

REPORTABLE (85)

ELISHA TSINDIKIDZO
v
CONNECT MICROFINANCE ZAMBIA LIMITED

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE: 15 NOVEMBER 2023 & 16 SEPTEMBER 2024

L. Madhuku, for the appellant

T. R. Mafukidze, for the respondent

BHUNU JA:

INTRODUCTION

1. The appellant brings an appeal against the entire judgment of the Commercial Division of the High Court of Zimbabwe (the court *a quo*), which dismissed his preliminary objection to jurisdiction and choice of law. It then proceeded to hand down judgment for the respondent on the merits with costs. Finally, it declared the appellant's two hypothecated immovable properties specially executable.

FACTUAL BACKGROUND

2. The appellant is a Zimbabwean national whereas the respondent is a company incorporated in accordance with the laws of Zambia.

3. Sometime in 2019 a legal entity, Transafrika Holding SA (Transafrika) a company registered under the laws of Switzerland obtained a loan facility from the respondent, a company resident and incorporated in Zambia. As, such it is the principal debtor. The appellant stood as guarantor, surety and co-principal debtor for the due performance of Transafrika's loan obligations to the respondent.
4. The appellant is the owner of two immovable properties being Stands 504 and 12085 both located in Harare, Zimbabwe. In pursuit of the surety agreement, the appellant mortgaged and hypothecated the two properties as security for the due repayment of the loan. Both mortgage bonds were drawn up executed and registered in Zimbabwe. It was a term of the two surety bonds that they would provide continuing cover in respect of Transafrika's debt to the respondent.
5. Surety mortgage bond number 3033/2019 hypothecating Stand number 12085 was registered in the Zimbabwe Deeds Office in accordance with the laws of Zimbabwe on 15 November 2019. It secured a debt of US\$200 000.00. Similarly, the second mortgage bond number 719/2020 hypothecating Stand number 504 was registered on 15 March 2020 in accordance with the laws of Zimbabwe securing a further debt of US\$ 200 000.00.
6. The appellant chose the two mortgaged stands as his *domicilium et executant*. That is to say his addresses of service. The addresses were given as:
 - “(a) Certain 2536 square metres of land called Stand 12085 Salisbury, Township of Salisbury lands situate in the District of Salisbury held under Deed of Transfer number 10251/2011 dated 12 October 2001.

(b) Certain piece of land situate in the District of Salisbury called Stand 504 Helens Vale Township measuring 1,2796 hectares under Deed of Transfer 0386/2000 dated 17 October 2000.”

7. Transafrica defaulted in repaying the loan. Clause 5 (b) of the surety agreement provides that:

“In the event of the principal debtor making any default in its obligations, the mortgagee shall immediately without notice have the right to call up the bond and have the property hypothecated hereunder declared executable”.
8. Pursuant to clause 5 (b) of the surety bond, the respondent sued the appellant in the court *a quo* by way of court application seeking relief for payment of US\$ 714,000.00. It further sought an order declaring the two mortgaged properties specially executable.

PRELIMINARY ISSUES

9. Before the court *a quo*, the appellant objected to the jurisdiction of Zimbabwean courts. It contended that Zimbabwean courts had no jurisdiction to hear and determine the matter because clause 15 (b) of the surety agreement as read with clause 17 of the loan agreement provide that disputes arising from the loan agreement are subject to determination under Zambian law by Zambian courts.
10. The respondent countered that the appellant is a Zimbabwean national with properties in Zimbabwe and transacting business in Zimbabwe. It further contended that the appellant was not a party to the loan agreement. He was only a party to the surety agreement which was drawn, executed and registered in Zimbabwe in terms of Zimbabwean law. Thus, the cause of action in respect of the surety agreement arose in Zimbabwe. The appellant gave his address of service as his two hypothecated properties situated in Zimbabwe thereby signifying his submission to the jurisdiction of Zimbabwean courts.

11. It was the respondent's case that the combined effect of the above factors conferred jurisdiction on domestic courts of Zimbabwe. The court *a quo* being a court of unlimited jurisdiction it had the necessary jurisdiction to hear and determine the dispute between the parties.
12. The court *a quo* upheld the respondent's argument and rejected that of the appellant. It accordingly held that the court *a quo* had jurisdiction to preside over the matter. It then turned to determine the case on the merits.
13. Having considered the facts of the case as outlined in this judgment, the court *a quo* rejected the appellant's contention that there were material disputes of facts. It accordingly upheld respondent's submission that the appellant had admitted liability to the respondent in the amount claimed hence the appellant was liable to the respondent by virtue of his admission. Thereafter the court *a quo* proceeded to issue the following order:

- “(1). The respondent be and is hereby ordered to pay applicant the sum of US\$714 000 (Seven Hundred and Fourteen Thousand United States Dollars only).
- (2) The respondent shall pay interest on the loan amount of US\$400 000 (Four Hundred Thousand United States Dollars) at the rate of 4.5% per month calculated from the 1st of August and for each and every month, or part thereof, the loan amount remains unpaid.
- (3) The following respondent's hypothecated immovable properties be and are hereby declared specially executable:
 - (a) Certain piece of land situate in the District of Salisbury called Stand 504 Helensvale Township of Stand 487 Helensvale Township measuring 1, 2796 Hectares held under Deed of Transfer No. 9386/2000 dated 17 October 2000.

(b) Certain 2,536 Square metres of land called Stand 12085 Salisbury Township of Salisbury Township lands situate in the District of Salisbury held under Deed of Transfer No. 10251/2001 dated 12 October 2001.

(4) The respondent shall pay costs.”

14. Aggrieved, the appellant appealed to this Court on the following grounds:

THE APPELLANT GROUNDS OF APPEAL

1. The court *a quo* erred at law in exercising jurisdiction disregarding Clause 17.2 of the loan novation agreement which mandated a referral of any dispute to a competent court in the Republic of Zambia applying Zambian law in terms of Clause 15.1. the dispute ought not to have been adjudicated in a Zimbabwean court.
2. The court *a quo* erred at law in divorcing the surety bonds from the loan novation agreement. The surety bonds were accessory contracts which cannot exist independently of the principal obligation. The bonds could only be enforced in terms of Zambian law by Zambian courts in accordance with the loan novation agreement.
3. The court *a quo* grossly misdirected itself in excluding the jurisdiction and choice of law clauses on the basis that the respondent had predicated its cause of action on the surety bonds alone. To the contrary, the respondent also relied on the loan novation agreement and correspondence between the parties to substantiate the quantum claimed.
4. The court *a quo* erred at law in placing undue emphasis on the location of the property to justify the exercise of jurisdiction and in failing to consider and determine the import of other factors such as the place where the contract had been concluded and performed, the *domicilium* of the appellant and the country where the purported cause of action arose.

5. The court *a quo* grossly misdirected itself on the facts in concluding that the appellant implicitly consented to having the dispute adjudicated in Zimbabwe contrary to such finding the appellant objected to the jurisdiction of the High Court in his opposing papers relying on several grounds including referring to Clause 17.2 of the agreement his domicile and where the purported cause of action arose.
6. The court *a quo* erred in law in awarding costs in favour of the respondent without giving any reasons for such an order
7. The court *a quo* erred at law in failing to apply Zambian law in accordance with Clause 15.1 of the loan novation agreement. The court *a quo* ought to have found the surety bonds and loan novation agreement were null and void for non-compliance with s 9.1 and 9.2 of the Money Lenders Act [*Chapter 3981 (Zambia)*].
8. The court *a quo* grossly erred in failing to find that the amount of arrear interest forming part of the claim, far exceeded the amounts actually advanced, in breach of the *in duplum* rule.
9. The Court *a quo* erred at law in failing to determine the objection to the application based on material disputes of fact. Despite enunciating a material dispute relating to amounts advanced to Transafrica Investment Holding SA and interest claimed, the court made no ruling on the objection.
10. The court *a quo* grossly misdirected itself in concluding that the surety bonds constituted liquid documents. The surety bonds provided security for the principal debt, however, extrinsic evidence elicited from the loan novation agreement and other documents was

required to establish the amount owed. The surety bonds did not prove the amounts claimed by the Respondent.

11. The court *a quo* erred at law in concluding that the appellant had no defense to the claim for payment of money owing to the renunciations contained in the surety bonds. The court *a quo* did not identify which renunciations applied and how they related to defenses raised.
12. The court *a quo* erred grossly in concluding that the respondent had established its case for the order sought without exercising its mind specifically to the defenses raised by the appellant. The court *a quo* failed to deliberate on the defenses raised judiciously.

RELIEF SOUGHT

15. The appellant is seeking the following relief:

That the judgment of the court *a quo* be set aside and substituted with:

- “(a) The preliminary point on jurisdiction is upheld.
- (b) The application be and is hereby set aside
- (c.) That the appeal succeeds with costs.
- (d) That the judgment of the court *a quo* be set aside and be substituted with the following:

‘The application be and is hereby dismissed’

- (f) The Applicant shall pay costs on an attorney-client scale.”

ISSUES FOR DETERMINATION

The grounds of appeal raise the issues tabulated hereunder:

1. Whether or not the court *a quo* erred in finding that it had jurisdiction to resolve the matter.
2. Whether or not the court *a quo* erred in finding that there were no material disputes of facts

3. Whether or not the court *a quo* erred in finding that the amount claimed violated the *in duplum* rule.
4. Whether or not the court *a quo* erred in awarding costs in favour of the respondent.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* erred in finding that it had jurisdiction to resolve the matter.

16. The appellant's complaint is that the court *a quo* erred when it found that it had jurisdiction to determine the matter. His argument is that the loan agreement, which gave birth to the surety agreement was subject to Zambian law and to determination by Zambian courts. He maintained that as the cause of action arose in Zambia in respect of the loan agreement, the surety agreement followed suit as it was a mere accessory to the main claim and therefore indivisible from the main claim.

17. The respondent maintained its stance that the surety agreement was a separate and distinct agreement severable from the main claim subject to the jurisdiction of different countries depending on the parties' agreement.

18. This question can be answered by a consideration of the relationship between a surety agreement and a loan agreement. The examination bears a glance at the definition of suretyship in relation to the main agreement through the cases.

19. In *Ellse v Johnson* 2017 (2) ZLR 86 at 89H – 90A-D the court in discussing the relationship between a surety agreement and a loan agreement had this to say:

“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 TROLLIP 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.’”

20. The case in *Trinity Engineering Pvt Ltd v Karimazondo* HH 672- 15 put the icing on the cake when it observed that:

“... a suretyship is a separate agreement between the surety and the creditor... What is clear therefore is that the suretyship agreement, although accessory, is a standalone one binding the surety to the creditor”

21. What emerges quite clearly from case law is that a suretyship is an independent accessory contract guaranteeing the discharge of the debtor’s obligations to the creditor in the event of default. It is a separate subsidiary agreement by a third party undertaking to perform the debtor’s obligation to the creditor in case of default.

22. In the context of a surety agreement an accessory agreement may be described as a separate supplementary agreement in aid of the due performance of the debtor’s obligations to the creditor.

23. None of the cases relied upon by the parties suggest that an accessory agreement is not severable from the primary agreement. Indeed, in real life most accessories are severable from the mother body. Car radios, seat belts, spare wheels and seat covers being just but a few prominent examples.
24. The cited authorities make it clear that a suretyship agreement is a separate and distinct accessory contract to the principal contract between the creditor and the debtor. We accordingly hold that the suretyship agreement was a separate agreement between the appellant and the respondent guaranteeing payment of the debtor's obligation to discharge the principal debtor's indebtedness to the respondent in the event of default.
25. The surety contract was executed in Zimbabwe hypothecating immovable property in Zimbabwe over which no Zambian court or any other foreign court had jurisdiction. The appellant, though resident in Zambia is a Zimbabwean national. On those facts we hold that the cause of action arose in Zimbabwe. It is trite in our law that you pursue the defendant to their court or the place where the cause of action arose.
26. As a general rule every court jealously guards its jurisdiction because it is the very foundation of its existence and functionality. For without jurisdiction, the court becomes dysfunctional and a useless bull dog. It is trite that the High Court of Zimbabwe has unlimited jurisdiction unless a statute provides otherwise. Section 13 of the High Court Act [*Chapter 7:06*] provides that, "*Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.* In this case, in the

absence of any statute limiting its jurisdiction, the court *a quo* cannot be faulted for steadfastly holding onto and exercising its jurisdiction. Doing otherwise would have been tantamount to abdicating its duty of dispensing justice without fear or favour. On that score, we find that the court *a quo* had the necessary jurisdiction to hear and determine the dispute between the parties.

27. It is pertinent to note as correctly found by the court *a quo*, that the suretyship contract does not contain the choice of law clause which is contained in the principal contract. That being the case, the choice of law clause found in the loan agreement is not binding on the parties to the surety agreement. This is because both contracts are separate and distinct from each other. It follows therefore that in the absence of any binding clause of the suretyship contract directing the court *a quo* to apply foreign law, the court *a quo* was correct to apply its normal domestic law.

Whether or not the court *a quo* erred in finding that there were no material disputes of facts.

28. The court *a quo* found that the appellant in a letter written by his legal practitioners unreservedly admitted liability. That finding was made on the appellant's failure to refute the respondent's allegations to that effect. In its founding affidavit the respondent averred at para 18 that:

“18. In the said letter, respondent's legal practitioner:

18.1 Unreservedly admitted respondent's execution of the Surety Mortgage Bonds; and

18.2 Did not dispute respondent's liability to applicant; and

18.3 Pleaded that a settlement agreement be executed to resolve the matter.”

29. The letter of 18 August reads as follows:

“CONNECT MICROFINANCE ZAMBIA LTD VS ELISHA TSINDIKIDZO

We act for our Client Elisha Tsindikidzo who has asked us to respond to your letter to him dated 4 August 2022.

We confirm that our client executed two surety bonds described in para 2.1 and 2.2 guaranteeing due performance by Transafrika SA of its loan obligations.

Our Client’s position is as follows:

1. The Principal Debtor has been communicating with your client regarding challenges which lead to the non-performance of the loan. Mainly the Covid -19 pandemic from early 2020, arbitration proceedings with Government and the general elections in Zambia.
2. The Principal Debtor has proposed to settle the loan and accrued interest in their letter to your Client dated 28 July 2022. We attach a copy of the offer **Annexure ‘A’**.
3. Our Client pleads that you put on hold the threatened legal action and impress upon your Clients to enter into a settlement arrangement with the principal debtor, as this situation appears capable of resolution between the Connect Zambia Limited and the principal debtor.

We thank you for your understanding.

Yours faithfully

Signed

MBIDZO MUCHADEHAMA AND MAKONI

Cc: Client”

30. Our law is clear. What is admitted need not be proved. It is therefore not surprising that the learned judge *a quo* upon being confronted with the unequivocal admission on all the material facts ruled that there were no material dispute of facts.

31. On appeal the appellant and his lawyers have decided to steer a wide birth from the admission letter of 18 August 2022. The net result is that it remains virtually unchallenged. We accordingly find that the learned judge *a quo* was correct in his ruling that there was no material dispute of fact in this case.

Whether or not the court *a quo* erred in finding that the amount claimed violated the *in duplum* rule.

32. The finding in para 29 above disposes of all the disputes on the merits. The appellant cannot now be heard to challenge what he unequivocally admitted in circumstances where the admission still stands.

Whether or not the court *a quo* erred in awarding costs in favour of the respondent.

33. It is now settled law that costs follow the result. It is only in exceptional circumstances that a court in our jurisdiction would deny a winning party costs at the ordinary scale, the onus was therefore on the appellant to prove exceptional circumstances disentitling the respondent to costs at the normal scale. With respect the appellant has failed to say anything that would upset the apple cart of costs.

DISPOSITON

34. Our courts in Zimbabwe will always jealously guard their jurisdiction. They will not hesitate to exercise their jurisdiction in the absence of clear proof that they have no jurisdiction to hear and determine any matter occurring in their territorial jurisdiction.

35. In this case the suretyship contract having been concluded in Zimbabwe and the dispute between the parties was over property in Zimbabwe, those factors localised the case in the absence of anything taking away the domestic courts' jurisdiction.
36. On the merits, the appellant's admission by letter of 18 August 2022 unequivocally admitting liability was damning to his appeal. We therefore find no fault at all in the judgment appealed against. As regards costs we find that the appellant has failed to persuade the court that there are any special reasons or circumstances warranting departure from the normal rule that costs follow the result.
37. In the result it is ordered that the appeal be and is hereby dismissed with costs.

CHIWESHE JA : I agree

MUSAKWA JA : I agree

Kantor & Immerman, appellant's legal practitioners.

Mbidzo Muchadeham & Makoni, respondent's legal practitioners