IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. CACLB-008-09
HIGH COURT CVHLB-001356-08

In the matter between:

PERCY RADITLADI **APPELLANT**

And

AFRICAN BANKING CORPORATION
OF BOTSWANA LIMITED **RESPONDENT**

FOR APPELLANT: Adv S.T. Pilane (with him Miss M. Molema)
FOR RESPONDENT: Adv T.W. Beckerling SC (with him Mr. K. Osei-Ofei)

JUDGMENT

CORAM: MOORE AJP,
RAMODIBEDI, JA
LETSIDIDI, AJA

RAMODIBEDI JA:

[1] This appeal seeks to challenge summary judgment which the High Court granted to the respondent as against the appellant and two others jointly and severally the one paying the others to be absolved. The summary judgment was granted in the following respects:-

(1) Payment in the sum of P5, 037, 259.29.

(2) Interest at the prime lending rate plus 5% per annum calculated from 31 July 2008 to the date of final judgment.

(3) Costs of suit on attorney and own client scale.

(4) Collection commission at the rate of 10% of the capital amount claimed.

[2] The particulars of claim alleged that on or about 25 July 2007, the respondent and Nacobee (Pty) Limited t/a Welldone Communications (hereinafter referred to as "the first defendant") entered into a "Cash Advance Loan

Facility Agreement" ("the Loan Agreement"). The material terms of the Loan Agreement were the following:-

"6.1 *Plaintiff would advance and loan to the First Defendant, at the special instance and request of the latter, being a cash advance loan facility required by the First Defendant in an amount not exceeding **BWP 8, 000,000.00** to augment the First Defendant's working capital requirements;*

6.2 *The amount so advanced by the Plaintiff to the First Defendant would be repayable on demand;*

6.3 *The Plaintiff would be entitled to charge interest on any outstanding amount at the prime lending rate per annum, which interest is to be calculated daily and compounded monthly;*

6.4 *The First Defendant would pay the Plaintiff's normal and usual charges levied in the administration of the First Defendant's account;*

6.5 *In the event the First Defendant breached any of the terms and conditions of the Cash Advance Loan Agreement, all of which were considered material, the total balance then outstanding, inclusive of capital and interest shall become immediately due and payable by the First Defendant to the Plaintiff on demand;*

6.6 *Additionally, the Plaintiff could at any time demand payment of the balance outstanding;*

6.7 *A certificate issued by the Plaintiff under the hand of any Director or General*

*Manager of the Plaintiff, would constitute **prima facie** proof of any sum due, owing and payable by the First Defendant to the Plaintiff;*

6.8 *In the event the Plaintiff was constrained to institute legal proceedings for the recovery of any amount due in terms of the term loan agreement, and the court made an Order for costs in favour of the Plaintiff against the First Defendant, the Plaintiff will be entitled to recover such costs on a scale as between Attorney and Client inclusive of collection commission at the rate of **10%** of all amounts claimed by the Plaintiff from the First Defendant."*

[3] It was specifically alleged in the particulars of claim that at the special instance and request of the first defendant, the respondent advanced and disbursed to the first defendant a cash advance loan in terms of the Loan Agreement and that the balance as at the date of drafting the summons was P5,037,259.29.

[4] It is not disputed that on the same day, namely, 25 July 2007 the appellant, together with one Kagiso Moremi ("Moremi"), executed deeds of suretyship and bound themselves as co-principal debtors in solidium for the due and punctual payment of any and all sums of money

which were or might become due for payment to the respondent. They further bound themselves for the punctual performance and discharge of the first defendant's obligation towards the respondent.

[5] The respondent further alleged in its particulars of claim that the sum of P5,037,259.29 in question had become due and payable. Accordingly, the first defendant and the co-principal debtors including the appellant were indebted to it jointly and severally.

[6] After service of summons on him, the appellant entered an appearance to defend. Thereafter, the respondent applied for summary judgment in terms of Order 34 Rules 1 and 2 of the High Court Rules (Cap. 04:02). Jitto Kurian, the respondent's Managing Director, filed an affidavit in which he averred that in his opinion the appellant had no bona fide defence to the action and that appearance to defend had been entered solely for the purpose of delay.

[7] Now, the principles applicable in summary judgment proceedings are well-settled in this jurisdiction. Thus, for example, in **Information Systems Zone v First National Bank of Botswana Ltd [2008] 1 BLR 221 (CA)** at 225 this Court expressed the principles in these terms:-

> "*Insofar as a correct approach to summary judgment is concerned, it is instructive to note that in several of its decisions this court has drawn attention to the fact that this remedy is an extraordinary one. This is so because it is a stringent and drastic remedy which permits judgment to be given without a trial. It literally closes the door to the defendant without being heard. Unless properly handled, this remedy may therefore become a weapon of injustice to defendants who might otherwise have a bona fide defence. It is for this reason that the courts have insisted on strict compliance with the provisions of Order 34.*
>
> *But, it should always be borne in mind that the other side of the coin is equally true. Order 34 was designed to provide a speedy remedy to plaintiffs in cases where defendants have no bona fide defence and where appearance to defend is made solely for the purposes of delay. See for example Du Setto (Sunnyside II) (Pty) Ltd and Others v Financial Services Company of Botswana Ltd [1994] BLR 274, CA at p 287; Econony Investments v First National Bank of Botswana Ltd [1996] BLR 828, CA; Thamatlhogo Training and Conference Centre (Pty) Ltd v*

> *Botswana Development Corporation [1999] BLR 94, CA; Standard Chartered Bank v Isaacs and Another [1999] BLR 453, CA; Sebina v Gantsi Hotel (Pty) Ltd t/a Kalahari Arms Hotel (Pty) Ltd [2004] 2 BLR 121, CA; Wayguard Security (Pty) Ltd v Botswana Tyre Corporation (Pty) Ltd [2004] 2 BLR 125, CA; Estate Construction (Pty) Ltd and Others v National Development Bank [2005] 2 BLR 367, CA.*
>
> *So far as unmeritorious defences are concerned, it is instructive to bear in mind the apposite remarks of this court per Tebbutt JA, as he then was, in Du Setto's case (supra) at p 288, namely:*
>
> *'The court should, in my view, not be astute to extend liberality to defendants in summary judgment matters who raise bogus defences in order to evade their obligations and to keep plaintiff's with valid claims out of their money. A refusal to exercise the court's discretion in the appellant's favour, and particularly in Du Plessis's favour, would result in no injustice to them or him.'*
>
> *See also Wayguard Security (Pty) Ltd v Botswana Tyre Corporation (Pty) Ltd (supra)."*

[8] The appellant's defence was set out in his opposing affidavit to summary judgment. Therein he made the following averments:-

> "12. *I reiterate that I have a bona fide defence to Plaintiff's claim, which defence I set out hereunder.*
>
> *13. As deposed to at Paragraph 8 herein, the Plaintiff allowed 1st Defendant an extension*

> *of time on the call up of the facility and the expiry of same. Such extension amounted to a novation of the agreement at Annexure "A" to the Plaintiff's Particulars. I am advised by my attorneys of record and believe same to be true, that novation of an agreement terminates such agreement in favour of the creation of a new agreement. As such, the agreement in respect of which I had stood surety was terminated without my knowledge and consent and by virtue of such termination, I am advised and believe same to be true, that I was thereby discharged from the suretyship. Legal argument on this point will be addressed more fully by my attorneys of record.*
>
> *14. I accordingly beg the above Honourable Court to dismiss the summary judgment application and offer me opportunity to defend the case against me."*

[9] The appellant subsequently filed a supplementary affidavit in which he averred that the repayments made as fully reflected in paragraph [12] below were made without his knowledge and authorisation. Such payments were, therefore, "wrongly debited."

[10] Despite the defence of novation, and the alleged lack of authorisation, however, it is convenient to mention at this stage that, both in his heads of argument and in

submissions before this Court, the appellant has now made considerable concessions, namely:-

(1) That he is in fact liable to the respondent for the payment of P3, 850,543.53, including the bank's prime rate as agreed calculated at 16% per annum.

(2) That he is liable to a "portion" of the costs on the attorney and client scale, but not on own client scale.

[11] Of particular significance is the fact that the appellant now accepts the finding of the court a quo that it does not avail him that he relinquished his shareholding and directorship in the first defendant company. He concedes that the respondent was within its right in refusing to release him from the suretyship in question. Yet notwithstanding all of these concessions, the appellant persisted in his defence of novation in the court below.

[12] Before dealing with novation, it is necessary to point out that the appellant's concession that he is liable to the respondent for payment of P3, 850,543.53 is based on the calculations set out in his heads of argument as follows:-

"*Capital claim of*	*P5, 037,259.29*
Less payment of 22/06/2007 made without requisite signature of Appellant	*P767,154.00*
Less payment of 22/06/2007 made without requisite signature of Appellant	*P169,979.50*
Less payment of 22/06/2007 made without requisite signature of Appellant	*P84 298.35*
Less payment of 31/01/2008 made without requisite signature of Appellant	*P145,000.00*
Less payment of 31/01/2008 made without requisite signature of Appellant	*P15, 226.60*
Less payment of 06/02/2008 made Without requisite signature of Appellant and after expiry date of facility	*P80,858.16".*

[13] As can be seen from paragraph [8] above, the appellant's defence in the court a quo was based on novation. He relied on clause 24 of the Loan Agreement which provided as follows:-

> "24. ***<u>Expiry Date of Facility</u>***
>
> *2.4.1 This facility represents a line of credit and not a legal commitment to lend and unless previously withdrawn by the Bank it will expire on* ***31 January 2008*** *on which date all monies due hereunder must be repaid. Should the Borrower require a new facility after the expiry date, its written application for renewal should be submitted to the Bank two months before the expiry date that is on* ***30 November 2007.***
>
> *24.2 In the event of any monies due remaining unpaid after the expiry date the Bank reserves its right to institute legal action in terms of this agreement for the recovery of the same. Any accommodation, or indulgences which may be made by the Bank, shall not be regarded as a waiver of such right or any other right under this agreement.*
>
> *24.3 Further, in the event of advances being made by the Bank to the Borrower under this facility after the expiry date, the terms and conditions herein will remain binding until settlement in full has been made."*

Hence the appellant submits that all the loan facilities extended to the first defendant beyond the expiry date of 31 January 2008 amounted to novation.

[14] In this Court the appellant has, however, shifted the goal posts. He no longer relies on novation. Instead, he relies on variation of the extension of the time agreed for the duration of the Loan Agreement as well as the absence of his signing mandate in the first defendant's accounts. The point is expressed in paragraphs 14.2 and 15 of the appellant's heads of argument in the following terms:-

> *"14.2 The requisite signatories of the company were the Appellant and his co-shareholder and director, the Third Defendant [i.e. Moremi], this authority being varied by the letter being reproduced by the learned Judge.*
>
> *15. Accordingly, the resulting position must be that the Agreement between Respondent and the company was not novated, but was varied in the foregoing terms."*

[15] For the sake of completeness, the letter in question is annexed to the appellant's supplementary affidavit as

annexure "SA2" dated 15 March 2007. It is co-signed by the appellant and his co-principal debtor, Moremi. It is addressed to the respondent in these terms:-

> "*We hereby confirm that Mr. Kagiso Moremi is authorised to instruct African Banking Corporation Ltd to make Rand Drafts payable to Oilstock Traders and Pula direct payments to any Transport Company for vegetable oil transaction.*
>
> *The directors confirm that it shall be competent of Mr. Moremi to instruct African Banking Corporation to make payments to these suppliers provided the cumulated transactions do not exceed BWP2 Million. There shall be no need for Mr. Raditladi to counter sign the instruction on this deal provided payments made are to Oilstock Traders and transport companies.*
>
> *This arrangement shall only apply to the specified suppliers. For the rest of the payments, the two directors will continue to counter sign all the instructions as per the original mandate.*
>
> *This arrangement shall remain valid up to the end of April 2007.*"

[16] I have not the slightest doubt that the appellant's reliance on the absence of his authorisation based on the letter in question is misplaced. Adv Beckerling SC for the respondent submitted that the defence based on this letter is indeed spurious. I am inclined to agree. The

respondent was not made a party to the arrangement proposed in the letter. Nor was it the appellant's case that the impugned payments to the respondent did not form part of the principal obligation. Crucially, for that matter, there is no evidence to show that the payments were made contrary to the intention of the parties. In this regard the appellant merely averred as follows in paragraph 9 of the supplementary affidavit:-

> "*I was not aware that I am still a signatory on the accounts as 3rd respondent [Moremi] was supposed to have instructed Plaintiff [now respondent] to remove me from the list, which he admits he failed to do.*" *(Emphasis supplied.)*

In my view, this letter is a strong indication that on his own account the appellant was not discharged from the suretyship after all.

[17] In summary, the position then is that the appellant failed to establish a defence of either novation or variation. In any event, none of these defences avails the appellant.

Clause 24.3 of the Loan Agreement as fully reproduced in paragraph [13] above expressly provided that in the event of advances being made by the respondent to the first defendant under the Loan Agreement after the expiry date, the terms and conditions of the agreement in question would remain binding until settlement in full had been made. It is common cause that no payment has been made as claimed in the summons or at all.

[18] In fairness to Mr. Pilane for the appellant, he very fairly and properly, in my view, conceded the point in the preceding paragraph relating to non-payment. His main submission was that the respondent should have obtained the appellant's agreement to the extension of the duration of the Loan Agreement between it and the first defendant because his rights were affected. The real point in my view, however, is that the appellant did not terminate his suretyship which accordingly still binds him. In this connection, it is important to observe that

the appellant expressly agreed to be bound as follows in the deed of suretyship:-

> "***AND** I agree that it shall always be in the discretion of the Bank as to the extent, nature and <u>duration</u> of the facilities to be allowed the Debtor, that all admissions or acknowledgments of indebtedness by the Debtor shall be binding on me, that the bank shall be at liberty, without affecting its rights hereunder, … to give time to or compound or make any other arrangements."* *(Emphasis added.)*

[19] I should emphasise at this stage that I find myself in respectful agreement with Harms JA in **<u>Bock And Others v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA)</u>** that the starting point in determining the rights and obligations of the respective parties in a matter such as this is the deed of transfer of suretyship itself read with the loan agreement. Viewed in this way, I accept that the appellant's submission that he was discharged from the suretyship is untenable in the light of the agreements to which he had bound himself.

[20] Similarly, I fail to appreciate how, on the authority of **Makuluba v National Development Bank [2006] 2 BLR 590** (CA), per my Brother Moore JA (currently the Acting Judge President), the appellant could have suffered prejudice arising from the fact that the first defendant actually discharged its obligation by making the payments complained of, using its own money and not the appellant's. It will be remembered, for that matter, that the amounts paid were admittedly due and payable. If anything, such payments reduced the appellant's obligation as a co-principal debtor in relation to the quantum of his liability to the respondent.

[21] But more importantly, the new defence of variation flies in the face of clause 23 of the Loan Agreement. This clause reads as follows:-

> "23. ***Variation***
>
> *Save for instances where variation is otherwise provided for in this agreement, no variation shall be of any force or effect unless reduced to writing and signed for by*

> *both parties and any waiver of any default shall only be effective if made in writing and signed by the Bank."*

There is no evidence of a signed variation of the Loan Agreement. In my judgment, therefore, the Loan Agreement cannot be altered verbally.

[22] It follows from these considerations that the appellant raised no more than bogus defences. Accordingly, this appeal has no merit. It is, in my view, a typical case where appearance to defend was made solely for the purpose of delay. That being the case, an order for costs on attorney and own client scale in the court below was justified in the circumstances.

[23] It is necessary to point out, however, that in this Court the respondent has specifically asked for costs of appeal on attorney and client scale in its heads of argument. I see no reason why such costs should not be granted in the circumstances. In any event, clause 16.3 of the Loan Agreement pertinently provides as follows:-

> "16.3 *All costs and other charges necessarily incurred by the Bank and arising out of, or by reason of the grant or the recovery of this loan, including legal charges on a legal practitioner/client scale as well as collection commission which the Bank may incur both at pre-litigation and in taking action for the recovery of any amounts(s) due to it, will be recoverable by the Bank, on demand, from the Borrower."*

Furthermore, in terms of the deed of suretyship signed by the appellant, he bound himself for the repayment of all sums of money due to the respondent including "other necessary or usual charges … and legal practitioner/client costs and collection commission" which the respondent might incur.

[24] In all the circumstances of the case, therefore, I am inclined to the view that the appeal ought not to succeed. It is accordingly dismissed with costs on attorney and client scale.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JULY 2009.

M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree

S.A. MOORE
ACTING JUDGE PRESIDENT

I agree

M.S. LETSIDIDI
ACTING JUSTICE OF APPEAL