

**PRINCE TICHAKUNDA MARIGA (In his capacity as the
Executor Dative of the estate of the late Regis Mariga)**

Versus

NMB BANK LTD

And

THE DEPUTY SHERIFF N.O.

And

REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 25 JUNE & 12 JULY 2012

Miss L. Duve for the applicant

T. Khumalo for the respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

“Terms of the final order sought

It is ordered that:

1. Pending the determination of the application for rescission of default judgment, the execution of the judgment granted under case number HC 3735 [*sic*] be and is hereby immediately stayed.

2. That the costs of this application be borne by the 1st respondent if it opposes this application.

Interim relief granted

Pending the finalization of the matter the applicant be granted the following relief.

1. That this order acts as an interim relief preventing the Deputy Sheriff from proceeding with the execution and the auction.
2. That the Deputy Sheriff restores possession of the applicant's property that he attached.
3. That the Registrar of Deeds removes the caveat placed on the immovable property stand number 506 Emganwini Township of Lot 400A Umganin that he, acting on the default judgment granted in favour of the 1st respondent had under judicial attachment."

The salient facts of this matter are the following. On 10 August 2010 the 1st respondent loaned to Toover Enterprises (Pvt) Ltd t/a SBC Hardware a sum of US\$15 000 i.e. US\$5 000 as an overdraft and US\$10 000 as a call loan. Brian Simbarashe Chipanera, Innocent Sibonginkosi Ncube, Regis Mariga and Brighton Chipanera bound themselves as co-principal debtors in solidum with Toover Enterprises. Stand number 506 Emganwini Township of Lot 400A held under Deed of Transfer Number 384/98 registered in the name of Regis Mariga was hypothecated as security for the said loan. Toover Enterprises failed to service the loan and summons were instituted under case number HC 2163/11 against it as the principal debtor and the above-mentioned co-principal debtors including Regis Mariga under case number HC 3735/11. A default judgment was granted by this court against the above-mentioned principal debtor and co-principal debtors in the sum of US\$14 271,10 with interest.

Further, stand number 506 Emganwini Township of Lot 400A Umganin held under Deed of Transfer 384/98 was declared specially executable. The applicant is the executor dative of the estate of the late Regis Mariga having been appointed by the Master of this court on 1 February 2011. Regis Mariga in fact passed away on 10 January 2000 i.e. around ten (10) years before the loan agreement between the 1st respondent and Toover Enterprises *supra*. The long and short of the matter is that the signature on the suretyship form purporting to be that of Regis Mariga is clearly a forgery as the latter passed on several years ago. The national identity number 42-079804 R 42 reflected on the suretyship form is that of the late Regis Mariga. The above-mentioned property hypothecated as security for the loan belonged to the late Regis

Mariga. With these clear facts it is not surprising that the 1st respondent did not challenge the authenticity of the documents filed by the applicant.

In particular, the 1st respondent does not dispute that Regis Mariga was deceased at time the loan agreement was concluded. The 1st respondent does not challenge, under oath, that signature purporting to be one of Regis Mariga was forged. The 1st respondent was a victim of the forgery and it cannot seriously expect to starve off this application on the basis of technicalities. The property declared specially executable is property belonging to the estate of the late Regis Mariga which is registered with this court under DRB 382/00.

The applicant has made out a case for the provisional order sought.

Accordingly, the provisional order is granted in terms of the amended draft.

Legal Aid Directorate, applicant's legal practitioners

Cheda & Partners, 1st respondent's legal practitioners