolving acceptance credits while US$100 000 was in respect of the cash advance facility. The facility offer letter details the figures applicable under the composite facility. He testified that the fifth defendant signed an unlimited guarantee and tendered her immovable property as security for the debt. The mortgaged property is a certain piece of land situate in the District of Salisbury called Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant measuring 4062 square metres. Copies of the deed of hypothecation and guarantee form signed by the fifth defendant were produced in evidence. The witness stated that the amount secured by the deed of hypothecation was up to a maximum of US$150 000. He stated, however, that that amount did not reflect the total debt guaranteed by the fifth defendant which, according to him, was unlimited.

The fifth defendant gave evidence and also called the second defendant Duncan Mukondiwa to testify on her behalf. The two of them are related. The fifth defendant testified that she was approached by the second defendant who asked to use her property as security for a loan which he intended to obtain from the plaintiff. He advised her that the loan amount was US$150 000.00. She agreed and surrendered the title deed of her immovable property to the second defendant. She did not personally meet the bank officials. The guarantee form was brought to her by one Fainah Mangwende who was the first defendant's accountant. The form had blank spaces when she signed it. In other words, according to her, the handwritten portions were completed after she had signed the form. She filled in her name and address and signed the form. She stated that she never became aware of the further borrowings made by the first defendant after she had signed the guarantee form. Her evidence was that her understanding of the deed of hypothecation was that the hypothecation of her property related to a maximum of US$150 000. She understood that to be the full extent of her liability as well. The fifth defendant stated that she was assured by the second defendant that he would repay the loan to the plaintiff within three months and that her security was required just for that period.

Duncan Mukondiwa's evidence was that as far as he understood the fifth defendant's immovable property was to secure the first defendant's debt up to a maximum of US$150 000. He confirmed that he is the one who approached the fifth defendant as a relative in order for him to use her property as security for the first defendant's debt. He denied that he assured the fifth defendant that the security she had given would lapse after three months.

His evidence was that even in 2011 when he made further borrowings the security given by the fifth defendant was still valid.

I need to consider whether the fifth defendant's liability was limited to a sum of US$150 000 which is stated in the deed of hypothecation as well as whether the principal debtor has discharged its obligations to the plaintiff in a manner that discharges the fifth defendant from liability.

The fifth defendant's case is that she believed that her liability was limited to a sum of US$150 000 because of the assurances given to her by the second defendant. But the security was given in favour of the plaintiff not the second defendant. In other words, the agreement was between the fifth defendant and the plaintiff. She does not allege that the plaintiff or its employees ever assured her that her guarantee applied only to a maximum sum of US$150 000. If any person misled her as to her maximum liability then that person was the second defendant. The fifth defendant's contention is that because the word "unlimited" had not been inserted at the time that she signed the guarantee form then she is not bound by its contents insofar as they relate to the extent of her liability.

When a party to an agreement signs it in blank and leaves it to the other party to complete the rest then they cannot turn around and claim that they are not bound by the terms of the agreement. In the case of *National and Grindlays Bank Ltd* v *Yelverton* 1972 (4) SA 114(R) the court considered the implications of signing a contract in blank, where a printed form containing blank spaces was allegedly filled in after signature. Applying the *caveat subscriptor* principle, the court held that the signatory could escape liability only by raising one of the defences that would have availed if the blank spaces had been filled in prior to the signature, that is, the normal defences which would be available to any signatory. Those defences are misrepresentation, fraud, illegality, duress, undue influence and mistake. See R. H. Christie, *The Law of Contract in South Africa* 3rd Ed., p. 197; A. J. Kerr. *The Principles of the Law of Contract* 4th Ed., p. 90.

In relation to suretyship agreements, blanks in written contracts can sometimes be dealt with either on the basis that they could be filled in from another document where there is such a document which is incorporated by reference, or that the clause containing the blank was designed solely for the benefit of one party who, by leaving the blank, has elected not to take the proffered benefit. See *First Consolidated Holdings (Pty) Ltd* v *Bisset* 1978 (4) SA 491(W) at 495-6; Christie, *The Law of Contract in South Africa* 3rd Ed. p. 139. *In casu* the terms of the deed of hypothecation were not incorporated into the terms of the guarantee.

The fifth defendant does not explain why she did not fill in the sum of US$150 000 if she genuinely believed that figure to represent the full extent of her liability in terms of the deed of suretyship. She should therefore be taken to be bound by the terms of the guarantee form which she signed. That, in my view, is the approach which is consistent with the dictates of modern commercial convenience.

Further, I do not believe that the addition of the word 'unlimited' altered the extent of the fifth defendant's liability from what it would be if that word was to be excluded. The document is worded in sufficiently clear terms to mean that in the absence of a figure being mentioned then the liability is unlimited. Clause 1 of the guarantee form signed by the fifth defendant provides, *inter alia*, that the fifth defendant guarantees and binds herself as surety "for the repayment on demand of **all sum or sums of money which the Debtor may now or from time to time hereafter owe or be indebted in to the said Bank…**" (my emphasis). The unlimited guarantee could only have been limited if a specific amount had been stated in the blank space in which the word "unlimited" is inserted. Indeed, it is clear that the word unlimited does not even grammatically accord with the sentence in which it is inserted, as that space would be relevant where there is a specific figure to be filled in. The words preceding the blank space illustrate that that space is meant for a specific sum of money to be inserted if there is one agreed upon.

The deed of hypothecation specifically provided that the liability of the fifth defendant in respect of that security was not to exceed a sum of US$150 000. But that limit applied only to the security constituted over the fifth defendant's immovable property, Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant. It does not in any way limit the liability constituted through the guarantee form to a sum of US$150 000. That conclusion does not at all depend on what the second defendant represented to the fifth defendant. The two, that is, the deed of security and the deed of hypothecation, are separate and distinct forms of security; one has a maximum limit of liability while the other one does not limit the liability to a specific amount.

The fifth defendant does not contest the total amount which is owed to the plaintiff by the principal debtor. After all, judgment has already been given against the principal debtor and the other three defendants. That judgment was granted on 28 February 2012. Her contention that the total of the payments made by the first defendant to the plaintiff exceed a sum of US$150 000 does not present a sound defence, as those payments have not cleared the debt.

The plaintiff claims both attorney-client costs and collection commission. It is important for the principle to be reiterated, that collection commission is a charge that is levied by an attorney or agent when payment of a debt has been recovered through his services prior to judgment. See *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567(H) at 569B-570B; *UDC Rhodesia Ltd* v *Ushewokunze* 1972 (2) RLR 97(G) at 100F. In other words, the commission is for collecting the payment other than through a judgment. Where the payment is recovered in terms of a judgment in terms of which the judgment creditor has been awarded costs on an attorney-client scale there can be no legal justification for claiming collection commission in addition to such costs. The rationale is that attorney-client costs compensate the judgment creditor in full for the costs paid to the legal practitioner representing him. Accordingly, it seems to me that there is no justification *in casu* for the plaintiff to recover both attorney-client costs and collection commission.

In the result, it is ordered that judgment be and is hereby given in favour of the plaintiff against the fifth defendant for payment of a sum of US$685 442.46 together with interest thereon at the rate of 6.5% per month plus a penalty rate of 5% per month with effect from 1st June 2011 to the date of payment in full, and costs of suit on an attorney-client scale. The fifth defendant's liability is joint and several with that of the first, second, third and fourth defendants, the one paying the others to be absolved.

Costa & Madzonga, plaintiff's legal practitioners
Mtetwa & Nyambirai, 5th defendant's legal practitioners