

INTERFIN BANKING CORPORATION LIMITED
t/a INTERFIN BANK (Under Curatorship)
(Represented by Peter L. Bailey in his capacity as curator)
versus
GOLDLOCK INDUSTRIES 2003 (PRIVATE) LIMITED
and
ZVENYIKA MHENDURWA
and
EVELYN MHENDURWA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 10 July & 3 September 2013

Adv. L. Uriri for the applicants
B. Mataruka, for the defendant

TAKUVA J: The plaintiff issued summons claiming provisional sentence in the following terms:-

- “1. The plaintiff’s claim is for provisional sentence in the amount of Four Hundred and Thirty Three Thousand and Forty Six United States Dollars and Twenty Eight cents (USD 433 046-28) with interest thereon at the rate of 20% per annum from 14 March 2012 to date of payment in full.
2. The plaintiff’s claim against first defendant is based on the following:-
 - (a) A first Mortgage Bond which was executed on 28 April 2010 by the first defendant in favour of the plaintiff over stand 666 Marlborough Township Extension 5 of Subdivision A of Strathmore held under Deed of Transfer Number 3245/2009.

The full capital amount payable under the bond is One Hundred and Sixty Thousand United States Dollars (USD 160 000-00). The Bond was registered in the Deeds Registry at Harare on 28 April 2010.
3. The amount of USD 433 046-28 has become due and payable. Attached hereto is a certificate of indebtedness marked Annexure B. Despite demand, the first defendant has failed, refused or neglected to pay the sum of USD 433 046-28.
4. The plaintiff claim against the second and third defendants is based on Deeds of Suretyship executed by the second and third defendants in favour of the plaintiff for the due performance of all of the first defendant’s obligations to the plaintiff as sureties and co-principal debtors in solidium, for the repayment on demand of all sums of money which the first defendant owed to the plaintiff, with interest and collection commission and costs of suit on the legal

practitioner and client scale to the extent that such costs are permissible in terms of the Law Society By-Laws.

5. Copies of the Deeds of Suretyship are attached hereto marked Annexures “C” and “D” respectively.
6. The amount claimed by the plaintiff has become due and payable and the defendants have failed, neglected or refused to pay the same”.

The plaintiffs’ prayer is put as follows:

- “(a) that the first, second and third defendants are jointly and severally liable the one paying the others to be absolved to pay the plaintiff the sum of USD 433 046-28 plus interest thereon at the rate of 20% per annum from 14 March 2013 to date of payment in full calculated in terms of para (a) of the Mortgage Bond;
- (b) Collection commission in terms of the Law Society by laws calculated in terms of para (n) of the Mortgage Bond;
- (c) That stand 666 Marlborough Township Extension 5 of Subdivision A of Strathmore held under Deed of Transfer Number 3245/2009 be and is hereby declared specially executable.
- (d) Costs of suit on a legal practitioner client scale calculated in terms of para (n) of the Mortgage Bond”.

First to third respondents opposed the application on the following grounds;

- (i) the amount of USD 433 048-28 is not due and owing by virtue of a liquid document or at all. The argument is that the mortgage bond reflects a capital amount of USD 160 000-00 and not the USD 433 048-28 that is claimed. It was further argued that if the basis for the claim is the certificate of indebtedness, this document is not a liquid document within the contemplation of provisional sentence proceedings as embraced in order 4 r 20 of this court’s rules.
- (ii) that the plaintiff has no claim against the second and third defendants in that in terms of an agreement entered into by the parties in 2011, the second and third defendants were to provide security in the form of surety documents, which documents were meant to secure the irrevocable letter of undertaking to pay certain sums of money to the plaintiff executed by C.I. Enterprises.
- (ii) the interest sought for exceeds the capital
- (iv) the plaintiff has no standing to institute the present proceedings in that the plaintiff’s papers in case no HC 6860/17 reflect that the plaintiff ceded the present claim to a third party namely Al Shams Global BVI Ltd.
- (v) the plaintiff has not observed r 24 of this court’s rules. Rule 24 states:

“When provisional sentence is claimed on a mortgage bond which has become due by reason of notice given or interest being unpaid, the date when and the manner in which notice was given or the particulars of the unpaid interest shall be stated in the summons” (the emphasis is mine).

The respondents’ argument *in casu* is that no particulars of any notice delivered to the defendants by the plaintiff appear on the plaintiff’s papers, neither did the plaintiff attach a physical document reflecting the same.

- (vi) the defendants have a *bona fide* defence to the present claim which defence carries a high prospect of success in that C.I. Enterprises executed an irrevocable undertaking to pay the proceeds of the sale of the supplied stock purchased pursuant to the credit facility in the plaintiff’s favour.

The plaintiff conceded that the claim for USD 433 048-28 is unsustainable as it is not mentioned in the mortgage bond. The plaintiff restricted its claim to the amount of USD 160 000-00 reflected in the mortgage bond and invited the court to grant provisional sentence in respect of this amount and order the balance to stand over for trial. While this concession is proper, the plaintiff’s claim suffers from a fatal defect in that r 24 has not been complied with. The rule requires that notice that the amount has become due must be given and the date and manner in which notice was given shall be stated in the summons. The rule is mandatory and the plaintiff has not stated why the amount has become due. All it stated in the summons is “The amount of USD 433 046-28 has become due and payable. Attached hereto is a certificate of indebtedness marked Annexure B. Despite demand the first defendant has failed, refused or neglected to pay the sum of USD 433 046-28”. The certificate of indebtedness is not a notice requiring the defendants to settle, in lieu of which settlement the plaintiff would institute the present proceedings. There is no need to consider the rest of the respondents’ grounds of opposition.

Accordingly, provisional sentence is refused and the case is ordered to stand over for trial in terms of r 34 of the High Court Rules 1971.

Dube, Manikai & Hwacha, plaintiff’s legal practitioners
Mtewa & Nyambirai Incorporating Wilmot & Bennett, 1st to 3rd defendants’ legal practitioners