

BONIFACE DENENGA
and
LORRANE DENENGA
versus
ECOBANK ZIMBABWE (PVT) LTD
and
STRIVEWELL INVESTMENTS P/L
(being represented herein by Mr. Makuyana The judicial manager)
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 10 April 2014

Urgent chamber application

MAWADZE J: I received this urgent chamber application on 4 February 2014 at about 1430 hours. I immediately attended to the matter and after reading the documents filed of record I declined to set down the matter on account that the matter is not urgent. An endorsement to that effect was made the same day. I latter received a letter from the Registrar dated 24 march 2014 indicating that the applicants have noted an appeal against my refusal to set down the matter on an urgent basis. I was thus required to give further reasons for the decision I now proceed to do so.

The terms of the provisional order sought are as follows,

“INTERIM RELIEF GRANTED

1. 1st AND 3rd respondent be and are hereby ordered to stay execution pending the filing of an application for late filing of Rescission of Judgement to be filed within forty eight (48) hours of this order.
2. Costs be costs in this cause.

SERVICE OF PROVISIONAL ORDER

Service of this order to be effected by applicant’s legal practitioners” (sic)

The appellants are self actors and one wonders as to which legal practitioner are being referred to.

The terms of the final order are as follows;

“TERMS OF FINAL ORDER SOUGHT.

That you show cause why a final order should not be made in the following terms;

1. 1st and 3rd respondents be and are hereby ordered to permanently stay execution in case number HC 59112/13
2. Costs be cause in the cause.” (sic)

The background facts of this mater are as follows:

The first respondent on 10 July 2013 issued summons out of this court claiming the following against the applicants and the second respondent jointly and severally the one paying the other to be absolved.

- “a. Payment of US\$288 519-90 due in respect of an unpaid loan facility advanced to first defendant (now 2nd respondent) by the plaintiff (now 1st respondent)
- b. Interest at the penalty rate from time to time, currently at 24% per annum, compounded on a monthly basis with effect from 30 June 2013.
- c. Payment of the sum of US\$ 163 633-35 due in respect of an overdraft facility extended to the first defendant by the plaintiff.
- d. Interest thereon at a penalty rate 24% per annum, compounded on a monthly basis with effect from 30 June 2013 to the date of full payment in full.
- e. An order declaring a certain piece of land in this District of Salisbury being stand 375 Borrowdale Brook Township of Stand 137 Borrowdale Brook Town Ship measuring 2 206 square metres specially executable
- f. Collection commission thereon calculated in accordance with By-Law 70 of the Law Society of Zimbabwe By-Laws 1982.
- g. Costs of suit on a legal practitioner attorney – client scale.”

The first respondent Ecobank Zimbabwe Ltd is a duly registered company in terms of the laws of Zimbabwe and carries out business as a registered commercial bank. The second respondent Strivewell investments (Pvt) Ltd t/a Denenga Supermarkets is a duly registered company in terms of the law of Zimbabwe. Both the first and second appellants whose relationship is not clear reside at no 375 Brook Way, Borrowdale Brook, Harare.

On 29 June 2012 the first respondent and the second respondent entered into a written agreement (attached to the declaration) in which the first respondent provided to the second respondent banking facility firstly as a loan payable on specified terms and overdraft facility also repaid on specified terms in the amounts claimed in the summons. The second respondent breached both the loan agreement and the agreement relating to the overdraft facility by failing to pay amounts due hence both amounts became immediately due and payable in accordance with the agreement.

The first and second applicants are party to the proceedings in that they signed a guarantee document and binding themselves as surety and co-principal debtors with the second respondent for repayment of all sums due and outstandings to the first respondent Ecobank Zimbabwe Limited. As part of the agreement both first and second applicants registered a surety mortgage bond over a certain piece of land 375 Borrowdale Brook Township of Stand Number 137 Borrowdale Broke Harare. The first and second applicants are therefore jointly and severally liable with the second respondent to the first respondent in the amounts claimed.

The second respondent was served with the summons on 8 August 2013. Both the first and second applicants were served with the summons at their place of residence No 375 Brook Way Borrowdale Brook Harare through their maid Esther Kubwire on 29 July 2013. Neither the second respondent nor the both first and second applicants entered an appearance to defend. On 10 October 2013 the first respondent applied for a default judgement which was granted by my brother MATHONSI J on 16 October 2013 as per the first respondent's claim in the summons. Subsequent to that writ of execution against the immovable property Stand 375 Borrowdale Brook township of Stand 137 Borrowdale Brook Township in the District of Salisbury measuring 2 206 m² was issued on 5 November 2013. A notice of seizure and attachment was issued on 31 January 2014 with the removal date being 4 February 2014. This triggered the filing of this urgent chamber application by the first and second applicants on 4 February 2014.

In explaining the urgency of the matter both applicants admit being served with the summons on 29 July 2013. They both said they took the summons to one Mr. Munyaka who was the Judicial Manager of the second respondent and were advised to leave the matter in Mr Munyaka's hands. Thereafter from July 2013 they both did nothing to check if anything had been done by Mr. Munyaka. Both applicants only sprang to action when the Sheriff of Zimbabwe visited their residence on 30 January 2014 armed with a notice of seizure and

attachment. The applicants blame Mr. Munyaka, whose affidavit is not even attached for their predicament, for their failure to enter an appearance to defend. The applicants believe they have a *bona fide* defence to the first respondent's claim as they challenge the correctness of the amounts due both in respect of the loan facility and the overdraft facility. They seem to admit to be in breach of the agreement but do not state the amount they believe to be due.

As already said after I perused the documents filed by both applicants I formed the opinion that the matter is not urgent and declined to set down the matter for hearing.

The question of what constitutes urgency is settled in our law. See *Kuverenga v Registrar General and Anor* 1998 (1) ZLR 188 at 193 F (H); *Gifford v Mazire and Ors* 2007 (2) ZLR at 134 H-135 A (H).

The general thread which runs through all these cases is that a matter is urgent if,

- (a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
- (b) There is no other alternative remedy.
- (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.
- (d) The relief sought should be of an interim nature and proper at law.

I am not satisfied that the applicants have been able to make a case for the matter to be heard on an urgent basis. Firstly both applicants were sued in their respective capacities as co-principal debtors in terms of the agreement they both signed. The cause of action is clear. They were both properly served with the summons and did not enter an appearance to defend. It is clear that both applicants did not treat this matter as urgent themselves. The mind boggles why both applicants believed one M. Munyaka would absolve them of their obligations at law. Both applicants were being sued in the personal capacities in terms of the agreement they both signed. There is nothing in the papers filed to show what other action the applicants took after the inexplicable decision to leave their fate to the hands of Mr. Munyaka. They simply waited for the day of reckoning. Indeed the day arrived on 30 January 2014, 6 Months later after service of summons, and in order to avert the inevitable doom they rushed to court seeking to be heard on an urgent basis. There is no good reason why the court should treat this matter as urgent when the applicants themselves did not treat it as such. The urgency alleged is self created. To sum it all, the applicants have not even applied for the rescission of the default judgement. They are

clearly out of time. They are yet to file an application for Condonation of Late Filing of an application for rescission of judgement. It is upon this basis that I am asked to grant the interim relief sought! In other words I am being asked to treat this matter as urgent and grant temporary stay of execution pending nothing.

It is precisely for the reasons outlined above that I hold the view that this matter is not urgent and I declined to set it down. The reasons thereof were communicated, in a summary form, to the Registrar on the same day I received the application.