IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 125 OF 2017

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

INTERMARKET BANKING CORPORATION LIMITED APPELLANT

AND

GOLDMAN INSURANCE LIMITED RESPONDENT

CORAM: CHASHI, SIAVWAPA AND NGULUBE

On the 23rd of January, 9th February, 28th March and 6th September, 2018

For the Appellant: R. Ngulube, Messrs Tembo Ngulube and Associates

For The Respondent: D. Kamfwa, Messrs Wilson and Cornhill

JUDGMENT

NGULUBE JA delivered the Judgment of the Court

Cases referred to:

1. Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) ZR 175

2. Holme vs. Brunskill)1877) QBD 278

3. Hackney Empire Limited vs. Aviva Insurance UK Limited (2013) B.L.R 728

This is an appeal against a Judgment of the High Court delivered on 10th November, 2016. The respondent who was the plaintiff in

the lower court, commenced an action by writ of summons on 10th February, 2014 claiming payment of the sum of ZMW 2,538,822=00, the balance of the admitted sum of ZMW 606,804=00 and the cover sum of ZMW 3,140,606=00 on the performance bond that was issued by the respondent in favour of the appellant over its contractual obligations to the Rural Electrification Authority (REA). The appellant sought damages for breach of the performance bond, interest on the sums due with costs.

In the lower court, the defendant filed a defence on 14th February, 2014, which was subsequently admitted with leave of the court to include a counter claim. It sought a refund of ZMW 606,804=00 and argued that there was a misrepresentation by the plaintiff. The defendant also sought damages for deceit and misrepresentation with interest.

The back ground of this matter is that, the plaintiff and the defendant had a mutual client, Plinth Technical Works Limited who was awarded five contracts by the Rural Electrification Authority (REA) for the supply, delivery, installation and commissioning of electricity grid extensions and transformers in selected rural areas in Zambia. The contrator was required as

part of the contract requirements to present bank performance guarantees to the REA on each of the five contracts. Plinth Technical Works Limited sought a performance guarantee from the appellant in favour of the REA, on condition that a back to back guarantee would be issued by the respondent.

It was agreed that, the performance guarantee would be issued in favour of the appellant for ZMW 3,140,260,000=00 (un rebased) and the appellant gave the respondent a format of the said guarantee which was subsequently issued on 10th October, 2012, in accordance with the format provided and it was supposed to remain valid from 10th October, 2012 to 10th April, 2014. Five separate performance guarantees were then issued in favour of REA for the five lots.

On 23rd January, 2014, the appellant's managing director wrote to the respondent advising that the appellant had received a letter of demand from REA, claiming ZMW 2,804,660=00 on the performance guarantees that were issued in favour of REA on account of default. However, the respondent accepted liability for lot 16, Kayambi project valued at ZMW 606,804 and rejected liability for other lots. The respondent paid ZMW 606,804 for lot 16 Kayambi as it stated that the appellant varied the terms of the

performance guarantees and that this was prejudicial to the respondent.

The respondent filed a counterclaim pleading that the performance guarantee which was issued by the appellant in favour of REA had been varied to expire on 13th June, 2013 instead of 10th April, 2014. The respondent demanded a refund of ZMW 606,804 which it stated was paid for lot 16 Kayambi due to the appellant's misrepresentation.

The learned trial Judge assessed the witness statements, the testimony of the witnesses, the rival arguments and found that the respondent made a payment to the appellant for lot 16 Kayambi on an expired performance guarantee when there was no legal liability on the part of the respondent. The court found that Plinth Technical Works Limited as a supplier was replaced by Grid Transmission Limited and that the guaranteed amount was adjusted from the initial ZMW 598,140 to ZMW 722,878=00 as was indicated in the supplementary bundle of documents.

The court held that, the variation of the terms and conditions of the initial agreement between the appellant and REA without the knowledge and consent of the respondent released the respondent from liability under the performance bond. The court

dismissed the appellant's claims for damages, interest and costs for lack of merit but found that the appellant was liable to refund the amount of ZMW 606,804=00 to the respondent for lot 16 Kayambi due to the deceit and misrepresentation.

Dissatisfied with the lower court's judgment, the appellants filed four grounds of appeal. With leave of court, the appellant filed an amended memorandum of appeal on 19th March, 2018 as follows:

On ground one that the court below fell into grave error when it failed to completely and finally determine all the issues in controversy between the parties. It was further submitted that the court failed to adjudicate upon the issues relating to the performance bond that were issued in respect of lot 3, Kayambi, lot 6, Kaulu and lot 8, Chikando.

On ground two, that the learned trial Judge erred by holding that the respondent was discharged from legal liability on account of being prejudiced when the appellant honoured its obligations to REA on the strength of the varied performance guarantees when there was no evidence at trial to prove such prejudice.

On ground three, that the learned trial Judge erred in law and fact by holding that the respondent was similarly discharged from

legal liability on account that Plinth Technical Works Limited was entitled to assume that it had been removed as contractor on lot 16, Kayambi owing to the existence of a different bank performance guarantee issued to REA in the name of another contractor.

On ground four, that the learned trial Judge erred in law and fact by holding that the appellant's variation of the bank performance guarantee issued to REA in respect of lot 2, Kangwena and lot 16, Kayambi had the effect of negating the validity of the performance bonds issued by the respondent to the appellant.

On ground five, that the learned trial Judge erred in law and fact by finding that the appellant could not sustain an action against the respondent for the recovery of the funds guaranteed by way of a performance guarantee bond on account of the decision or action by the appellant to place the account of Plinth Technical Works Limited in a debit balance.

We have considered the appellant's heads of argument in detail.

On ground one, it was submitted that the court failed to adjudicate on all the appellants claims in the settlement of the appellant's claim. It was submitted that the learned trial Judge

only identified two issues for determination, the performance bonds that were issued in respect of lot 2, Kangwena and lot 16, Kayambi.

It was submitted that the learned trial Judge also sought to determine the effect of the appellant's debiting of the account of Plinth Technical Works Limited with the full amount that was paid to REA and that the learned trial Judge did not address the issues relating to the performance bonds that covered lot 6, Kaulu, lot 8, Chikandu and lot 3, Chimfunshi.

It was further submitted that, the court focused on the varying of the performance guarantee bonds relating to lot 2, Kangwena and lot 16, Kayambi and failed to adjudicate upon the matters relating to lot 6, 8 and 3. Learned Counsel referred to the case of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**[1] on the duty of the trial court adjudicating upon all the issues in controversy and prayed that ground one succeeds.

On ground two, it was submitted that the performance bonds that the appellant issued to REA whose expiry dates were adjusted were lots 2 Kangwena and lot 16 Kayambi and that any demand by REA in the event of default by Plinth Technical Works

Limited was supposed to be made on or before 10th April, 2014. It was submitted that, the natural and ordinary meaning of the performance guarantee bonds was that any demand that would be made by the appellant to the respondent or REA to the appellant would have to be made on a date not later than 10th April, 2014.

It was submitted that, although it is common cause that the expiry dates for lot 2 Kangwena and lot 16 Kayambi were adjusted from 10th April, 2014 to 13th June, 2013, the variation did not prejudice the respondent to attract the invalidating of the performance guarantee bond that was issued by the respondent.

It was submitted that, the adjustment of the expiry date to 13th June, 2013 was within the demand period for encashment of the performance guarantee bond. As such, it was argued that there was no prejudice to the respondent nor was the validity of the performance guarantee bond affected.

It was submitted that the respondent failed to prove that it suffered any prejudice due to the appellant's variation of the two performance guarantee bonds that were issued to REA. It was argued that the learned trial judge erred by upholding the

respondent's counterclaim when no prejudice was proved. Counsel urged the court to find merit in ground two.

On ground three, it was submitted that, one of the performance guarantee bonds that was issued by the appellant to the REA had Grid Transmission Limited as its contractor which had no relationship with the respondent. It was submitted that, the learned trial Judge found Plinth Technical Works Limited was entitled to assume that it had been replaced as contractor on Lot 2 Kangwena project. It was argued that, the lower court made a finding of fact which was not supported by the evidence on record as Plinth Technical Works Limited complained about the variation of the expiry dates on the performance guarantee bonds. Counsel prayed that ground three succeeds as the lower court's finding of fact was erroneous and not supported by any evidence.

On ground four, it was submitted that the learned trial Judge failed to determine the appellant's claims regarding lot 3, Chimfunshi, lot 6 Kaulu and lot 8 Chikando. It was further submitted that, the performance guarantee bond issued by the respondent to the appellant shows that it was issued in the sum

of ZMW 3,140,626 for the said five lots. However, the respondent only indicated lot 16, Kayambi.

It was submitted that lots 3,6 and 8 were still valid and that the performance guarantee for the lots was still valid notwithstanding that the learned trial Judge did not address the issue of the validity of the other three lots. It was submitted that the intention of the parties was to create a performance guarantee bond for the five lots and that this is what the learned trial Judge should have found. It was submitted that, the respondent obtained security from Plinth Technical Works Limited that was worth over ZMW 3,000,000=00 and that its intention was definitely not to secure only lot 16, valued at ZMW 606,804.

Counsel urged the court to find that the five Lots that were awarded to Plinth Technical Works were secured by the performance guarantee bonds in the sum of K3,140,626=00 and prayed that this ground of appeal be upheld and that the respondent be ordered to pay the outstanding amount of ZMW 2,227,856=00 as the balance of ZMW 3,140,626 that was secured by the performance guarantee bond.

On ground five, it was submitted that, the appellant's decision to place the account of Plinth Technical Works Limited on a debit balance was so as to place it in an overdrawn position which would attract interest. It was submitted that, no funds were moved into the bank account to settle the demand that emanated from REA. Counsel submitted that, the court's finding that, by the appellant debiting the account of Plinth Technical Works Limited, then the respondent was discharged from liability under its performance guarantee bond was a grave misdirection. Counsel urged the court to find merit in this ground of appeal.

The learned Counsel for the respondent filed heads of argument in response to those of the appellant. On ground one, it was submitted that the learned trial Judge completely and finally adjudicated on all the issues in controversy. It was submitted that, the learned trial Judge stated the facts giving rise to the proceedings and reviewed the evidence of the parties, identifying the issues to be determined.

It was submitted that, the learned trial Judge identified the first issue for determination, the question being –

" The effect of the plaintiff's variation of the expiry date and any other terms of the performance guarantee the plaintiff issued in favour of REA in respect of Lot 2 Kangwena and Lot 16 Kayambi"

It was further submitted that, the second issue for determination was what effect the plaintiff's debiting of Plinth Technical Works Limited's account with the full amount that the plaintiff paid to REA had on the performance guarantee bonds.

It was submitted that, the learned trial Judge found that, by debiting Plinth Technical Works Limited, the appellants had no right to claim the same amount from the respondent because Plinth made good on that amount. It was submitted that the learned trial Judge found the respondent not liable to the appellant under the performance guarantee and the respondent accordingly prayed that ground one fails for being misconceived.

On ground two, the respondent's counsel submitted that, the learned trial Judge was on firm ground when she held that the respondent was discharged from liability on the performance bond issued in favour of REA when the appellant honoured its obligations to REA on the strength of the expired bank performance guarantees.

It was submitted that, the learned trial Judge ably dealt with the effect of the variation of the expiry dates on the two performance guarantees issued by the appellant in favour of REA and that the appellant breached the terms and conditions of its performance guarantee and prejudiced the respondent by agreeing with REA to reduce the period within which the appellant would receive the claims by twelve months from April 2014 to June 2013 without the consent of the respondent as surety. It was therefore concluded that this prejudiced the respondent. Counsel prayed that ground two be dismissed for lacking merit.

On ground three, it was submitted that, the learned trial Judge was on firm ground when she made the presumption that Plinth Technical Works Limited was entitled to assume that it had been removed as contractor on Lot 2 Kangwena owing to the same job being given to a different contractor. It was submitted that the awarding of the contract to another contractor can only lead to the inference that the previous contractor had been removed. Counsel prayed that ground three be dismissed for lacking merit.

On ground five, it was submitted that the learned trial Judge was on firm ground when she agreed with the respondent's submissions that by debiting Plinth's account, it made good the

claim and that the appellant had no right to claim the same amount debited on Plinth's account from the respondent. It was submitted that since Plinth Technical Works account did not have sufficient funds, its account was overdrawn thus giving the appellant an asset instead of a liability. Counsel prayed that ground five of the appeal be dismissed for lacking merit.

We have considered the grounds of appeal, the heads of argument and the submissions by counsel on behalf of the parties.

On ground one, a perusal of the record of appeal shows that performance security guarantees were issued in respect of five lots; these being lot 2, Kangwena, valued at ZMW 559,140=00, lot 3, Chimfunshi, valued at ZMW 767,728=00, lot, 6, Kaulu, valued at ZMW 864,988=00, lot 8, Chikando, valued at ZMW 305,966=00 and lot 16, Kayambi. The total value of the performance security guarantees was ZMW 3,140,626=00. It is also clear from the record of appeal (the record) that the respondent issued a performance bond in favour of the appellant for the total sum of ZMW 3,140,626=00 under policy number 010/510/1/000432/2012 in consideration of the appellant

issuing an equivalent amount for the guarantees covering Plinth Technical Works Limited to REA.

The record shows that, the leaned trial Judge adjudicated upon issues relating to lot 2, Kangwena and lot `6 Kayambi, and left out lots, 6, 8 and 3, Kaulu, Chikando and Chinfumshi, respectively. In the case of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**, the Supreme Court stated that a trial court has a duty to adjudicate upon every aspect of a suit between the parties so that every matter in controversy is determined to finality.

We find that, the learned trial Judge erred when she only focused on the two lots; 2 and `16, Kangwena and Kayambi without addressing the issues relating to the other three lots; Kaulu, Chikando and Chimfunshi, which were part of the performance guarantees bonds that were issued by the respondent to cover Plinth Works Limited for the total amount of K3,140,626=00. The lots, were not varied by the appellant and the learned trial Judge should have found as such. We find merit in ground one and it accordingly succeeds.

Regards ground two, it is a fundamental principle of the relationship between the guarantor, principal and creditor that a material variation of the primary obligation that potentially prejudices the guarantor will release the guarantee.

In the case of **Holme vs. Brunskill[2],** the court stated that, the principle is that if the guaranteed contract is altered without the surety's consent, it will be released from the guarantee unless it can be shown that the alteration was *"unsubstantial"* or one which cannot be prejudicial to the surety.

In the present case, the issue is whether the variation of the performance bonds by adjusting the dates from April, 2014 to June, 2013 was prejudicial to the respondent. Although the appellant did vary the performance bonds to expire on 13th June, 2013 instead of 10th April, 2014, we are of the view that the variations were not material and as such did not prejudice the respondent. We say so because the demand was made and received by the respondent within the agreed period of time, before 10th April, 2014.

We do not find that this alteration prejudiced the respondent and having found no prejudice was occasioned, the respondent is

liable under the guarantee. The learned trial Judge misdirected herself in finding that the respondent was prejudiced and that its liability was discharged due to the variation which we find was not material. We are of the view that the variation in this matter fell within the general purview of the original guarantee as the demand was made before 10th April, 2014.

Having found merit in ground two , it according succeeds. The effect of the success of ground two is that the respondent's counter claim is dismissed for lacking merit.

On ground three, we have read the letter written by the country director of Plinth Technical Works Limited to the appellant's managing director dated 18th December 2013, addressing a number of issues regarding the recall of the performance bond and advance payment guarantees. We note that the director did not mention the issue of the complaint that his company was replaced as contractor on 2, Kangwena. We find no basis for the learned trial Judge's finding that Plinth Technical Works Limited assumed that it had been removed as contractor on Lot 2, Kangwena because there is no evidence on record that Plinth Technical Works ever made such a complaint.

It therefore follows that the learned trial Judge's presumption was perverse and not supported by the evidence on record. As such, it is reversed for not having been properly arrived at. The learned trial Judge's finding that the respondent was discharged from legal liability on account of a complaint that Plinth Technical Works Limited did not make lacks merit. We find merit in ground three and it succeeds.

On ground four, the issue is whether the appellant's variation of the bank's performance guarantee that was issued to REA in respect of lot 2, Kangwena and Lot 16, Kayambi had the effect of negating the validity of the performance bond that was issued by the respondent to the appellant.

In the case of **Hackney Empire vs. Aviva Insurance UK Limited**[3]**,** Edwards-Stuart**,** J stated that-

"where the bond provides that it will not be invalidated by any alteration or variation to the principal contract or the surety agrees to the variation, the surety will only be liable if the contract as varied remains a contract within the general purview of the original guarantee."

Having found that the variation of the performance guarantees in respect of Lot 2, Kangwena and lot 16, Kayambi did not prejudice the respondent, it follows that the performance bond that was issued to the appellant by the respondent cannot be negated and remains valid. We are of the view that the evidence on record shows that the performance guarantees remained within the general purview of the original guarantee as the demands for payment on the two lots were made within the time that was agreed upon. It is evident from the record that the performance guarantee bond for the five Lots was for the total sum of ZMWW 3,140,626, covering all the works that were awarded to Plinth Technical Works Limited. We are of the view that the performance guarantee bonds were valid for Lots 3, 6 and 8 and as such, the learned trial Judge erred when she ignored the said three lots in determining the matter.

We find merit in ground four of the appeal and it accordingly succeeds.

In respect of ground five, it was submitted that the learned trial Judge erred by finding that Plinth Technical Works Limited's account had been placed on a debit balance by the appellant. The court went on to find that the net result was that Plinth

Technical Works Limited had made good the appellant's claim, thus terminating the liability of the respondent under the performance guarantee bonds.

Having considered the submissions by Counsel on this ground, we are of the view that the learned trial Judge misdirected herself in applying the wrong test in determining whether liability of a surety, in this case the appellant should be discharged. The evidence on record on this ground is that the appellant debited the account of Plinth Technical Works Limited by overdrawing the account as there was no money in this account. It is clear that this was an overdraft for the purposes of accruing interest on it.

We are therefore of the view that the respondent cannot be discharged from liability for the performance guarantee bonds when the appellant did not recover any money from Plinth Technical Works Limited due to their lack of sufficient funds in their account.

Having found that the respondent was not discharged from liability for the performance guarantee bonds, we find merit in this ground of appeal and it succeeds. The net result of the

appellant's success in the five grounds of appeal advanced is that this appeal succeeds. The respondents are liable to pay the appellants the sum of ZMW 2, 227,856=00, the balance of the sum of ZMW 606,884 that the respondent paid to the appellant for under the performance guarantee for lot 16, Kayambi. The appellant is awarded interest on the sum found due, ZMW 2,227,856=00, with costs in this court and in the court below. Same so taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

J.M. SIAVWAPA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE