

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/0478



BETWEEN:

PANNAR SEED ZAMBIA LIMITED**PLAINTIFF**

AND

**MEANWOOD GENERAL INSURANCE
COMPANY LIMITED****DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 6th DAY OF JULY,
2018**

For the Plaintiff : Mr A. Mbambara, Mbambara Legal Practitioners

For the Defendant : No appearance

J U D G M E N T

CASES REFERRED TO:

1. *Lakeman V Mountstephen 1874 LR 7 HL 17*
2. *Yorkshire Railway Wagon Company V Maclure 1882 21 CHD 309*
3. *Re Conley 1938 2 ALL ER 17*
4. *MTN Zambia Limited V Investment Bank PLC Appeal No 155 of 2015*

OTHER WORKS REFERRED TO:

1. *Chitty on Contracts 13th Edition, Volume 1, Sweet and Maxwell 2008*
2. *Halsbury's Laws of England, 4th edition, Volume 9*
3. *Halsbury's Laws of England Volume 20, 4th Edition re-issue*

The Plaintiff commenced this action on 24th March, 2017 by way of writ of summons claiming;

1. *Payment of K315, 936.00*
2. *Interest at the commercial lending rate*
3. *Any other relief the court may deem fit*
4. *costs*

According to the statement of claim accompanying the writ of summons, a Credit Guarantee Bond Number MG/Bonds/020/11/2015 was entered into between the Plaintiff and the Defendant, under which the Defendant undertook irrevocably and without questioning to pay any outstanding amount that Kamundilanga Marketing would owe the Plaintiff, upon the Plaintiff supplying maize seed on credit up to the amount of K400,000.00.

It is stated that the Plaintiff supplied Kamundilanga Marketing maize seed valued at K315, 936.00 on 11th November, 2015, and that this was on the strength of the undertaking made by the Defendant in the said bond. It is further stated that the material terms of the Credit Guarantee Bond were that the Defendant obligated itself to pay the amounts outstanding upon receipt of written demand from the Plaintiff, and on proof that efforts of recovery from Kamundilanga Marketing had been exhausted.

In consequence of this, upon Kamundilanga Marketing failing to pay the outstanding amount of K315, 936.00, and on efforts of recovery proving futile from the said Kamundilanga Marketing, the Plaintiff on 26th September, 2016 wrote to the Defendant requesting payment of the said amount of money, and provided all the documentation relating to Kamundilanga Marketing's default of payment, as well as efforts made to recover from it.

The statement of claim also states that on 14th March, 2017, the Plaintiff again wrote to the Defendant requesting payment, but the Defendant has neglected, failed and or refused to settle the amount outstanding of K315, 916.00.

In the amended defence filed on 18th December, 2017, the Defendant states that the customer Kamundilanga Marketing was at all material times a business name, with no capacity to contract with the Plaintiff and the Defendant. That therefore the Credit Guarantee Bond Number MG/Bonds/020/11/2015 was null and void ab initio, with no corresponding liability on the part of the Defendant in the event of any default by the said Kamundilanga Marketing.

The Defendant denies that it undertook to pay any amounts up to K400, 000.00 that would be due and outstanding to the Plaintiff by Kamundilanga Marketing, or that the Plaintiff supplied the said Kamundilanga Marketing maize seed valued at K315, 936.00. On the other hand, the Defendant admits that it was term of the Credit Guarantee Bond that before the Plaintiff's claims could be settled, there should been failure on the part of Kaumdilanga Marketing to pay the amount due, and receipt of written demand from the Plaintiff showing that it had exhausted all efforts to recover from Kamundilanga Marketing.

The claim that K315, 936.00 is due and owing from Kamundilanga Marketing is denied, and the Defendant avers that the Plaintiff failed to fulfil the conditions precedent by showing proof that it had exhausted all efforts to recover the amount owing from Kamundilanga Marketing. It further denies that the Plaintiff on 14th March, 2017, demanded that it pays the amount owing, or that it owes the amount of K315, 936.00 to the Plaintiff and that it has neglected, failed or refused to pay the said sum.

At the trial only the Plaintiff and its Counsel were before the Court, and I allowed Counsel to proceed as notices of hearing were issued. The only

witness called by the Plaintiff was Debora Tembo, a Customer Service Leader for the Plaintiff. She testified that the Plaintiff supplied maize seed to Kamundilanga Marketing, a company owned by Boniface Hamoya in November 2015, and that this was on the strength of a credit guarantee given by the Defendant that Kamundilanga Marketing took to the Plaintiff.

PW1 further testified that the guarantee provided that in the event that Kamundilanga Marketing failed to pay for the maize seed supplied, the Defendant would settle the debt up to K400, 000.00. It was also stated that the maize seed was supplied on the condition that it would be paid for within ninety (90) days. When the ninety days elapsed and no payment was made, the Plaintiff sent a demand letter for payment in March, 2016 to Kamundilanga Marketing, but they found the shop closed.

PW1 still in her testimony stated that another demand letter was sent to Kamundilanga Marketing in May, 2016 and there was no response, and there was no one at their shop again. A third notice was sent to Kamundilanga Marketing by post, but the mail bounced. PW1 went on to testify that in September 2016, the Plaintiff wrote to the Defendant and informed them of the developments, but the Defendant did not respond. Then in February, 2017 the Plaintiff wrote a demand letter to the Defendant, and it responded asking for proof of the delivery of the maize seed to Kamundilanga Marketing, and the Plaintiff supplied all the documentation to the Defendant.

PW1 told the court that thereafter the Defendant had requested for time to establish the whereabouts of Kamundilanga Marketing. PW1 identified the document at page 1 as the Credit Guarantee Bond, explaining that

the document states that the Plaintiff's obligation was to supply maize seed to Kamundilanga Marketing up to the amount of K400, 000.00, while the Defendant's obligation was to cover Kamundilanga's debt in the event that Kamundilanga failed to pay the Plaintiff.

She also testified that at pages 2 and 3 of the Plaintiff's bundle of documents are the two delivery notes for the maize seed, one being system generated, while the other one was manually prepared. They were for the seed that was supplied in the amount of K315, 936.00, and that the said maize seed was received by Boniface Hamoya, the Director and Proprietor of Kamundilanga Marketing. The document at page 5 of the Plaintiff's bundle of documents was identified as the first demand letter that was sent to Kamundilanga Marketing, while the one at page 6 was the second demand letter also sent to Kamundilanga Marketing, and that at page 7 was the demand letter sent to Kamundilanga Marketing by post. The evidence of the bounced mail was at pages 8 to 9 of the Plaintiff's bundle of documents.

Still in her evidence, PW1 told the court that at page 10 was the first demand letter sent to the Defendant, adding that it was not responded to, and the one at page 11 was said to be the second demand letter sent to the Defendant, while the one at page 12 was the letter from the Defendant requesting for evidence of the delivery of the seed to Kamundilanga Marketing. Page 13 was said to be the cover letter authored by the Plaintiff to the Defendant enclosing the documentation requested, and page 14 was a letter to the Plaintiff from the Defendant on efforts to get in touch with Kamundilanga Marketing.

PW1 testified that the letter at page 15 of the Plaintiff's bundle of documents was a letter to the Defendant informing it that legal action

would be taken if the payment was not made. On paragraph 5 of the amended defence dated 18th December, 2017, that the Plaintiff did not exhaust efforts to locate Kamundilanga Marketing, PW1 stated that this was not true as they had exhausted all efforts, and at page 13 of the Plaintiff's bundle of documents was the letter they had written to the Defendant enclosing the letters at pages 5-7, including evidence of the bounced mail, which showed that they could not get hold of Kamundilanga Marketing.

That apart from writing Kamundilanga Marketing letters, physical visits were made to Kamundilanga Marketing. PW1 on the assertion by the Defendant that Kamundilanga Marketing is a business name, testified that the supply of the maize seed was based on a credit guarantee between the Defendant and the Plaintiff as contracting parties. PW1 asked the court to order the Defendant to pay K315, 936.00 with interest at the commercial bank lending rate, any other relief the court may deem fit and costs.

In the submissions filed by the Plaintiff on 18th June, 2018, it was stated that the issue in this matter is the enforceability of the Credit Guarantee Bond. That in order for the Plaintiff to recover, it must be shown that for the contract of guarantee to stand, there has to be an already existing contract or a main contract. Reference was made to the case of **LAKEMAN V MOUNTSTEPHEN 1874 LR 7 HL 17**, where Lord Selborne stated that;

“there can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto and need not be so at the time, but until there is a principal debtor, there can be no

suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

Further reliance was placed on the case of ***MTN ZAMBIA LIMITED V INVESTMENT BANK PLC APPEAL No 155 of 2015*** where it was held that ***"a guarantee is a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support of which it must fail"***.

That in this case, when the Defendant issued the credit guarantee, there was already in existence a contract between the Plaintiff and Kamundilanga Marketing who was the principal debtor and who had contracted to pay for the maize seed that the Plaintiff supplied. That upon failure by Kamundilanga Marketing to pay for the seed, the Plaintiff could recover the amount owing from the Defendant, on the strength of the Credit Guarantee Bond that the Defendant issued in favour of the Plaintiff.

In terms of what a guarantee is, the case of ***RE CONLEY 1938 2 ALL ER 17*** was relied on stating that the case defined a guarantee as ***"a promise to answer for the payment of some debt or the performance of some duty, in the case of failure of another person, who is in the first instance liable to such payment or performance or it can mean a collateral engagement to answer for the debt default or miscarriage of another person"***.

That going by the above definition, a contract of guarantee only becomes enforceable upon the default of the principal debtor to pay the debt or perform the obligations to the creditor. It was submitted that the evidence of PW1 showed that the Plaintiff supplied maize seed to Kamundilanga Marketing on the strength of the Credit Guarantee Bond

provided by the Defendant, in which it undertook to pay the debt, if Kamundilanga Marketing failed to pay.

It was further submitted that PW1 had testified that Kamundilanga Marketing was given ninety (90) days within which to pay, and upon failure to pay, the Plaintiff wrote the demand letters at pages 5, 6 and 7 of the Plaintiff's bundle of documents to Kamundilanga Marketing, the last one being by post, but the mail bounced. It was also submitted that when there was no response from Kamundilanga Marketing, the Plaintiff wrote to the Defendant in September, 2016 claiming payment, and when that letter was not responded to, the Plaintiff in February, 2017, wrote another demand letter to the Defendant, which the Defendant replied to, and asked for proof of delivery of the maize seed to Kamundilanga Marketing.

The Plaintiff's submission was that the letters written by the Plaintiff to Kamundilanga Marketing were reasonable efforts made by the Plaintiff to recover its money from Kamundilanga Marketing, and it therefore satisfied the conditions of the Credit Guarantee Bond, and is entitled to recover its money from the Defendant. That it is clear from the evidence that Kamundilanga Marketing defaulted in paying the money to the Plaintiff as a principal debtor, and it disappeared making it impossible for the Plaintiff to recover from it, and the Defendant having guaranteed to pay in the event that Kamundilanga defaulted, the Defendant is liable to pay the K315, 936.00 that Kamundilanga owes the Plaintiff.

On the Defendant's argument that the contract between the Plaintiff and Kamundilanga Marketing was void ab initio as Kamundilanga Marketing had no legal capacity to contract, as it is not an incorporated entity, the case of **YORKSHIRE RAILWAY WAGON COMPANY V MACLURE 1882**

21 CHD 309 was relied on. That it was held in that case that ***“there may be a transaction purporting to be a debt which is void, and yet a guarantee of that so called debt may be valid.”*** It was submitted that going by the above case, not all contracts entered into by persons (natural or artificial) with no capacity to do so, render subsequent contracts of guarantee void. Therefore in this case, while Kamundilanga Marketing had no capacity to borrow money, this does not render the contract of guarantee issued pursuant to such a debt void ab initio, and the Creditor, being the Plaintiff has a legal right to enforce the said contract of guarantee, which was a collateral contract.

It was further submitted that Kamundilanga Marketing being the Defendant’s client, the Defendant ought to have known that the said Kamundilanga Marketing had no legal capacity to contract. However, the Defendant went ahead to issue a Credit Guarantee Bond in favour of the Plaintiff undertaking to pay any amount owing to it by Kamundilanga Marketing in the event that Kamundilanga Marketing failed to do so.

It was prayed that the Defendant be ordered to honour its obligation as the unenforceability of the main contract did not render the contract of guarantee unenforceable.

I have considered the evidence. It is not in dispute that the Plaintiff produced invoices showing that it supplied Kamundilanga maize seed in the amount of K316, 936.00, and it is also not in dispute that the Defendant issued a Credit Guarantee Bond to the Plaintiff in which it undertook to guarantee payment to the Plaintiff up to the amount of K400, 000.00, if Kamundilanga Marketing failed to pay the sums due. It is a fact that the Plaintiff wrote demand letters to Kamundilanga Marketing for the payment of K316, 936.00, and Kamundilanga

Marketing did not respond, and the Plaintiff in September, 2016 wrote a demand letter to the Defendant demanding payment.

The question is whether the Defendant is liable to pay the sum of K315, 936.00 due to the Plaintiff from Kamundilanga Marketing by virtue of the Credit Guarantee Bond it issued to the Plaintiff? The Plaintiff in the submissions referred to the definition of a guarantee as defined in the case of **RE CONLEY 1938 2 ALL ER 17** as **“a promise to answer for the payment of some debt or the performance of some duty, in the case of failure of another person, who is in the first instance liable to such payment or performance or it can mean a collateral engagement to answer for the debt default or miscarriage of another person”**.

Halsbury's Laws of England Volume 20, 4th Edition re-issue defines a guarantee as **“an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person, whose primary liability to the promise must exist or be contemplated”**.

From the above, it can be seen that for a contract of guarantee to be valid it must be shown that there is another contract where another person is primarily liable to settle a debt or some other obligation. In this case, Kamundilanga Marketing contracted to buy maize seed from the Plaintiff and the Defendant executed a Credit Guarantee Bond with the Plaintiff in which it undertook to pay any amounts owing by Kamundilanga Marketing up to K400, 000.00. The evidence shows that Kamundilanga failed to pay the K315, 936.00 to the Plaintiff, and this was after the Plaintiff wrote it three demand letters which went unanswered. Physical visits made to Kamundilanga Marketing offices found the shop closed.

The Plaintiff in pursuance of the Credit Guarantee Bond issued by the Defendant then demanded payment from the Defendant. The Defendant in the amended defence filed on 18th December, 2017, stated that settlement of the claim to the Plaintiff was predicated on the Plaintiff exhausting all efforts to recover from Kamundilanga Marketing, as opposed to making mere reasonable efforts. Further, that the Credit Guarantee Bond is null and void ab initio with no corresponding liability on the Defendant, as Kamundilanga Marketing is a business name with no capacity to contract with the Plaintiff and Defendant.

On the legal capacity of Kamundilanga Marketing to contract, the Plaintiff in the submissions referred to the case of **YORKSHIRE RAILWAY WAGON COMPANY V MACLURE 1882 21 CHD 309**, where it was held that ***“there may be a transaction purporting to be a debt which is void, and yet a guarantee of that so called debt may be valid”***.

Halsbury’s Laws of England, 4th edition, Volume 9 at paragraph 225 on page 96 states that ***in general a valid contract may be made by any person recognized by law as having legal personality, ie natural persons, corporations and the crown. However the following classes of persons are in law incompetent to contract, and or are only capable of contracting to a limited extent or in a particular manner: bankrupts, minors, persons of unsound mind, alien enemies, drunkards, corporations, companies, partnerships and receivers of companies”***.

Chitty on Contracts 13th Edition, Volume 1, Sweet and Maxwell 2008 at paragraph 9-064 at page 746 states that ***“an unincorporated association is not a legal person and therefore cannot sue or be***

sued unless such a course is authorized by express or implied statutory provisions.... Nor can a contract be made so as to bind all persons who from time to time become members of such an association. But a contract purportedly made by or with an unincorporated association is not necessarily a nullity. If the person or persons who actually made the contract had no authority to contract on behalf of the members, they may be held to have contracted personally. On the other hand, if they had authority to contract on their behalf, the contract can be enforced by or against those members as co-principals to the contract by the ordinary rules of agency”.

Going by the above, while Kamundilanga Marketing is a business name, and therefore had no legal capacity to enter into a contract with the Plaintiff for the supply of maize seed, its member or members who actually contracted are deemed to have contracted personally if they did not have the authority of the other members to contract, and if they had such authority, they are liable as co-principals, on the basis that they were agents of the other members. There is no evidence on record as to which members of Kamundilanga Marketing entered into the contract for the supply of maize seed with the Plaintiff, but the evidence of PW1 was that the director of Kamundilanga Marketing, Boniface Hamoya received the maize seed when it was delivered.

However it is a matter of common knowledge that in order for Kamundilanga Marketing to be registered as a business name, there is a person or persons behind it as members. Therefore in this matter, the member or members of Kamundilanga Marketing are either personally liable or are liable as agents, and they are the principal debtors to the Plaintiff. It follows thus, that there is in existence a principal or principal

debtors to the Plaintiff, whose debt the Defendant contracted with the Plaintiff to guarantee, as evidenced on the Credit Guarantee Bond at page 1 of the Plaintiff's bundle of documents. The arguments by the Defendant that Kamundilanga Marketing had no legal capacity to contract cannot stand and will fail.

The Defendant also stated in the defence, that the Plaintiff did not exhaust all efforts to trace Kamundilanga Marketing for payment, and it therefore cannot claim the money owed by Kamundilanga Marketing from it. Indeed, Kamundilanga remained the principal debtor to the Plaintiff. However, as seen from the Credit Guarantee Bond, the Defendant contracted to guarantee payments due to the Plaintiff from the said Kamundilanga Marketing of up K400, 000.00 upon receipt of the suppliers written demand showing proof that they had exhausted all efforts of recovery from the client.

The debt owed by Kamundilanga Marketing to the Plaintiff was K315, 936.00. The delivery notes at pages 2 and 3 of the Plaintiff's bundle of documents show that Kamundilanga Marketing received the maize seed worth K315, 936.00. The documents at pages 5, 6, 7 and 8 of the Plaintiff's bundle of documents show that the Plaintiff demanded payment from Kamundilanga Marketing, and made physical visits to their offices in order to recover the amount owing to no avail, and also sent mail demanding payment, which mail bounced. Efforts were therefore made by the Plaintiff to recover from Kamundilanga Marketing, which efforts in my view were sufficient. The Defendant's argument that the Plaintiff did not exhaust all efforts to recover from Kamundilanga Marketing lack merit, and cannot succeed as a defence.

To the contrary, the Plaintiff demonstrated that it made efforts to recover from Kamundilanga Marketing, the principal debtor, and as such efforts failed, the Defendant as guarantor is liable to pay the Plaintiff, and the Plaintiff succeeds on a balance of probabilities. I accordingly enter judgment in favour of the Plaintiff for the sum of K315, 936.00, which amount shall carry interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment. The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 6th DAY OF JULY, 2018

S. Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE