ROSEMARY CHIPANGO

And

LOREEN CHIPANGO

Versus

CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 27 February and 31 March 2025

Commercial appeal

T. Sibanda for the appellants
S. Takaindisa for respondent

CHILIMBE J

INTRODUCTION

[1] The appellants pray for dismissal of the court a quo`s judgment which disallowed their exception. In its place they seek an order upholding the exception with a punitive award of costs. The solitary ground of appeal reads thus; -

> "The court a quo erred and misdirected itself in finding that the summons and particulars of claim filed by established a cause of action against the Appellants."

[2] Respondent instituted proceedings against the appellants as sureties and co-principal debtors to a loan advanced to an entity called Passade Enterprises (Pvt) Ltd. The respondent claimed the capital sum of ZAR403,653, 11, interest at 20% per annum plus costs of suit at attorney client scale. This claim was further detailed as follows in the declaration; -

> "7. Further to that, the defendants signed guarantees as security for the advanced amounts. They bound themselves as guarantors, sureties and co-principal debtors in favour of the plaintiff.

8. The defendants renounced the benefits of all legal exceptions including *ordinis seu execussionis et divisionis.*"

[3] The appellants formally sought further particulars from respondent. This decision will largely turn on the question of further particulars concerned. I set out the requested particulars hereunder; -

i. The currency for the order finance and loan facilities
ii. Copies of the loan and overdraft facility agreements
iii. Whether interest on the facilities was at any stage overcharged
iv. Copies, of the registered mortgage bonds, their registration dates and currency of the indebtedness.
v. The number of unlimited personal guarantees executed by appellants and copies thereof.
vi. Confirmation of disbursements made as well as the currency and payee concerned.

[4] Respondent issued a terse response to this request. It thus delivered no further details than reiterate the facts set out in the declaration. It also declined to deliver copies of the loan and overdraft facility agreement and surety documents sought. The respondent was however compelled by an order of court, to deliver the documents earlier requested after appellants successfully moved an application.

THE EXCEPTION IN THE COURT A QUO

[5] The appellants thereafter filed an exception averring that the respondent`s claim disclosed no cause of action against them. The exception was framed in the following terms; -

"1. The plaintiff avers that the defendants` supposed agreement to provide a guarantee for the alleged debts of Passade Enterprises (Pvt) Limited is contained in a contract to which the defendants are not a party. Consequently, ex facie the particulars of claim there is no privity of contract between the plaintiff and defendants on which any claim may be found."

[6] In opposing the exception in the court a quo, respondent insisted that the appellants had secured Passade`s indebtedness through personal guarantees. The summons and declaration

stipulated this nexus, which therefore established the basis upon which respondent had proceeded against the appellant.

[7] A letter dated 13 June 2013 relating to a loan facility extended to Fassade was attached to respondent`s papers. So too was a document on respondent`s letterhead titled "Guarantee by one or more sureties by company, joint or individual guarantors". This document bore on the face of it, the terms of a guarantee and showed the appellants as the guarantors.

[8] The character and validity of this document as a guarantee was contested via strenuous argument by Mr. *Sibanda* for the appellants. In the court a quo, the appellants disputed that there was any basis for the suit against them. Their position being that there was "…no evidence of the excipients being guarantors to the alleged debt of Passade Enterprises (Private) Limited."[1]

THE DECISION OF THE COURT A QUO

[9] The court a quo identified the basis of the exception as the appellants` self-same disputation of a nexus to Passade`s obligation. The trial magistrate distinguished this court`s decision in *Zimbabwe Microfinance Fund (Pvt) Ltd v Bailey & Anor* HH 264-19 from the facts of the matter before her. Much reliance was placed on this authority a quo as it was herein.

[10] It was the trial court`s conclusion that firstly, the loan and overdraft facility between respondent and Passade created an obligation on the part of the latter. This obligation was still outstanding. Secondly, the court observed that separate and independent to that agreement lay the appellants` suretyships issued in favour of respondent and over Passade`s debt.

[11] Having identified the applicable principles of law relating to exceptions, the court a quo found that the respondent had established a cause of action against the appellants. It thus dismissed the exception triggering the present appeal.

ARGUMENTS BEFORE THIS COURT

[12] The arguments in favour of appellants assumed a number of facets. Mr *Sibanda*`s written submissions commenced by echoing the exception filed in the court a quo, namely that there

[1] Paragraph 1 of the first excipient`s answering affidavit.

was no privity of contract between respondent and Passade. Having established this background, counsel proceeded to set the questions to be decided.

[13] These were (a) whether there was a tripartite relationship between the appellants, respondent and Passade and as (b); - whether the guarantee document introduced the appellants to the relationship between respondent and Passade. Evidently, counsel had already answered both questions in the negative in his opening written submission in the heads or argument. Nonetheless, the arguments were further articulated as follows; -

[14] The court a quo erred by straying beyond the four corners of the summons and declarations in dealing with the exception. This it did by recognising the existence of the loan/overdraft facility and the surety agreement. This consideration of the two documents by the trial court drew it, according to Mr. *Sibanda*, away from the established confines of the summons and declaration.

[15] The court a quo in that regard, invited evidentiary matters "extraneous" and "extrinsic" to the disposal of an exception. In the same vein, Mr. *Sibanda* attacked the trial court for having concluded that the surety or guarantee documents placed before it met the essential requirements of a valid guarantee. To use counsel`s own words, "eight faults besieged the surety agreement". To the extent that the surety agreement could neither, for any reason at law, be recognised nor accepted as a guarantee.

[16] The court queried counsel as to whether his second argument attacking the surety agreement had (a) been raised in the trial court (b) formed part of the grounds of appeal and (c) did not in fact raise the raise fault of straying away from the four corners of the summons and declaration. Counsel posed two issues.

[17] Firstly, counsel conceded that the defects in the surety agreements were not specifically raised before the court a quo. On that basis, he surmised that since the court a quo took account the existence of the loan/overdraft agreement as well as the surety agreement in its ruling, the argument remained relevant. He then entreated the court to consider the validity of the suretyship as a fundamental point of law critical to the determination of the question of cause of action and allow submissions on it.

[18] Counsel cited the authority of *Bakari v Total Zimbabwe (Pvt) Ltd* SC 21-19 where GUVAVA JA adverted, at page 14, to the following principles regarding the raising of a point of law for the first time on appeal; -

> "…. ….....generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one raised on the pleadings in the court below. In this regard I need do no more than refer to Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa 3ed at 736-737. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. Generally, it will decline to do so unless;
>
> 1. the point is covered by the pleadings;
> 2. there would be no unfairness on the other party;
> 3. the facts are common cause or well-nigh incontrovertible; and
> 4. there is no ground for thinking that other or further evidence would have been produced that could have affected the point[2]."

[19] Despite the oddities obtruding from counsel`s argument, we permitted him to proceed. He thus traversed the principles of law on the features of a valid guarantee. He returned to *Bakari v Total Zimbabwe (Pvt) Ltd* (supra) where GUVAVA JA referred to Caney LR, Forsyth CF and Pretorious JT, Caney's The Law of Suretyship in South Africa, (Juta and Co, 2010) and summarised a surety agreement as follows at page 6; -

> "……a suretyship involves three parties; the creditor, the principal debtor and the surety. It is a contract between the surety and the creditor in terms of which the surety binds himself to perform the obligations of the principal debtor to the creditor, if the principal debtor fails in whole or in part to fulfil his obligations. Suretyship is a contract and as such the principles of contract law apply to suretyships. The requirements of the suretyship are as follows; the identity of all parties (that is: -creditor, principal debtor and surety); and the nature and amount of the principal debt. It is important to note that all three parties must be different parties as a person cannot stand surety for his own debt."

[2] The Supreme Court cited CHIDYAUSIKU CJ in *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd. And Ors* SC 80-06 who in turn had referred to KRIEGLER in the case of *Donelly v Barclays National Bank Ltd* 1990(1) SA 375 at 380H-381B

[20] Mr. *Sibanda* thereafter waded neck deep across the clauses of the surety and loan agreements drawing attention to their defects and therefore invalidity. He further relied on this court`s decision of *Zimbabwe Microfinance Fund (Pvt) Ltd v Bailey & Anor (supra)* where an exception was upheld on the grounds of an invalid surety agreement.

[21] In her response, Ms *Takaindisa* for the respondent pointed out to the significant departure by appellant`s counsel from the contentions in the court a quo, the grounds of appeal as well as heads of argument filed of record. Counsel then argued that such deviation took the focus away from the key issue; - whether the plaintiff`s summons and declaration disclosed a cause of action. She also argued that the legal point had been improperly raised. There was no reason why the matter was not raised in the court a quo and none was furnished. The criticisms levelled against the surety agreement were, according to Ms *Takaindisa,* evidentiary. The respondent could properly rebut them via the leading of evidence.

ANALYSIS OF THE ARGUMENTS

THE GROUND OF APPEAL

[22] In *Dr Nobert Kunonga v The Church Of The Province Of Central Africa* SC 25-17, GARWE JA (as he then was) dwelt extensively on what constitutes valid grounds of appeal. In particular, the learned judge of appeal drew attention to the meaning of precision and concision in grounds of appeal and the importance of such parameters in aiding the appellate process.

[23] He referred at [24], to the remarks of the court in *Songono v Minister of Law and Order* 1996(4) SA 384 (Eastern Cape Division) the learned judge (Leach J) at p 385 G-H that: -

> "… it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo*, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet …"

[24] Having considered arguments tendered on behalf of the appellant, our view is that the solitary ground of appeal was neither concise nor precise. It attacked the court a quo`s finding to the effect that respondent had established a cause of action against the appellants. The wideness of the ground of appeal though somewhat disguised by its brevity, was eventually exposed by the arguments.

[25] Counsel for the appellants, with respect, vacillated beyond various principles; - from failure of the court a quo to confine itself to the pleadings, the effect of further particulars on a summons and declaration, to a fully-fledged onslaught on the validity of a surety document. The original ground was effectively abandoned though explicitly so. Mr *Sibanda* himself conceded this fact and sought to rely on an appellant`s option to raise a point of law for the first time on appeal.

[26] To that extent, the ground of appeal violated Order 31 (1) subrule (4) (b) of the Magistrates Court (Civil) Rules SI 11 of 2019 which prescribes that grounds of appeal should be precise and concise. The appeal will therefore fail on that basis. We proceed for completeness to consider the rest of the issues argued before us.

THE POINT OF LAW

[27] Was the point of law on the validity of the surety agreement properly raised on appeal? In addition to the principles laid down in *Bakari v Total Zimbabwe (Pvt) Ltd*, this aspect of the law is basically well established. The decisions of *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S), *Nissan Zimbabwe (Private) Limited* v *Hopitt (Private)* 1997 (1) ZLR 569 (S), *Gold Driven Investments (Private) Limited v Tel One (Pvt) Limited & Anor* SC 9-13 as well as among others fully set out the circumstances in which a point of law can be properly raised. Even for the first time on appeal.

[28] I may add a further dimension. In *Nissan Zimbabwe (Private) Limited* v *Hopitt (Private)* 1997 (1) ZLR 569 (S) KORSAH JA made the observation that admitting on appeal, argument on a point of law not raised before the trial court was not so much a matter of jurisdiction but of discretion. Such discretion being driven by the need to do justice between the parties by addressing a fundamental issue dispositive of their controversy.

[29] The question arises; - was the argument of the validity of the surety agreement, raised as a point of law for the first time on appeal, a matter central to the disposal of the competency of

the court a quo`s findings on the exception raised before it? As noted above, Mr. *Sibanda* relied on the authority of *Zimbabwe Microfinance* where the court examined the surety agreement placed before it via the further particulars. I will examine the principle espoused in *Zimbabwe Microfinance*.

THE PRINCIPLE IN ZIMBABWE MICROFINANCE v BAILEY & ANOR

[30] In *Zimbabwe Microfinance*, this court followed the trite position that an exception can be raised against a summons and declaration as amplified by further particulars. (See also *Sammy`s Group (Pvt) Ltd v Meyburgh N. O & 3 Ors* SC 45-15.)

[31] On the facts of before it, the court in *Zimbabwe Microfinance* proceeded to examine the validity of a surety agreement (supplied under the further particulars) on the basis that such document formed part of the further particulars. As such, consideration of the exception was confined to the summons, declaration, further particulars as well as the surety document. The court crystallised the issue before it as follows; -

> "I intend to proceed from the stand point that an exception is a procedure which points to a defect which appears *ex facie* the pleading and that the facts stated in the pleadings must be accepted. Those facts are that the defendants are bound as sureties by virtue of the loan facility agreements signed between the plaintiff and the principal debtor on 13 October 2017. Those agreements are now part of the pleadings having been filed as further particulars. The question which arises therefore is whether the plaintiff can found a valid cause of action for the liability of a surety <u>wherein the suretyship arises from an agreement signed between the plaintiff and the principal debtor</u>."

[32] The underlined part represents a distinct variation of facts between *Zimbabwe Microfinance* and the present matter. Secondly, in *Zimbabwe Microfinance*, the original debt in respect of which the appellants had validly bound themselves had been extinguished. Herein the debt by Passade is still due.

[33] Thirdly, the plaintiff-creditor in *Zimbabwe Microfinance* sought to proceed against persons who had signed guarantees not in a personal but representative capacity. No such defence is raised by the appellants. The fourth distinction appears at pages 5-6 where the court observed that; -

> "It is therefore settled that a suretyship relationship cannot exit by virtue of a clause in the main loan agreement that the directors of the company which is the principal debtor shall stand as sureties. For liability to attach to them, they must proceed to enter into a separate deed of suretyship in which they personally bind themselves as such. That being the position of the law, it must follow that a pleading couched as the plaintiff's declaration, as amplified by the further particulars, that the liability of the defendants as sureties arises from a loan facility agreement concluded between the principal debtor and the creditor, does not disclose a cause of action against the defendants. They simply cannot be liable on that basis.

WAS THE POINT OF LAW THEREFORE FUNDAMENTAL TO THE DISPOSAL OF THE MATTER?

[34] The short answer to this question is a negative. The decision and therefore approach taken in *Zimbabwe Microfinance* being clearly distinguishable. In that regard, the submissions on behalf of the appellants regarding the invalidity of the surety agreement become untenable. The arguments seeking as they did, to scrutinise the surety agreement became inconsistent with the established principles applicable to an exception that; -

> "For the purposes of an exception, no facts may be adduced by either party and an exception may thus only be taken when the defect objected against appears ex facie the pleading itself".[3]

[35] Mr *Sibanda*`s arguments strayed into issues extraneous to the summons, declaration and further particulars. Unlike in *Zimbabwe Microfinance*, there was no nexus inviting such argument herein. As noted above, the further particulars tendered by respondent basically introduced no new facts apart from re-stating the averments in the summons and particulars of claim.

[36] This background differentiates the matter from the circumstances which obtained in *Zimbabwe Microfinance* and in particular, *Sammy`s Group* decisions where ZIYAMBI JA observed as follows; -

[3] Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Edition, page 631.

"[39] The above having been said, had the exceptions been properly taken, I would have had no difficulty in upholding the finding by the court *a quo* that the appellant's declaration as amplified by its further particulars is excipiable. A more ineptly drawn declaration and further particulars is difficult to imagine. The further particulars read like an essay of sorts. The draftsman clearly lacked learning or training in the area of drafting of pleadings."

DISPOSITION

[37] On that basis, there was no reason for the court to then go into evidence as argued by Mr *Sibanda*. The point of law raised failed the test set in *Bakari v Total Zimbabwe*. It did not refer to an issue central to the disposal of the causa in the court a quo, or appeal before us. On the basis of the aforegoing reasons, we find no cause to interfere with the decision of the court a quo. The appeal must fail and it is ordered that; -

1. The appeal be and is hereby dismissed with costs.

MANZUNZU J_____I agree _____ date

Chivore Dzingirai Group of Lawyers-appellants` legal practitioners
Bhatasara Attorneys-respondents` legal practitioners

[CHILIMBE J____31/03/25]