STANBIC BANK ZIMBABWE LIMITED

Versus

NEIL WILLIAM RIX

And

FRANCOIS VAN DER ZEE

And

ALCO FOREST INDUSTRIES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO24 JANUARY & 13 & 20 FEBRUARY 2014

L. Ndlovu, for applicant
G. Nyoni, for respondents

Opposed Court Application

KAMOCHA J: The applicant in this matter is seeking an order in the following terms:

"IT IS HEREBY ORDERED THAT:-

(1) Leave be and is hereby granted to the applicant to execute on judgment number HB 24/13 and notwithstanding the respondents' appeal to the Supreme Court.
(2) The respondents, jointly and severally, the one paying the others to be absolved, shall pay the costs of suit."

The facts giving rise to this matter may be summerised as follows. By letter dated 2 March 2010 Stanbic Bank Zimbabwe Limited "the bank" offered a loan facility to Birdland Trading (Private) Limited "the company" which offer the company accepted on that same day. Birdland actually received from the bank a total of $794 860,54 in terms of the said loan facility.

In order to secure that loan Neil William Rix, Francis Van Der Zee and a company called Alco Forest Industries (Pvt) Ltd signed suretyship agreements binding themselves as sureties and co-principal debtors for the due repayment of the loan. As sureties the three respondents meant that if Birdland failed to pay the loan they undertook to do so themselves.

Birdland did fail to pay the loan and the respondents were expected to have come to its rescue and paid in terms of their undertakings as sureties but they also were unable to do so. The bank was left with no option but to institute action proceedings under case number HC

1252/11 against the company and the three respondents jointly and severally the one paying the others to be absolved.

On 8 September 2011 the bank applied for and was granted summary judgment against the respondents and the company in the following terms:-

"It is ordered that:-

(1) Judgment with costs on the legal practitioners and client scale be and is hereby entered against the four defendants, jointly and severally, the one paying the others to be absolved for payment of US$794 860,54 together with interest thereon at the rate of 31.8% per annum from 1 May 2011 to date of payment.
(2) Stand 16463 Bulawayo Township of stand 13567 Bulawayo Township held by fourth defendant under Deed of Transfer No. 2103/2004 be and is hereby declared specially executable."

This judgment is extant and has not been appealed against. The company and its three sureties have no complaints against that judgment and ought to expect it to be executed one day or another.

With that realization the company i.e. Birdland Trading (Pvt) Ltd applied for and was granted an *ex parte* provisional order placing it under provisional judicial management.

It was only the company which applied for and was granted provisional judicial management. The three respondents were not party to those proceedings and neither did they apply to be allowed to participate in the proceedings. They do not intend to apply for provisional judicial management. As natural persons the 1st and 2nd respondents would, of course, not.

However, paragraph 4 of the interim relief granted to the company provided that:-

"Pending the return date all actions and the executions of all writs, summons and other processes against the company and its guarantors be and are hereby stayed and shall not be proceeded without the leave of this court." Emphasis added

In my view, the protection against all actions and proceedings and the execution of all writs, summons and other processes should have been limited to Birdland Trading Industries (Pvt) Ltd only as it was the one that sought to be placed under provisional judicial management. There was no basis for extending the protection to the sureties who never sought to be placed on provisional judicial management and were not parties to those proceedings. The extension of the protection to them was, in my view, a patent error.

The respondents sought to benefit from the protection which they did not seek and were not party to the proceedings wherein the company was granted that protection. They had no legal basis for wanting to be associated to that protection. Their claim to the protection is clearly *mala fide*.

Since the extension of the protection granted to these *mala fide* guarantors was a patent error the bank in terms of order 49 rule (1) (a) and (b) of the bank filed a court application under

HC 3519/11 seeking the variation or correction of the wording of paragraph 4 of the provisional judicial management order. The three respondents opposed the application without success. The order of the court was in these terms:-

"Order

(1) Paragraph (4) of the provisional order issued by this court in HC 2616/11 and dated 21 September 2011 is amended by the deletion of "and its guarantors"
(2) The applicant is granted leave to execute on the judgment granted in its favour against the 1st, 2nd and 3rd respondents which was issued against the respondents on case number 2226/11 and dated 8 September, 2011.
(3) The costs of this application shall be costs in the cause in HC 1252/11 and shall be paid by the respondents on the legal practitioner and client scale."

The respondents noted an appeal to the Supreme Court against the judgment of this court. The bank sought leave to execute on the judgment pending the appeal but the respondents opposed the application.

At the hearing both parties referred this court to the case of *South Cape Corporation* vs *Engineering Management Services* 1977 (3) SA 534 (A) particularly at 544H-545H where the court held that:-

"The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised … in exercising this discretion, the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:-

(1) The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted.
(2) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused.
(3) The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has not been noted with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or to harass the other party; and
(4) Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent the balance of hardship or convenience, as the case may be."

As already observed in this judgment the respondents executed suretyships and are liable in solidium as co-principal debtors with Birdland Trading (Pvt) Ltd. In simple terms they undertook to pay the loan in full in the event of Birdland being unable to pay. In the result no harm or prejudice whatsoever would be sustained by the respondents if leave to execute would be granted.

It came out at the hearing of the matter that Birdland Trading (Pvt) Ltd has since applied for and was granted a provisional liquidation order. The company has made the already bad

situation of the respondents worse. They can no longer try to cling to the provisional judicial management which the company must have abandoned as provisional judicial management cannot exist side by side with provisional liquidation, in my view. It is therefore clear that the company is unable to pay and its guarantors will have to do so.

It was submitted by the bank that it had suffered and continued to suffer irreparable financial prejudice for as long as the respondents delayed the execution of the writ against them. It pointed out that part of its business was lending money to clients on specific repayment terms and the repayments were used to on-lend to other clients. Consequently the potentiality of irreparable financial prejudice being sustained by the bank and which would continue to be sustained by the bank and which would continue to be sustained if leave to execute were to be refused is very obvious and beyond question.

In this matter this court specifically finds that the respondents bound themselves as sureties and co-principal debtors with Birdland Trading (Pvt) ltd for the repayment of the bank loan. They failed to pay the bank loan and the bank sought and was granted summary judgment against them in case number HC 2226/11 and they have not sought to appeal against the judgment. They accept it as binding on them. They therefore, know that the writ against them would be executed ultimately. There is no lawful basis for them to delay execution of the judgment against them in light of the fact that they are bound jointly and severally with Birdland Trading (Pvt) Ltd for the repayment of the bank loan.

The outcome of the appeal against the judgment of this court in case number HC 2226/11 will have no bearing on their liability to satisfy to summary judgment against them.

Turning to the question of costs, this court holds that this is a proper case where an award of punitive costs should be granted. The respondents conducted themselves in a reprehensible manner. They sought to benefit from an order of provisional judicial management granted to Birdland Trading (Pvt) Ltd to which they were not parties. Their appeal does not have any prospects of success and was noted for the purpose of buying time. Summary judgment was granted against them. They accepted it as binding on them. They knew that it will ultimately have to be satisfied but still opposed execution pending appeal. They acted *mala fide.*

In the result I would grant the application in terms of the draft at page 1 of this judgment.

Calderwood, Bryce-Hendrie & Partners, applicant's legal practitioners
Messrs Moyo & Nyoni, respondent's legal practitioners