ALECS HWEKWETE

And

JUDY HWEKWETE

Versus

RENAISSANCE MERCHANT BANK LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 25 & 26 JANUARY 2012

G. Nyoni for applicants
P. Ncube for respondents

Urgent Chamber Application

NDOU J: The applicants seek a provisional order in the following terms:

"Terms of the final order sought

That you show cause why a final order should not be granted in the following terms:

1. The sale in execution of immovable property namely Lot 8 of Lot 37A Lochview situate in the district of Bulawayo measuring 5 427 square metres in pursuance of the judgment under case number HC 237/11 be and is hereby stayed pending the final determination of case number HC 221/12 and the subsequent applicant for suspension of sale of an immovable property.
2. The 1st respondent pays the costs of this application.

Interim order granted

That pending the final determination of this application, it is ordered that:

3. The 1st and 2nd respondents or any of their authorized officers, be and are hereby ordered to stop the sale in execution of the immovable property described in paragraph 1 herein pending the final conclusion of this application."

The salient facts of the matter are the following. On or about 5 November 2009 at the instance and request of CMS Leather (Pvt) Ltd trading as Footwear and Rubber Industries

("Footwear and Rubber Industries"), 1st respondent lent/and advanced a sum of US60 000,00 to the former. That loan was secured by a special hypothecation over Lot 8 of Lot 37A Lochview ("Lot 8") also known as number 3 Hill Road Lochview, Bulawayo. The applicants were also guarantors to the loan and to that effect signed unlimited guarantees in favour of the 1st respondent. Based on the agreement between the parties, a bond was registered over Lot 8 with the consent and acceptance of the applicants which bond provided for foreclosure proceedings should the loan remain unpaid. On the basis of that, the loan was then disbursed to Footwear and Rubber Industries. When Footwear and Rubber Industries defaulted 1st respondent called up the bond and issued summons against the guarantors in January 2011 claiming the sum of US$73 447,69 with interest at the rate of 42,5% compounded daily and an order declaring Lot 8 executable. The applicants filed an appearance to defend on 10 February 2011 leading to an application for summary judgment on 28 March 2011. That application was not opposed and on 21 April 2011, judgment was granted in favour of the 1st respondent against the applicants. On 18 July 2011, Lot 8 was attached by the Deputy Sheriff pursuant to a warrant of execution that had been issued by the 1st respondent. Thereafter, applicants approached their erstwhile legal practitioners. Nothing was done by the applicants from July 2011 to December 2011. The applicants only sprung into action on 15 December 2011 when they saw that Lot 8 was advertised for sale for 16 December 2011. They filed an application in terms of Rule 348A (5a) to suspend and/or stop the sale on the basis that a reasonable offer had been made of US$1 500,00 a month with effect from 31 December 2011 and that the sale would cause undue hardship to them. That application was opposed the very next day as it was improperly before the court. The sale was however cancelled by the Deputy Sheriff for some other reason unrelated to that application. That application was withdrawn by the applicants on 3 January 2012. Thereafter, Lot 8 was once more advertised for sale by the Deputy Sheriff on 5 January 2012 for 27 February 2012. From 5 January 2012 to 20 January 2012 the applicants did nothing. It was only on 20 January 2012 that they filed an application for condonation for the late filing of their intended application in terms of Rule 348A (5a). The application was served on the 1st respondent on 20 January 2012. On 24 January 2012, the present urgent chamber application was issued and served on 1st respondent. The 1st respondent raised points *in limine* which I propose to consider in turn. The first point is whether the application is urgent. The applicants seek an interdict under a certificate of urgency. In *CABS* v *Ndlovu* HH-3-06, CHATUKUTA J rightly pointed out that:

> "Applicant is required to satisfy the court that irreparable harm may be suffered by the applicant if the matter is not dealt with urgently and that applicant should have treated the matter urgently." – See also *Triangle Ltd* v *ZIMRA* HB-12-11 and *Kuvarega* v *Registrar General* 1998 (1) ZLR 188 (H).

It is not the arrival of the date of reckoning that matters. As alluded to above, the applicants were served with the notice of execution on 18 July 2011. The latter was, therefore, the time to act. They did nothing from July until 15 December 2011. They only acted a day before the date of the advertised sale. When the sale was cancelled they once more did nothing until 3 January 2012 when they withdrew their flawed application of 15 December 2011. They did not simultaneously or soon thereafter file another application until the 1st respondent re-advertised the sale of Lot 8. After the latter sale was advertised on 5 January 2012 they waited for several days before filing the current application on the eleventh hour. It is evident that all along the applicants were acting in snail's pace, so to speak, and were only prompted into action by the arrival of the date of reckoning. They simply did not treat their matter urgently. The attempt to blame their erstwhile legal practitioners is not helpful as such dilatoriness persisted even under the current legal practitioners. The applicants have all along been represented by legal practitioners and even brief an advocate at some point yet there was not urgency shown on their part. There is no explanation proffered for the non-timeous action. *Kuvarega* v *Registrar General*, *supra* and *Mutizhe* v *Ganda & Ors* SC-17-09. In the absence of such acceptable explanation the matter cannot be treated as urgent whatever the prospects of success may be – see also *Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E and *Viking Woodwork (Pvt) Ltd* v *Bluebells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 253. Taking all the above factors into consideration the applicants failed to make a case for the matter to be dealt with urgently. On this point alone without going into the merits the application is dismissed with costs.

Moyo & Nyoni, applicants' legal practitioners
Coghlan & Welsh, 1st respondent's legal practitioners