

STANBIC BANK ZIMBABWE LTD

APPLICANT

Versus

NEIL WILLIAM RIX

1ST RESPONDENT

And

FRANCOIS VAN DER ZEE

2ND RESPONDENT

And

ALCO FOREST INDUSTRIES (PVT) LTD

3RD RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
CHEDA AJ
BULAWAYO 26 NOVEMBER 2012 & 14 JANUARY 2013

*Advocate L. Nkomo instructed by J. Moyo for the applicant
G. Nyoni for the respondents*

Judgment

CHEDA AJ: This is an application for an amendment of a provisional draft order issued on 21 September 2011 placing Birdland Trading (Pvt) Ltd (the company) under Provisional Judicial Management and other relief. The particular part targeted by this application is paragraph 4 of the provisional order which reads as follows:

- “4. Pending the return date all actions and proceedings and the execution of all writs, summons and other process against the company and its guarantors (my emphasis) be and are hereby stayed and shall not be proceeded without the leave of this court.”

What gave rise to this application is that on 8 September 2011, under case number HC 2226/11 the applicant got a judgment against Birdland Trading (Pvt) Ltd, Neil William Rix, Francois Van De Zee and Alco Forest Industries (Pvt) Ltd who are 2nd, 3rd and 4th respondents in this application. The judgment was for the four respondents to pay the applicant US\$794 860,54 and costs on a legal practitioner and client scale jointly and severally, the one paying the others to be absolved, and interest at the rate of 31.8% per annum from May 2011 to day of payment.

The liability of the other respondents in that judgment is because they signed suretyship agreements for the company's debt. After this judgment was granted, on 21 September 2011 Birdland Trading (Pvt) Ltd, applied for, and got an order for it to be placed under Provisional Judicial Management and other relief. It is this provisional order which included all its guarantors in the proceedings to be stayed. The provisional draft order was duly advertised in the Chronicle Newspaper and the Government Gazette of 14 October 2011.

The applicant is now unable to execute against the guarantors of the company because of their inclusion in the provisional draft order. This application now seeks the deletion of that part of the order so that the applicant can proceed against the guarantors of the company. Applicant contends that there was no basis for the provisional order to protect anyone other than the company concerned. It says the court was not told why the order relating to Birdland Trading (Pvt) Ltd should apply to the respondents and there is no legal basis for them to enjoy the same protection as they were not party to the application by the company and they made no request to be included in the suspension of execution. They are not insolvent. They signed as guarantors so that the applicant can fall back on them in the event that the company was unable to pay its debt. This is what has now happened and they must now pay. The court is now asked to delete them from the provisional draft order.

The application is opposed by the respondents. In his opposing affidavit, Neil William Rix, one of the respondents, says he and 2nd respondent were co-directors of the company until the date of the provisional order placing it under judicial management. They stood as guarantors for various loans that were advanced to the company by the applicant and they signed suretyship agreements in their individual capacities and also on behalf of the 3rd respondent. The agreements did not contain any renunciation clauses or renunciation of benefits "exclusion and division".

The agreement contains the following on clause 8:

Default

"If the borrower should fail to make payment by due date of any amount due in terms of the facilities or any other facilities that the Bank has accorded the Borrower or may offer to the Borrower, or breaches any term, representation, warranty, undertaking or condition of the Facility Letter or any other facility the bank may grant to the Borrower or any other facility between the Borrower and Standard Bank Group Limited or any other subsidiary or associate company of the Bank, or become insolvent, or be provisionally sequestered, or be provisionally or finally wound up or be unable to pay its debts as they become due, or be placed under provisional or final judicial management, ... then in any such event the full amount of the Facilities and any other facilities accorded to the Borrower by the bank, then the outstanding, and all charges

accrued thereon, together with additional interest as defined ... shall immediately become due and payable.”

In addition the suretyship documents signed by the respondents provide as follows on clause 5.

“5. Insolvency of debtor or the sureties

If the debtor or sureties or their estates are provisionally or finally placed in or under liquidation, judicial management or sequestration -

5.1 and Stanbic does not prove any claim against the Debtor or any other sureties in full or in part or abandon all or part of its claim this shall not affect its right to recover from the Sureties the full amount of its indebtedness under this suretyship.”

This clause shows that the provisional judicial management order should not have the effect of barring the applicant from proceedings to recover against the respondent. The respondents in this case are not just directors of the company they are sureties. They signed these documents clearly appreciating what was intended. They agreed to bear the liability of the company should it be placed under judicial management. They meant that if the company fails to pay they will pay. The company has now failed to pay and has been placed under judicial management, the very same situation for which the suretyships were made. They should not now be allowed to hide behind the judicial management order. The judicial management provisional order has not been confirmed. There is nothing to show that they have moved for its confirmation.

The judgment granted against them is still intact. It was obtained before the order for judicial management. It would appear the provisional order was obtained to protect them. It has no finality so far.

The provisional order provides on paragraph 4 as follows:

“4. Pending the return date all actions and proceedings and the execution 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.”

Clearly this paragraph gives the court discretion to allow the proceedings against the guarantors if the court deems it necessary on good cause shown. In this case I am satisfied that a good case has been made out for me to exercise any discretion in favour of the applicant. I am also not persuaded by the argument for the respondents that the court is not supposed to

interfere with or review the provisional order. The parties themselves agreed that the court can exercise its discretion as far as executing against the sureties is concerned.

I agree with the submission by the applicant that the application for judicial management was intended to protect the company, and no foundation was laid for the need to grant the respondents the same protection. It seems this was done to shield them from liability and stall the judgment already granted against them.

The respondents question why the applicant has not opposed the confirmation of the provisional order, yet they too have not taken any steps to have it confirmed. It has also been submitted that the application for the Provisional Judicial Management order was not cited in this application as it is its order that will be affected. That may appear to be so, but the part of the order to be deleted does not affect the company or prejudice it in any way. The order will affect only the respondents.

In my view the applicant has made out a proper case for the relief sought in terms of the draft. The relief sought by the applicant is clear from its founding affidavit and is stated as follows:

“As a result of that portion of the order, applicant has been unable to proceed with the execution against the respondents.”

I am satisfied that in view of the above I can exercise my discretion in favour of the applicant and authorize execution against the respondents, a discretion which is also granted to me by the provisional order itself where it says,

“... pending the return date all actions and proceedings and execution of all writs and 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.”

This shows that the court can in its discretion grant such leave. I am satisfied that the applicant has made out a case that justifies my exercising my discretion in its favour.

Order

1. Paragraph 4 of the provisional order issued by this honourable 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 8th September 2011.
3. The costs of this application shall be costs in the cause in HC 12523/11 and shall be paid by the respondents on the legal practitioner and client scale.

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