TRINITY ENGINEERING (PVT) LTD
versus
RUSSELL KARIMAZONDO
and
MAXIFIX (PVT) LTD
and
TELECEL ZIMBABWE (PVT) LTD
and
PEOPLE'S OWN SAVINGS BANK
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 14, 15 July 2015 & 05 August 2015

Civil trial

L. Uriri, for the plaintiff
J. Mutevedzi, for the 1st defendant
2nd defendant in default
R.M Fitches, for the 3rd defendant

MATHONSI J: When matters of the family end up in court finding the truth in the maze of family disputation, especially when a loving father and husband finds himself having to choose between members of his family, is the proverbial searching for a needle in a haystack. Never mind that this is litigation mainly between incorporations which in itself may be deceiving indeed, but this matter seeks to resolve differences that have arisen within members of one family.

The plaintiff, which is an incorporation founded in 1975 by Senator Aguy Georgias, the major shareholder and the pulse of the company, instituted proceedings against the first defendant, who is Senator Georgias's son born out of wedlock, his company the second defendant and the other three defendants seeking an order nullifying mortgage bond number 01533/2011 registered in favour of the third defendant, Telecel Zimbabwe (Pvt) Ltd and mortgage bond number 04504/2011 registered in favour of the fourth defendant; People's Own Savings Bank and costs of suit.

The plaintiff's declaration contains the following relevant averments:

"8. On the 6th February 2011 the plaintiff and the first and second defendants entered into and signed an agreement in terms of which the first and second defendants would register a second Bond over plaintiff's property namely stand 374 Willowvale Township, Harare.
9. It was a term of the agreement that the bond was a covering bond for first and second defendants' draw down on airtime cards.
10. Having entered into the said agreement, it was a requirement that Trinity Engineering (Private) Limited represented by Senator Aguy Clement Georgias would sign a power of attorney to pass mortgage in favour of Telecel Zimbabwe (Private) Limited.
11.Trinity Engineering (Private) Limited and/or any of its duly authorised representatives did not sign such power of attorney to pass mortgage.
12. The first and second defendants however managed to have two bonds registered over the plaintiff's property without its mandate.
13. First and second defendants registered a bond over plaintiff's property in the sum of US$250 000. 00 in favour of fourth defendant through Messrs Mawere and Sibanda Legal Practitioners without the knowledge and consent of the plaintiff.
14. On the 4th March 2011, first and second defendants caused to be registered yet another bond over plaintiff's property in the sum of US$1 000 000.00 in favour of the third defendant.
15. In short, first and second defendants forged signatures of Aguy Clement Georgias on both Powers of Attorney to pass mortgage bonds and the respective minutes of the board of directors of Trinity Engineering (Private) Limited authorising the registration of the said bonds.
16. It is my humble submission that the bonds are null and void and as a result of forgery."

The last paragraph of the declaration is misplaced in its wording as it is a departure from standard pleading and assumes a personal nature of an affidavit which it is not.

Only the first, third and fourth defendants entered appearance and pleaded to the claim. I must say that the first defendant's initial plea filed on 23 January 2012 (he later amended it and filed a completely different plea recanting the first one), makes interesting reading to the extent that it is an unmitigated confession to forgery. Self-acting, the first defendant pleaded.

"The 1st defendant pleads as follows to the plaintiff's claim:
1. Ad Paragraph 1-7
   No issues arises (*sic*)
2. Ad Paragraph 8-9
   These are correct.
3. Ad Paragraph 10
   This is correct
4. Ad Paragraph 11-12
   This is admitted. I, on behalf of the second defendant connived with a representative of the third defendant in the person of its chairman, Mr James Makamba to forge Senator Georgias' signature as he was not acting expeditiously and was becoming reluctant to sign. Indeed I had no authority or mandate to so act.
5. Ad Paragraph 13
   This is admitted.
6. Ad Paragraph 14
   This is admitted. Again I reiterate that this was without the consent and knowledge of the plaintiff and/ or Mr Georgias.

7. Ad Paragraph 15-16
These are admitted.
WHEREFORE I and the second defendant admit that plaintiff be granted the prayer that it seeks."

As I have said, more than 2 years later on 31 October 2014, the first defendant recanted that plea in an amended plea averring that he never caused the registration of the bonds but the plaintiff itself did. The plaintiff registered the bond over its property in terms of the agreement of the parties and as consideration for that the second defendant paid the plaintiff again in terms of the agreement. The first defendant denied forging the signature of the plaintiff's representative on the powers of attorney and board minutes and asserted that the bonds are valid.

In its own plea, the third defendant insisted that the bond registered in its favour was registered by the plaintiff and is therefore valid. The third defendant counter claimed against the plaintiff and the second defendant for payment of US$686 172.38 due in terms of a credit agreement for the supply of recharge telecommunication cards to the second defendant wherein "the plaintiff agreed to stand as surety and co-principal debtor".

The third defendant's counter claim and plea was amended a number of times and now includes an averment that the plaintiff is bound by its contractual obligations evinced by the mortgage bond especially as, prior to issuing summons it was aware of the bond, made queries with the third defendant about the amount of indebtedness and never raised any contemporaneous objection or challenge to the signature. It further averred that the plaintiff had received the benefit of payments effected under the advance secured by the mortgage bond. The payment received by the plaintiff constitutes unjust enrichment.

The fourth defendant averred in its plea that the mortgage bond over the plaintiff's property registered in its favour was registered with the knowledge and consent of the plaintiff.

At the pretrial conference of the parties held before a Judge the dispute between the plaintiff and the fourth defendant was settled. According to the agreed pretrial conference minute;

"1. It was agreed that the fourth defendant, without admission of liability, does not oppose the relief sought against it, subjection (*sic*) to a cession of the said mortgage bond to CBZ Bank Limited pursuant to an agreement between the plaintiff and the said CBZ Bank Limited.
2. The plaintiff and the fourth defendant shall file of record a consent order recording the settlement between the said parties. Thereafter the fourth defendant will play no further part in these proceedings."

Indeed an order was granted by consent, per Kudya J, on 19 October 2012 in the following:

> "IT IS ORDERED THAT;
> 1. The 4th defendant, without admission of liability, does not oppose the relief sought against it by plaintiff subject to a cession of the mortgage bond number 04504/2011 to CBZ Bank Limited pursuant to an agreement between the plaintiff and the said CBZ Bank Limited.
> 2. Each party shall bear its own costs."

That way the fourth defendant was phased out of these proceedings. The trial involved the plaintiff against the first and third defendants only, the second defendant's defence having been struck off at the pre-trial conference. The claim of the third defendant against the second defendant was referred to the unopposed roll.

As between the plaintiff, the first and third defendants three issues were identified namely:

1. Whether the plaintiff's duly authorised agent signed the power of attorney authorising the registration of the mortgage bond in favour of the third defendant.
2. Whether the said mortgage bond in favour of the third defendant is valid.
3. Whether the plaintiff stood a surety and co-principal debtor for any amount that may be owing by the second defendant to the third defendant.

In order to tackle those issues each party called one witness with the plaintiff adding the testimony of its lawyer, Muyengwa Motsi to rebut certain allegations made against him.

Senator Aguy Clement Georgias testified on behalf of the plaintiff, while the first defendant himself gave evidence and Lovemore Masvingise testified for the third defendant.

The 80 year old Senator Georgias (Georgias) founded the plaintiff company in 1975. He is the majority shareholder and board chairman and talks fondly of his "business empire" which unfortunately he said is crumbling because of his involvement with the first defendant (Karimazondo) his son born out of wedlock.

Of course he has his wife, daughters and other sons but it is Karimazondo whom he did not know of until a few years ago-"about four, five or seven years ago" Then Karimazondo had pulled up in a flashy, Mercedes Benz ML Motor vehicle at his Trinity Engineering offices and introduced himself as his son. From the very beginning Georgias' evidence is at variance with that of Karimazondo who said that he first communicated on the telephone with his father in 1994 when he was doing the first year of his Bachelor of Business Administration at Solusi University. Thereafter Georgias assisted in paying his

University fees but he engaged him physically for the first time in year 2000 as his father, although he had seen him before.

Georgias says he was quite happy to meet his son who made an immediate impact because he was friendly with his daughters when his other boys from previous marriage did not relate well with his daughters. He was quick to point out that when one has children out of wedlock that is a problem presumably because they do not get along well with the main stream family. He trusted Karimazondo as he was optimistic that he would look after his other children well after his demise he being a brilliant young businessman. He was ready to make him an executive in his business empire.

Karimazondo wanted assistance from him to secure licences for his 20 recharge cards kiosks dotted around town which did not have licences. Georgias quickly stepped in by approaching Minister Chombo to expedite the licences which were issued. His son returned with a request for assistance to meet Minister Goche in an effort to get a business deal from Reward Kangai the head of Netone Cellular. Although he assisted, nothing came out of that Karimazondo was not done yet. He came back with a request to be assisted in meeting Minister Mohadi who was thought to be in a position to persuade James Makamba of Telecel to give the young businessman some money. Although he again took his son to him, Minister Mohadi was not impressed by the story and again nothing came out of that.

Subsequent to that Karimazondo then made a proposal to him for the sale of airtime cards and vouchers which resulted in an agreement, exhibit 1, being signed between them on 6 February 2011. The witness confirmed that his signature is appended on that agreement he having signed on behalf of the plaintiff. Karimazondo signed on behalf of the second defendant.

The preamble to that agreement recites that the second defendant's core business is the wholesale and retail of cellular airtime recharge cards/vouchers, that it had secured a roll-over facility with the third defendant to access re-charge cards/vouchers against suitable collateral of $1million and that the plaintiff was "willing to permit a mortgage bond to be registered" over its property in favour of the third defendant as security for the roll over facility. It further records that the bond would be a second bond after that in favour of POSB and that in return the parties would "profit share in the sale of the stock allotted by Telecel to Maxifix."

In terms of clause 2 of that agreement:

"2. <u>Bond Registration</u>

> Trinity shall do all such things and sign all such documents as may be required to enable a second bond in the sum of US$1 million to be registered over the property in favour of Telecel. The said bond shall have a fixed term of 12 months (the Bond Tenure) commencing from the date of registration. Maxifix shall bear all costs associated with the bond registration."

In terms of clause 4, in consideration for the collateral security the second defendant was, *inter alia*, to pay the plaintiff $50 000-00 within 15 working days from the date of initial draw-down, $500 000-00 within 8 weeks after the initial draw-down and service the first bond in favour of POSB by stop order.

Georgias denied ever signing the power of attorney to pass a mortgage bond either in favour of POSB or the third defendant stating that the signature on the power of attorney used by Wintertons to register the bond for the third defendant, while it is strikingly similar to his, is not his but a forgery.

He did not attend at Wintertons to sign it although they are his legal practitioners of long standing he having dealt with Mr Paul of that firm. They also did the conveyancing for his house. When he got to know that they had registered the bond on his property in favour of the third defendant he did not deem it necessary to take any action against them. He did not find it necessary to report what was clearly a criminal offence to the police as he was legally advised that it was not for him to do so but for the third defendant which has been prejudiced.

The witness stated that the existence of a bond in favour of the third defendant was not discovered by himself but his wife and daughter. When the two made the discovery they went about investigating the issue only to discover that the first defendant already owed the third defendant money which was now secured by the mortgage bond and not that he needed the bond to secure future advances.

When the existence of the third defendant's bond was brought to his attention he says he confronted the first defendant demanding to know why, as his son he could do such a thing to him when he had not met the conditions of their agreement, namely to pay him the sums set out in the agreement and to allow access to the books of the second defendant among others. He then pressured the first defendant to pay off the debt owed to the third defendant in order to have his property released from encumberment.

It was at that point that the first defendant admitted having forged the witness's signature which admission he demanded in writing. The first defendant was taken to Harare Central Police Station to depose to an affidavit, exh 2, making that confession. The affidavit which was sworn to on 22 January 2012 reads in relevant part thus:

"I, RUSSEL KARIMAZONDO, ID NO 29-162678 M 47 of No 163 Robert Mugabe Road Harare, do hereby make oath and swear that:-

1. I am the director of Maxifix (Private) Limited of 163 Robert Mugabe Road, Harare.

2. I confirm that I forged the signatures of Senator Aguy Clement Goergias to pass two mortgage bonds in favour of Telecel Zimbabwe and People's Own Saving Bank amounting to US$1 250 000-00.

3. I also forged Senator Georgias's signatures on the purported minutes of the Board of Directors of Trinity Engineering (Private) Limited authorising the registration of the said bonds.

4. The mortgage bond numbers are 04504/2011and 01533/2011 respectively.

5. For all intents and purposes it was my intention to pay off the bonds but failed to do so because of Mr James Makamba of Telecel who did not perform his side of the transaction as agreed.

6. I apologise to Senator Georgias for my misdemeanour."

This is interesting indeed. A person confessing to having committed a crime of forgery was, even as he made the confession, still blaming someone else for his crime. I shall return to deal with the credibility of the first defendant later. But for now, let it suffice that Georgias stated that when the first defendant intimated that he wanted to make arrangements to pay, he advised him to go to his lawyers to do that. The engagement with first defendant ended, according to the father, with the latter vowing that he never wanted to see his son again. He has kept his word.

Georgias denied receiving any payment from the first and second defendants whom he said failed to meet any of the conditions in exh 1. He denied ever attending at the offices of the third defendant to inquire about the status of the account maintaining that it is his wife and daughter who did that. He denied standing as surety and co-principal debtor for the due performance of the second defendant's liability to the third defendant.

Under cross-examination Georgias made quite surprising statements regarding the entire dispute. Although both his summons and his exh 2 (Karimazondo's affidavit) state categorically that the power of attorney and resolution of the board of directors used to register the POSB bond were forged, he was adamant that the POSB bond registration was, proper and there was no forgery involved at all.

In fact he said that bond has been paid off through an arrangement he had with CBZ Bank. He literally disowned the contents of his summons and declaration.

But then life can never be that easy. A party to proceedings is bound by its pleadings. In addition, it is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He cannot have it both ways: *S* v *Marutsi* 199- (2) ZLR 370 (S). The basis of the plaintiff's claim is that both bonds were registered on the strength of forged documents and the pleadings were not amended. It cannot turn around when it suits it, to accept one bond as having been lawfully registered and persist on the other having been a fraud. It is either both were unlawfully registered or not. It is not easy to accept the testimony of a prevaricating witness, and ordinarily adverse inferences have to be drawn against such a witness. Of course Mr Uriri tried to give that evidence a new colour in his closing address stating that the plaintiff abandoned the claim against POSB for other reasons than what was stated by the witness. Counsel cannot give evidence.

Although he claimed to have discovered a crime and to being very angry with Karimazondo, someone he never wanted to see again, he did not find it necessary to report the crime. He left that to the third defendant, a party which was enjoying the benefit of security which it is seeking to enforce. While he accused Wintertons of fraudulently registering a bond on his property, he says he did not raise any complaint with them and did not find it necessary to sue them because he never dealt with them in the first place and saw no need to "bother them."

In the end what was left was his self-serving denial of his signature and the confessions of his son who had made it a point to change his story each time an opportunity presented itself. On the signature itself, he was requested by Mr *Fitches* for the third defendant to provide a specimen of the signature from the witness box which he did. He admitted that the signature on exh 1, the agreement with the second defendant, is his, so is the one on the discovery affidavit and the two of them have a striking resemblance not only with the specimen produced in court but also with the signature on the power of attorney used to register the bond.

To my untrained eye, there is absolutely no difference between the signature on the power of attorney and the other three signatures attributed to Georgias. They are the same. In that regard, I find it quite strange that Georgias, whose entire case hinges on him successfully disowning the signature on the power of attorney, with all his years as a businessman of repute and with the benefit of very competent legal representation, did not bother to enlist the services of a handwriting expert to assist him in his endeavours. Only an expert would

have authoritatively dealt with the issues of signatures and told us if his signature was forged, not the mere say so of an extremely conflicted witness.

An adverse inference must be drawn against the plaintiff's failure to adduce the evidence of an expert to resolve the disputed signature. As I have said, to me the questioned signature resembles that of Georgias. His failure to bring an expert can only mean that he was aware that the expert would confirm that he signed the power of attorney, as I hereby find as a fact that he did.

I am fortified in my conclusion by the manner in which the whole saga unfolded. As I have said, it is not Goergias of his own volition, who stood up to challenge the bond in favour of the third defendant. In fact, as reference to the letters from his legal practitioners dated 1 and 5 August 2011 will show, long after the bond had been registered, he was happy to seek to harvest from the effects of the registered bond. It is his wife and daughter who took the leading role in raising a red flag. Although Georgias did not say so in his evidence, according to his summary of evidence, his wife received a summons from POSB. When he went to investigate the issue, she discovered there was another bond registered on the property in favour of the third defendant. Problems then started for Georgias, who was quick to point out himself at the commencement of his testimony that if one has children out of wedlock that creates problems.

I would not want to speculate, but one cannot resist the conclusion that when questioned about the bond which was benefiting only his newly found son, Georgias was forced to disown it. It is for that reason that this matter has come up. How else can one explain his insistence on enforcing an agreement which could only bear fruits upon registration of the bond, long after the bond had been registered on 7 March 2011. I am here referring to the letters from Gollop and Bank in August 2011, which incidentally did not complain about his signature in the power of attorney?

On 1 August 2011, Gollop and Bank then representing the plaintiff, complained to Karimazondo thus:

> "Senator Goergias advises that he met with you on Thursday 28th July 2011 to discuss the outstanding issues mentioned in our two previous letters. ... Our instructions are that you undertook to comply with the payment of $500 000-00 mentioned under Clause 4 ii of the principal agreement by no later than Wednesday 3rd August 2011 and that you would also ensure that all payments due by Trinity in favour of the POSB as mention in Clause 4 iii would be paid up to date. In addition to the above you gave an undertaking to afford Trinity's representative access to all your company records concerning payments that had been received from Telecel as provided for with reference to Clause 3 and the sub-clauses thereunder forthwith.

> We are instructed to write to you to confirm these arrangements which have been entered into and concluded with you by Trinity on a purely 'without prejudice' basis and more particularly in an attempt to keep the agreement alive. ....
>
> In the event that your promised payments are not effected by the close of business on Wednesday 3rd August 2011our client instructs us that it shall deem the agreement violated and that cancellation take place. Damages arising from the breach are reserved and in addition our client, in the event that funds do (sic) to it under the agreement have been diverted, will rise a complaint of fraud alternatively theft by conversation with the Zimbabwe Republic Police as a criminal complaint. Hopefully this can be avoided. The delays thus far are completely unacceptable and require immediate rectification."

In terms of exh 1, the third defendant was only going to make advances against suitable collateral of US$1 million and the parties would enjoy "profit share in the sales of the stock allotted by Telecel to Maxifix" after registration of the bond. The plaintiff could thus only claim as it did in the above letter after registration for the bond.

On 5 August 2011 Gollop and Bank addressed another letter, this time to the third defendant, which reads in part:

> "Maxifix approached Trinity with a proposal to share in the profit of the sale of the recharge cards/vouchers which were to be administered by Maxifix. The consideration to profit-sharing was dependant upon Trinity giving authority that its immovable property 70 Woolwich Road, Willowvale, Harare be released to Maxifix so that it in turn could be handed over to Telecel who would register a bond over the property equivalent to the amount of the required security reflected in the principal agreement. Other undertakings by Maxifix are set out in the agreement attached to this letter.
>
> Trinity advise that Maxifix have breached various terms and conditions of the agreement between them. In consequence, Maxifix has been put on terms to remedy its default but thus far has neglected to do so. The Trinity bond's tenure in terms of clause 2 was for a period of 12 months. It is not known whether registration of the bond has taken place. Trinity have requested that steps be taken to cancel the bond which they assert has been registered in consequence of fraudulent representations, clearly evidenced by the default of Maxifix coupled with the conduct of the Managing Director……..
>
> Are you in a position to confirm whether a bond has been registered in Telecel's favour over Trinity's property? If so, would Telecel agree (to) the cancellation of the bond and return of title to Trinity?"

Of course the plaintiff may have been laying the ground work for litigation and experienced legal practitioners give away very little, but rocket science is not required to decipher what was happening here because there can only be one interpretation that can be assigned to this letter. It is that the plaintiff was aware that the bond was either in the process of being registered or it had been registered hence the need to have it cancelled. Significantly there is no mention whatsoever of the signature having been forged. In fact the gist of the

"fraudulent representations" was not forging the signature but the default of the second defendant coupled with the conduct of Karimazondo which prompted the plaintiff to put the second defendant "on terms to remedy its default."

I therefore come to the inescapable conclusion that the plaintiff agreed to the registration of the bond and that Georgias signed the documentation to make this possible. When the second defendant failed to honour its side of the bargain and realising what a bad business decision it had made, the plaintiff resorted to disowning the bond.

Muyengwa Motsi is the legal practitioner representing the plaintiff who has instructed counsel in these proceedings. He is accused by Karimazondo of having drafted the first plea that Karimazondo filed in which he admitted having forged Georgias's signature and the affidavit, exh 2. He was brought in specifically to rebut those allegations and did not make a good job of it.

What is noteworthy is that he claims to have met Karimazondo for the first time at Georgias' offices located at Construction House in early January 2012. He had been called by his client to come and intercede between him and his son with a view of resolving the matter amicably. His advice was that Karimazondo had to simply pay off the debt in order to release the plaintiff's property from encumberment. He denied drafting the pleas and confession affidavit.

When his attention was drawn to the fact that January 2012 came long after the summons commencing action in this matter had been issued on 18 August 2011, he was puzzled indeed. In fact, if he met Karimazondo in January 2012, it coincides with the time that the disowned plea was filed, it having been filed on 23 January 2012 and the time that the confession affidavit was made on 22 January 2012.

When he regained his composure *Motsi* stated that he must have met Karimazondo at Construction House in January 2011. Unfortunately for him that is not possible because then the parties had not concluded even the principal agreement, exh 1, which was only signed in February 2011 and was to take effect on 6 February 2011. The mortgage bond forming the basis of the dispute, was only registered on 7 March 2011. He could not have been advising the parties about the alleged forgery even before it had allegedly occurred.

Motsi was not being candid with the court. His only saving grace is that his accuser is a person who cannot be believed in the end because he has discredited himself by changing statements, for whatever reason, with changes in the weather. Had it not been that, I would

have made findings about *Motsi's* professional conduct with necessary consequences. However, the accusations cannot be relied upon.

Which then brings me to the evidence of Karimazondo which I must say cannot be useful to any court of law. For whatever reasons, he signed and filed a plea in this court on 23 January 2012 which breaks all legal records by its bizarre contents constituting a confession in a suit against him with serious consequences to himself and his business. Under oath he stated in exh 2 that, he had committed a crime by forging his father's signature. Instead of assuming full responsibility for that infraction, he blamed it on James Makamba, not for anything else but for denying him credit.

Much later, when it suited him, he turned round and deposed to an affidavit in the pursuit of recanting his earlier plea, in HC 8033/13 accusing the plaintiff's lawyer of having prepared the plea for him and filing it. He eventually filed an amended plea asserting that his father had indeed signed the power of attorney for the bond registration. In his testimony in court he stuck to the story that indeed his father signed the power of attorney and that he had lied in his earlier pleading and on oath under duress, his father having threatened him.

That may well be so, but all credibility has been lost. It is trite that where a witness has been shown to have lied, everything that he says should be rejected. There is logic in that because a court of law may never know when the truth is told by such a witness. It is only safe to reject everything the witness says as I hereby proceed to do. It means therefore that both his alleged confession and his testimony in court after he says he had undergone some damascene experience and seen the light, are of no use to the court and are rejected.

Lovemore Masvingise who, at the material time was the credit control manager of the third defendant, testified on behalf of the latter. He is now the administration manager, he having been in the employ of the third defendant for a period of 15 years.

Masvingise stated that the third defendant had stopped giving credit to the second defendant because it had an outstanding debt. It then demanded security to cover the historical and future debt for it could resume business with the second defendant. That is when the second defendant's representative, Karimazondo brought an agreement between them and the plaintiff, exh 1. He confirmed the contents of that agreement including the agreement to register a mortgage bond in favour of the third defendant. He stated that the third defendant insisted on the registration of the bond, as per that agreement, before it could resume business with the second defendant. That way the bond was registered although he, as credit control manager, had not seen the plaintiff's representative to verify the authenticity of

their undertaking before the bond was registered. At that time the second defendant already owed money which is now a sum of $686 172-38.

After satisfying himself of the registration of the bond, they resumed providing airtime cards to the second defendant for its operations. On its part, the second defendant made some payments towards the debt but the aforesaid sum is still owing.

It was after the security had been registered that Georgias' wife and daughter came to his office inquiring about the status of the second defendant's account. He refused to divulge any information to them because they were not the account holders. Later, Georgias who was known to him as a public figure but he was meeting for the first time physically, came to his office in the company of his daughter. He also inquired about the status of the account. Masvingise says, initially he refused to divulge anything because the account did not belong to them. Georgias pressed for it, reminding the witness that his property was encumbered by a bond securing that account. At that he relented and gave Georgias the information that he required.

Georgias' concern was that the second defendant was not servicing the debt which situation was putting his property at risk. He also complained that the second defendant was not paying to him what was due in terms of the principal agreement. The witness then formulated the impression that the plaintiff was aware of the registration of the bond and consented to it.

Under cross examination, the witness readily accepted that the third defendant did not have a suretyship agreement with the plaintiff, except the bond, that he had not communicated with the plaintiff about the security prior to the registration of the bond as he relied entirely on Karimazondo and that nowhere (other than the mortgage bond) does the plaintiff commit itself as a surety and co-principal debtor. He also readily accepted that when they gave the second defendant an indulgence in the repayment agreement signed on 6 April 2011, they had not consulted the plaintiff.

Musvingise gave his evidence very well and did not try to add anything that would put the third defendant's case in a better light. He was quick to make concessions where that was called for and his demeanor was very good. He struck me as a credible witness. As Mr *Mutevedzi* for the first defendant put it, he gave his evidence with admirable confidence and candour. I embrace his evidence which is itself simply that the third defendant is owed a sum of $686178-38 in respect of airtime re-charge cards advanced to the second defendant on credit. The second defendant has not settled that amount, which is secured by a mortgage

bond passed by the plaintiff on its property. For that reason both the second defendant and the plaintiff are liable to the third defendant for that amount jointly and severally, the plaintiff by virtue of the mortgage bond in question.

In the course of this judgment, I have virtually answered the issues for trial. The plaintiff failed dismally to prove that its representative did not sign the power of attorney authorizing the registration of the mortgage surety bond in favour of the third defendant. In fact the evidence placed before me shows, on a balance of probabilities that Georgias signed that document.

The plaintiff had sought to invalidate the mortgage bond, not on any other ground than that the signature on the power of attorney was forged. It failed to establish the forgery and to the extent that the mortgage bond was registered on the strength of a power of attorney signed by Georgias, it is valid.

I accept that in the heat of drafting pleadings the third defendants counsel made the averments that the plaintiff had stood as surety and co-principal debtor for the amounts that are owed by the second defendant when there is no suretyship agreement to that effect and when the third defendant did not deal with the plaintiff at all prior to the registration. However, that is of academic interest only given the legal effect of a mortgage bond which the plaintiff acceded to with its eyes, or is it those of its directors, very wide open.

This is because a mortgage bond is in essence, an acknowledgment of debt backed up by the security of immovable property. *Stricto sensu* in conveyancing, a mortgage bond is executed by either the owner of the immovable property or a legal practitioner (Conveyancer) authorized by the owner in the presence of the registrar of deeds for it to be valid. Where the owner has given the conveyancer a power of attorney which is valid to appear on his behalf and register the bond, a bond so registered is valid and creates a creditor and debtor relationship between the mortgagee and mortgagor respectively.

Mr *Uriri* for the plaintiff submitted that there exists four grounds upon which the mortgage bond should be nullified namely that Georgias' signature was forged; the power of attorney for its registration was irregular by reason that it fell foul of s 78 (a) of the Deeds Registries Act [*Chapter 20:05*] to the extent that, according to the evidence of Karimazondo, it was signed in the absence of witnesses; although purporting to be a surety the bond was not predicated on a tripartite agreement between the plaintiff, the second and third defendants and finally that it does not accord with the terms of the principal agreement between the plaintiff and the second defendant.

I have canvassed the first ground relating to the signature allegedly forged and found that the signature was not forged. The other 3 grounds sought to be relied upon were not identified as trial issues. I shall however address them.

Section 78 (a) of the Deeds Registries Act [*Chapter 20:05*] provides:

> "Powers of attorney to pass deeds or to do any act in connection with a deeds registry shall, if executed within Zimbabwe be accepted if witnessed by two competent witnesses or by a justice of the peace or commissioner of oaths and the signature of each such witness, the justice of the peace or commissioner of oaths, as the case may be, has been affixed thereto in the presence of the person executing it."

Mr *Uriri* submitted that the power of attorney was invalid by reason that, according to Karimazondo, it was signed by Georgias alone in the absence of witnesses. He urged me to nullify the mortage bond on the basis that the power of attorney signed in breach of s 78 (a) could not found a valid bond. I do not agree that the power of attorney was signed in the absence of two witnesses. For a start, two witnessed appended their signatures on that document as a seal that they witnessed the signing by Georgias and on the face of it, there was compliance with the provisions of s 78(a).

The problem with Mr *Uriri*'s argument is that it relies on the evidence of Karimazondo and his alone. I have already rejected that evidence as being demonstrably unreliable. It therefore cannot form the basis for impugning an otherwise valid power of attorney.

Mr *Uriri* submitted that the power of attorney should be nullified on the further basis, firstly that there was no tripartite agreement involving the plaintiff, the second and third defendants. A surety bond should have an underlying suretyship agreement. Secondly, the bond itself as registered was at variance with the terms of the principal agreement between the plaintiff and the second defendant.

Mr *Fitches* for the third defendant objected strongly to the reliance on that argument in light of the fact that it was not pleaded thereby depriving the defendants an opportunity to respond to it and appears to have been highlighted in closing submissions. I must say that those issues were canvassed during the cross examination of witnesses but were certainly not pleaded. More importantly, they were not made issues for trial at the pre trial conference of the parties. The same applies to the submission that by entering into an agreement post the default to extend the time to pay, the second and third defendants released the surety. Can the plaintiff be allowed to raise a new cause of action which is not contained in the pleadings? I think not. I have said that a party is bound by its pleadings.

Even if I am wrong in that conclusion, the plaintiff's cause cannot be rescued because having denied the mortgage bond, it cannot at the same time rely on it on the merits. The plaintiff cannot approbate and reprobate at the same time. That principle is to the effect that a person cannot on the one hand state that a transaction is invalid and then turn round on the other to state that it is valid for purposes of securing some other advantage: *Archipelago (Pvt) Ltd* v *Local Authorities Pension Fund & Anor* SC 30/13; *Fulner* v *Freeman* 1985 (3) SA555 (C).

Allied to that is the question of the disparity between the terms of the principal agreement and the mortgage bond. This was not the cause of action relied upon by the plaintiff in the suit. Even if it had been relied upon it would not affect the liability of the plaintiff to the third defendant. This is because suretyship is a separate agreement between the surety and the creditor. Mr *Uriri* referred to a part in Caney's *The Law of Suretyship*, 6th ed, Juta p 30 where it is stated that there are three parties involved in a suretyship to the extent that the suretyship agreement is an accessory to the principal obligation and suggested that there must at all times be a principal suretyship agreement.

What counsel overlooked was the extrapolation by the authors at p 31 :

> "Although there are three parties involved, there is not necessarily a tripartite agreement or contract; indeed, in practice there seldom is. There is the transaction, as a result of which the principal debtor is bound to the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus the principal debtor is bound to the creditor, and there is a contract between creditor and surety by which each is bound to the other. Thus the principal debtor is not necessarily a party to the contract between the surety and the creditor, but nonetheless, there comes into existence the obligation of the principal debtor to reimburse the surety what he pays the creditor……. The surety's obligation arise from the making of the contract of suretyship, from then he becomes bound to the creditor and from then he becomes a conditional creditor to the principal debtor in relation to his right of recourse against the latter."(the underlining is mine)

What is clear therefore is that the suretyship agreement, although accessory, is a stand alone one binding the surety to the creditor. In the present case what we have is a suretyship created by a mortgage bond which the plaintiff passed through the medium of its attorney. Mr *Mutevedzi* made the vital point that the mortgage bond itself, without recourse to any other document, is evidence of liability that the plaintiff undertook. After all it is an acknowledgment of indebtedness in which the mortgagor agreed to:

> "…… bind itself as surety and Co-Principal Debtor in the sum of US$1 000 000-00 (one million United States Dollars) ('the capital sum') for the due payment of the said indebtedness of the Principal Debtor under the facilities and as security to hypothecate the immovable property of the mortgagor herein – after described."

In my view that was a separate suretyship agreement binding the plaintiff. In that regard all the other issues of how and why it came about and the contents of the agreement between the second and third defendants pale. The liability of the plaintiff arises from the mortgage bond that it passed with its eyes very wide open which I find as valid and binding.

It has been argued on behalf of the plaintiff that the extension of time to pay given to the second defendant by the agreement signed after default released the plaintiff from liability in terms of the suretyship agreement. I have already said that the plaintiff is not entitled to make that argument when it denied the existence of the suretyship and/or validity of the bond. This would amount to approbating and reprobating at the same time. Even if it had been on properly made it would fail.

My attention has been drawn to the remarks of the learned authors, C F Forstyth & JT Pretorius in *Caney's The Law of Suretyship ibid*, at p 208 which settles that issue. They remarked:

> "Although the old authorities are not entirety harmonious on the question of the effect of an extension of time, the law was laid down by the *Appellate Division in Estate Liebenberg* v *Standard Bank of South Africa Ltd* (1927 AD 502 at 520 ff). The central rule is that where the creditor gives the debtor more time in which to pay before the debt falls due, and time is of the essence, that amounts to a material alteration and releases the surety. Unlike in English Law,should the grant be made after the debtor is in *mora*, the surety is not released. This is because the surety can avoid any prejudice in such circumstances by paying the debt when it falls due and exercising his right of recourse against the debtor." (The underlining is mine)

In the present case I have found as proved that the plaintiff gave Peter Joseph Moor of Wintertons a valid power of attorney to appear before the Registrar of Deeds and pass the mortgage bond in favour of the third defendant. All the conveyancing formalities were complied with. To that extent therefore the plaintiff is bound as surety and co-principal debtor. That, in any event is the whole basis for requiring security of that nature. So that in the event of a default, the creditor will fall back on the security. It can only do so if the mortgagor is so bound.

The third defendant has asked for costs on an admonitory scale to be awarded against the plaintiff. Such costs are awarded, first and foremost as a seal of the court's disapproval of the conduct of a party as well as recompense to a party that has been unnecessarily put out of pocket. The findings I have made in this matter point to conduct on the part of the plaintiff that should be admonished. A party that led itself to a bad business decision set about to pull the wool of over the court's eye by disowning what it had voluntarily done. In the process it

dragged everyone through a lengthy and expensive trial which could have been avoided. The case cries out for punitive costs.

In the result, it is ordered that;

1. The plaintiff's claim is hereby dismissed with costs on a legal practitioner and client scale.
2. The 3rd defendant's counter claim succeeds to the extent that judgment is hereby entered in its favour against the plaintiff and the 2nd defendant jointly and severally, the one paying the other to be absolved in the sum of US$686 172-38 together with interest at the rate of 5% per annum with effect from 1 May 2011 to date of payment.
3. The plaintiff and the 2nd defendant shall bear the 3rd defendant's costs on a legal practitioner and client scale.

Messrs Motsi & Associates, plaintiff's legal practitioners
Mutangamira & Associates, 1st defendant's legal practitioners
Scanlen & Holderness, 3rd defendant's legal practitioners