STANDARD CHARTERED BANK ZIMBABWE
LIMITED
versus
DEXTER TAWONA NDUNA
and
SCHOLASTICA NDUNA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 August and 26, October 2017

Opposed Application

Miss *E Drury*, for the applicant
E Samukange, for the 1st & 2nd respondents

MANGOTA J: The respondents are husband and wife. They successfully applied for a loan from the applicant. They did not service the loan.

The applicant sued them. It obtained a judgment for provisional sentence against the respondents and Badon Enterprises (Pvt) Ltd in the sum of $231 171-60 with interest thereon at 23.5% per annum. The interest was calculated from 30 June, 2013 to the date of full payment. The judgment is under case number HC 6556/13.

On 2 September, 2015 the order for provisional sentence was made a final order. Following the final order which I have referred to, the applicant levied execution of the judgment through the office of the Deputy Sheriff. He was not able to locate any assets which belonged to the respondents to satisfy the judgment debt. A *nulla bona* was, accordingly, returned.

Following the *nulla bona* return of service and applicant's other attempts to have the judgment debt satisfied, the applicant remained of the view that the respondents have committed an act of insolvency within the meaning of section 11 (b) of the Insolvency Act [*Chapter 6:04*] ("the Act"). It filed the present application in terms of s 12 of the Act as read with r 4 d of the High Court Rules, 1971. It moved the court to provisionally sequestrate the respondents' estates.

The respondents opposed the application. They submitted that they were not devoid of means with which to satisfy the judgment debt. They averred that they engaged in some farming activity and they had many cattle which they could sell and pay part of the debt. The first respondent said he had a Ford Ranger motor vehicle which had a value of $40 000. He insisted that he was not insolvent. He said he enjoyed a monthly salary which he requested the applicant to garnish. He stated that he earns allowances for chairing the portfolio committee on corruption. He averred that the house which he used as security for the debt had a value of $120 000. He insisted that his wife and him should not be declared insolvent. He stated that they realised an amount of $50 000 - $70 000 per month from their farming activity. Both of them challenged the appointment of Mr Winsely Evans Militala of Petwin Executor & Trust Company as their provisional trustee. They said he was not a fair adjudicator and was fighting the first respondent whom he wanted to fix. They, therefore, objected to his appointment as trustee. They moved the court to dismiss the application with costs on a higher scale.

The first respondent is a member of the Parliament of Zimbabwe. He is, therefore, an honourable person. He is, to the stated extent, expected to hold himself with honour. When however, he fails to do so, as *in casu*, the honour which is reposed in him will easily take flight of him and he has no one to blame but himself for having conducted himself in a dishonourable way.

On the day of the hearing of this application, the court postponed the matter to a future date to allow the parties to negotiate with a view to reaching a settlement. The postponement was at the request of the respondents. The matter which was to be heard on 5 July, 2017 was, accordingly, postponed to 1 August, 2017.

On the mentioned date, the parties appeared before the court. They advised that no settlement had been reached.

The respondents unsuccessfully applied for leave to file a supplementary affidavit. The affidavit, they said, aimed at showing that they were not insolvent.

The applicant strenuously opposed the application. It remained of the view that the application was a delaying tactic which was of immense prejudice to it.

The court ruled against the respondents. It remained alive to the fact that the respondents gave no reasons at all for not having included the contents of the intended supplementary affidavit in their opposing affidavit. It also was aware that the respondents appeared before it on 5 July, 2017 and, instead of talking about having the supplementary affidavit filed, they talked about a possible settlement of the matter which, as it turned out,

never came to be. It agreed with the applicant which stated, correctly so, that the suggested route remained prejudicial to it. The respondents conveyed a distinct impression of a party which intended to delay the hearing of the main matter as much as it could and, for the mentioned reasons, the court ruled against it.

The respondents made efforts to show that they were able to pay the debt which they owed to the applicant. The bottom line, however, is that they paid nothing from the time that payment became due todate. It is displeasing to learn that they did not meet their obligation to the applicant even when the court ordered them to do so.

The provisional sentence was entered against the respondents on 11 September, 2013. The final order was made on 2 September, 2015.

The respondents gave no reasons at all for not complying in whole or, in part, with the court order. All they could said was that they have the means to pay and they would pay. They made statements which were not supported by any deed or positive conduct.

The applicant made every effort to recover what was due to it from the respondents without success. The writ of execution which it issued on 30 October, 2013 had a *nulla bona* return. It issued further writs on 12 November 2013, 22 March 2014 and 8 May, 2015. None of those writs brought any good news to it. The applicant's unchallenged assertion was that the first respondent resisted its effort to realise the security which it held for the judgement debt.

The respondents' assertions which were to the effect that they operated a vibrant farm from which they realised between $50 000 to $70 000 per month were not substantiated. Nor was the issue of the cattle which they said they owned ever supported by any concrete evidence apart from their statement which is filed of record. The first respondent's Barclays Bank statement had a balance of $3 393-78 as at 13 September, 2016. The claim that the second respondent has substantial amounts of money in her account was not substantiated. The sum which is in the account was not stated. The first respondent produced no evidence which showed that he owned the Ford Ranger motor vehicle. Nor did he produce any valuation papers which showed that the property which he used as security for the debt was valued at $120 000. The respondents did, in short, make statements which they did not support with any evidence.

The applicant applied under s 12 of the Act. Subsection (1) of section 12 states, in part, as follows:

> "(1) A petitioner for the sequestration of the estate of a debtor who is insolvent or who has committed an act of insolvency may be made to the High Court by –

(a) a creditor who has a liquidated claim for not less than such amount as may be prescribed; or
(b) ……..; or
(c) ……." [emphasis added]

The applicant, it is noted, is a judgment creditor of the respondents. It has a liquidated claim against them. It is, therefore, entitled to apply for the sequestration of the respondents' estates. The judgment which it holds against them has remained unsatisfied for a considerable length of time. It, in terms of subsection 3 of the same section, specified:

(a) the amount, cause or nature of its claim against the respondents; and
(b) that it holds the first respondent's property as security against its claim; and
(c) that the respondents are insolvent.

I am satisfied, from the foregoing matters, that the applicant meets all the requirements which are stated in s 13 of the Act. The respondents, in my considered view, failed to satisfy the judgment debt which they owe to the applicant. They committed an act of insolvency.

The respondents' assertion which was to the effect that they were in the process of obtaining further immovable property was completely devoid of merit. The agreement of sale which they attached to their opposing papers shows that Nduna Abattoirs (Pvt) Ltd, and not the respondents, is the purchaser of the property. Reference is made in this regard to Annexure A which appears at page 38 of the record. The respondents would know, as much as anyone does, that a company is a separate legal *persona* which is different from those who form or found it. The property it purchased does not belong to the respondents. It belongs to itself. That property cannot, therefore, be used to settle the debts of the respondents unless, of course, the company is their *alter ego*. The respondents did not make any assertion to the stated effect. The annexure which they attached to their opposing papers does not, therefore, take their case any further than where they left it.

The application was, in my view, properly made and well argued. It resonated well with the *dictum* which the court made in *De Waard* v *Audrew Thiehaus Ltd*, 1907 T.S 727 which, commenting on the subject at hand, stated as follows:

"….., when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him; first, a judgment is obtained against him then a writ is taken out, and he must expect, if he does not satisfy the claim, that his estate will be sequestrated. …. the court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says: "I am sorry

> that I cannot pay my creditors, but my assets, far exceed my liabilities. To my mind the best proof of solvency is that a man should pay his debts, and I therefore always examine in a critical spirit the case of a man who does not pay what he owes." (emphasis added).

The cited case is no doubt of persuasive value. It, however, falls on all fours with the current application where the respondents continued to say they will pay but paid nothing. A *fortiori* when what they said were their assets remained unsubstantiated allegations apart from the sum of $3393.78 which was in the first respondent's bank account as at 13 September 2016.

The respondents stated in their heads that a sequestration order would not be justified in instances where there was other disposable property which could satisfy the debt. They submitted that the applicant failed to prove that they did not indicate to the Sheriff that they do not have sufficient disposable property.

The applicant, in the court's view, did not have to prove the stated matter. It was incumbent upon the respondents to show the Sheriff that they had sufficient disposable property which could satisfy the debt. The applicant does not know the respondents' property. It does not know where that property is located or situated. They do. They were, therefore, expected to have indicated their property to the Sheriff.

Evidence which was led showed that the applicant issued four writs in its effort to satisfy the judgment which had been entered in its favour. That was as much as it could go. It could not do anything further than what it did.

It is trite that he who alleges must prove. The respondents alleged that they had sufficient property which could satisfy the applicant's debt. They should, therefore, have produced evidence to the Sheriff or the court showing the existence of the property which they alleged they owned.

The respondents challenged the appointment of Mr Militala as trustee for their estates. The applicant made concessions on that matter. Mr Militala will not, therefore, be appointed as trustee. The applicant will, in the mentioned regard, find a replacement for Mr Militala.

The court has considered all the circumstances of this case. It is satisfied that the respondents do not have the means to satisfy the judgment debt. It will, in the circumstances, be to the advantage of the applicant and other creditors of the respondents to grant the application.

The application is, therefore, granted as prayed subject to the applicant replacing Mr Militala with another trustee of its own choice.

Honey & Blackenberg, applicant' legal practitioners
Venturas & Samkange, respondent's legal practitioners