

AGRICULTURAL BANK OF ZIMBABWE LTD
t/a AGRIBANK
and
ELISHA HUNDA
and
BEAUTY MAKONI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3 October 2017 and 22 November 2017

Civil trial

J Dondo and L Matapura, for the plaintiff
B Mahuni, for the 2nd defendant

MUREMBA J: The plaintiff's (bank's) claim against the defendants is for the payment of US\$23 104.76, interest thereon at the prescribed rate and costs of suit on a legal practitioner and client scale in terms of the loan agreement.

This is a debt which emanated from a loan facility that was advanced to the first defendant for which the second defendant signed as surety and co-principal debtor in 2011. The second defendant was a wife to the first defendant, but by the time the summons was issued in April 2016 the first defendant had passed away. At trial the plaintiff indicated that it was no longer pursuing its claim against the first defendant.

During trial the second defendant did not dispute the amount that is still owing to the plaintiff. However, her defence was that she is not liable to repay the loan because she did not voluntarily interpose herself as surety and co-principal debtor. She stated that the plaintiff's claim lies with the first defendant's estate.

To prove its case the plaintiff led evidence from Washington Masocha its Senior Branch Manager for the Marondera Branch where the loan was advanced to the first defendant. He produced the facility agreement document as exh 1. He said that the second defendant guaranteed the loan by pledging her immovable property (a house) as collateral security for the loan. As proof of the pledging he produced exh(s) 2 and 8 being letters dated 10 and 28

December 2010 which the second defendant allegedly wrote to the bank saying that she had authorised her husband, the first defendant to use the title deeds to her property as collateral security for his loan application. Attached to the first letter was a copy of her marriage certificate (exh 3). Attached thereto was a copy of the title deeds (exh 4). The witness said that pursuant to this, the bank then gave notice to the Registrar of Deeds about its interest in the property. The witness went on to produce the suretyship which the second defendant signed declaring to bind herself as surety jointly, severally and in solidum and as co-principal debtor with the first defendant. This was produced as exh 6. It was signed on 14 February 2011.

The witness also produced an Acknowledgement of Debt which the first defendant signed on 20 March 2013 promising to pay the debt in that same year. The loan facility had been rolled over from the time it was taken in 2011. The first defendant died in July 2014 having not paid the debt. Washington Masocha said that the bank was not aware that the second defendant was forced to sign the suretyship by her late husband. He further produced an ex-parte application for an interdict which the second defendant once made in the Magistrates Court at Marondera in 2013 suing the bank, Southbay Real Estate and her late husband. The bank had put up her property for sale in order to recover its money and she wanted it interdicted from selling it. The witness said that in her application the second defendant was saying that she had guaranteed the loan and surrendered her title deed for number 3885 Nwiwa Road, Rusike, Marondera to the first defendant to use as security for the loan application. She averred that the bank had no right to have her property auctioned without first exhausting other avenues to recover the debt from her late husband and without first obtaining a court order authorising the sale as this was in violation of the *audi alteram partem* rule. The witness said that the second defendant never mentioned in her founding affidavit that she had been forced to sign the suretyship. Washington Masocha said that the second defendant has no defence to the plaintiff's claim.

Under cross examination Washington Masocha said that he was not present when the second defendant signed the suretyship. He said even then if the second respondent had been forced to sign the suretyship she could have reported the matter to law enforcement agents soon after signing.

During the defence case the second defendant was the sole witness. She produced a letter (exh 11) which she wrote on 7 December 2010 to the respondent's Marondera Branch Manager saying that as the owner of the title deeds for house number 3885 Nwiwa Road, Rusike Park, Marondera she was not willing to surrender her title deeds as surety for the loan

that was being granted to the first defendant. The letter bears the respondent's stamp which shows that the respondent received it on the same day of 7 December 2010. The second defendant said that what had happened was that her late husband (first defendant) had taken her title deeds from her with the intention to use them as security for the loan he was applying for. So she went to see the Bank Manager and to alert him of this and that she did not want her title deeds used in securing the loan. The Bank Manager, Mr Kufakunesu then asked her to put this in writing which she did on the same day at the bank. She left a copy of the letter. The Bank Manager had assured her that he would not give the first defendant the loan and that he would not make any disclosure about the letter the second defendant had written.

The second defendant said that although she was married to the first defendant, the first defendant was having a relationship with another woman who owned a farm. He was actually staying with this other woman at her farm and would occasionally come home with relish. The second defendant said that she is a school teacher. Over the years she struggled to save money and eventually bought a house in her name for herself and her 4 children that she had with the first defendant. The first defendant then stole her title deeds. She said that on the day she signed the suretyship, the first defendant phoned her inviting her to come to the bank where he said he was waiting for her. When she got there he started shouting at her saying that she wanted his tobacco which was in the field to rot. He said this tobacco was worth US\$80 000-00. She said that he threatened to kill her together with her children. She said she succumbed to the threats and signed the suretyship. She said that she was afraid of him because he always used to abuse her and threaten her in their marriage. She said that after signing the suretyship she never took any action to have the surety agreement reversed. She said that she believed that the first defendant was going to pay back the loan. She said that she had spoken to his relatives about it and he had told them that he was going to pay. These relatives had assured her that he was going to repay the loan since he was farming.

The second defendant said that the letters which the plaintiff's witness produced which she purportedly wrote on 10 December 2010 and 28 December 2010 authorising the bank to allow the first defendant to use her title deeds as security for the loan application were not written by herself, but were forged by the first defendant. She said that it was her late husband's hand writing. She said that she never benefited from this loan as the first defendant used all of it at the farm where he was staying with his girlfriend. He even died there.

During cross examination the second defendant maintained that she never wrote letters authorising her title deeds to be used as security for the loan application. She said that she had

even told her lawyers about it although it was not put in her plea. She was also cross examined on the founding affidavit she had deposed to in the *ex parte* application for an interdict she had made in the Magistrates Court. It was put to her that she had averred in the founding affidavit thereof that she had guaranteed the borrowing of the money from the bank for tobacco production purposes and that she had surrendered the title deeds for the house to the first defendant for use in securing the loan. In response the second defendant said that she is not the one who deposed to this affidavit, but it was her late husband, the first defendant. She said she did not even sign this affidavit. She said that actually it was the first defendant who had processed the *ex parte* application. She said all she did was to appear in court stating that the first defendant was the one who was supposed to pay back the loan.

The second defendant was shown a letter which was in the possession of her lawyers by Mr *Dondo*. This letter was from the bank acknowledging receipt of the title deeds on 10 December 2010 and it was addressed to her. She confirmed having been shown this letter by the first defendant on the very day the bank wrote it. The second defendant was asked why she did not take action when she realised that her husband had taken the title deeds to the bank without her authority, moreso considering and that on 7 December 2010 (3 days before), she had written a letter to the bank notifying it that she was not willing to surrender her title deeds as security. In answer she said that she did not see the point because the title deeds had already been taken by the bank and the first defendant was boasting that the Manager, Mr Kufakunesu was his best friend. She said that she did not report the case to the police because the first defendant was an abusive husband who was threatening her with death. She said that she was saving her life and that of her children. She further said that she knew that there was no way the police could guard her or protect her 24 hours a day. The second defendant said that she was born in 1965, is a qualified school teacher with a Bachelor of Science Special Education Degree. She said that she tried to register the first defendant's estate, but all it had were household goods. She said that she was told that there was no property worth registering an estate for. She said that during his life time the first defendant had been a war collaborator, held a diploma in agriculture, but never kept a formal job. He once worked as a farm manager but he resigned. He was now into farming with his girlfriend.

Analysis

The critical question in the present matter is whether or not the second defendant is liable for the debt the first defendant failed to pay. She is being sued on the basis that she bound herself as surety and co-principal debtor on 14 February 2011 when she signed a suretyship. In

that same suretyship she also tendered her immovable property described as Stand 3885 Dombotombo Township of Stand 3612 Dombotombo Township, Marandellas District as security. She further agreed that she shall remain liable as surety and co-principal debtor until the principal, interest and other monies due in terms of the principal obligation between the bank and the borrower shall have been discharged.

It is clear from the oral evidence that the second defendant gave that she is the person who signed the suretyship on 14 February 2011. This is an undisputed fact. With this, it will not be necessary for me to resolve the issue about the letters she is said to have written to the bank on 10 December 2010 and 28 December 2010 allowing the first defendant to use her title deeds to secure the loan which letters she disputes having written and says were forged by the first defendant. Whether these letters were forged or not, this is no longer material as they were subsequently over taken by the suretyship the second defendant later signed on 14 February 2011. Whilst not disputing having signed the suretyship, the second defendant's defence is that she did not voluntarily sign the suretyship as the first defendant, her late husband shouted at her in the bank and made threats of death to her which caused her to sign the suretyship.

In the law of contract, there are certain factors which vitiate a contract. If all the essential elements of a valid contract are present in a contract, but the consensus of the other party was obtained in an improper manner through any of the following factors such a contract is potentially void or is voidable. The factors include misrepresentation, duress, undue influence, mistake and bribery of agent. See Innocent Maja *The Law of Contract in Zimbabwe* at p 95. The innocent party can decide to enforce the contract or have it declared void. If he chooses to have it set aside the contract becomes invalid. If he chooses to uphold it, it becomes valid and enforceable just like any other valid contract. See Innocent Maja *The Law of Contract in Zimbabwe* at p 95.

In *casu* the suretyship that the second defendant signed has all the essential elements of a valid contract, but she says threats of death were made to her by her now late husband. The use of threats of harm, compulsion, coercion and pressure to induce a person to enter into a contract is called duress. See Innocent Maja *The Law of Contract in Zimbabwe* p 100. Duress deprives the innocent party of the freedom to enter into a contract. Therefore such a contract is voidable at the instance of the innocent or coerced party. The contract is still voidable even if the pressure, coercion, compulsion or threats were not made by the other party to the contract, but by a third party like what is prevailing in the present matter wherein the first defendant was

a third party. See *Ferguson & Partners v Zimbabwe Federation of Trade Unions & Ors* 2004

(1) ZLR (H). The party pleading duress has the onus to prove that:

- (i) There was actual violence or reasonable fear
- (ii) There was threat of some considerable harm
- (iii) The harm was imminent or inevitable
- (iv) The use of the threat or intimidation must be unlawful or *contra bonos mores*
- (v) The threat caused damage. See *Mlambo v Mupfiga* HH 65-14. These factors are considered cumulatively or together.

In the present matter, the second defendant having signed the suretyship under duress on 14 February 2011 as she says, she however, did not take any action to have the suretyship set aside. The first defendant died in July 2014, more than 3 years after he had coerced her into signing the suretyship, but by that time she had not taken any action whatsoever to have the suretyship set aside. Besides, in August 2013 an *ex parte* application was made in her name interdicting the bank from proceeding with the sale of her house which it had put up for sale on the basis that the bank had not exhausted all other avenues of recovering its money and that there was no court order authoring the sale. The issue of the suretyship having been signed under duress was never mentioned in the founding affidavit. The second defendant's explanation for this is that she is not the one who filed that *ex parte* application but her late husband, the first defendant. She said that despite having this knowledge she went to court but never notified the court that it was not her who had filed the application. She just went along with the application as if it was her who had filed it. She did not dissociate herself from that application. At that time her property was on the line as it was about to be sold by the bank. That was her most opportune time to institute proceedings to have the suretyship set aside by having it declared void on the ground that she had not voluntarily signed it, but she did not. Not taking action means that the second defendant chose to uphold the suretyship she says she was coerced to sign. She cannot use duress as her defence to the plaintiff's claim now because it is too late. The court cannot be convinced by this defence of duress because over the past years she never raised it. In the *ex parte* application she could have raised it, but she made no mention that she had signed the suretyship under duress. Instead the contents of the founding affidavit give the impression that she freely and voluntarily signed the suretyship. All that concerned her was that the bank had not exhausted all other avenues of recovering its money and that there was no court order authorising the sale.

In addition to the above, the second defendant did not give a convincing explanation why right from the start she did not take action when the bank wrote her a letter on 10 December 2010 acknowledging receipt of the title deeds knowing fully well that just 3 days before she had left a letter with the bank which said that she did not want her title deeds used as security. She could have gone to the bank to find out what was happening, but she did not. 2 months later she went to the same bank to sign the suretyship. She said that the first defendant threatened her with death in the bank but she did not explain why she did not notify the bank officials about it. After signing, she left the bank and went home. Her explanation for failing to raise alarm or for failing to report the matter to the police is not convincing. The second defendant being an educated person who holds a university degree ought to have stood up for her rights and protected her property. If she could save money on her own and buy a house without the help of the first defendant there was no reason why she could not or failed to take measures to protect her interests in that property. As an educated person, surely she had an appreciation of what she was signing for when she signed the suretyship. The suretyship is binding on her.

In view of the foregoing it be and is hereby ordered that:

The second defendant pays to the plaintiff

1. US\$23 104.76 plus interest at the rate of 5% per annum calculated from the date of summons to the date of payment in full.
2. Costs of suit on a legal practitioner and client scale.

Dondo & Partners, plaintiff's legal practitioners
Scanlen & Holderness, 2nd defendant's legal practitioners