AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
DYNAMIC SUCCESS (PVT) LTD
and
DORCAS MARY MUDENDA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 6 February 2014, 30 April 2014

Opposed application

Advocate *T. Mpofu*, for the applicant
Advocate *T. Magwaliba*, for the respondent

MTSHIYA J: In this application the applicant seeks the following relief:-

"**IT IS ORDERED THAT:-**

1. It is ordered that Respondent pays the sum of US$154 922-07 plus interest on this sum at the rate of 50% per annum from 1st January 2012 to the date of payment in full;

2. Respondent pays the costs incurred in Case No. 137/12 as ordered by the High Court and collection commission thereupon calculated in terms of the Law Society of Zimbabwe by-laws;

3. Respondent shall pay costs of this application on a scale f legal practitioner and client."

It is common cause that:

(a) On 1 August 2011 a company known as Sunjet Development Holdings (Pvt) Ltd (Sunjet) agreed that it owed applicant a sum of US$145 138-00 being loan proceeds.

(b) On 11 August 2011 the 1st respondent, as a surety and co-principal debtor guaranteed payment of the amount referred to in (a) above. The surety was executed by the second respondent and

(c) On 25 October 2012, under case number HC 137/12, the applicant obtained the following judgment against Sunjet:-

"**IT IS ORDERED THAT:**

1. Defendant pays the sum of US$154 922-07 plus interest thereupon at the rate of 50% per annum from 1st January 2012 to date of payment in full.

2. Defendant pays the costs of this application and of the main suit on a scale of legal practitioner and client and collection commission calculated in terms of the Law Society of Zimbabwe By-Laws."

It is on the basis of the above order that, the applicant, in its supporting affidavit of 10 January 2013 states as follows:-

"8. Consequently First and Second Respondents are now obliged to make the payment of the amount disclosed in Annexure D. In spite of promises by Sunjet Development Holdings (Pvt) Ltd to make payment, it has not in fact done so.

9. In the result Applicant prays for judgement in the following terms:

That First and Second Respondent, jointly and severally, the one paying the other to be absolved, pay the said sum of US$154 922-07 plus interest on this sum at the rate of 50% per annum form 1st January 2012 to the date of payment in full together with costs and collection commission in terms of the high Court judgement Annexure 'D' plus further costs arising from this application on a scale of legal practitioner and client scale and in terms of the draft attached hereto."

The application is opposed mainly on the basis that there is no founding affidavit, there is a misjoinder of second respondent and because, as the respondents state:-

'4.5 **<u>AD PARAGRAPHS 8-9</u>**

The failure by the principal debtor to make payments in terms of the order obtained by the Applicant does not itself oblige the 1st Respondent to be liable to pay the amount reflected on the Order, more particularly in that;

(a) When Annexure "D" was obtained, the Respondents in this matter were never a party to the said. Had they been a party, maybe the court would have reached a different outcome. By requiring the Respondents to fulfill and satisfy an order they were not a party to, is a clear disregard of the natural principle of the *audi alteram partem rule*.

(b) The Applicant is simply trying to join parties to an order which they never participated in litigation and its outcome thereof."

> I agree with the above position taken by the respondents. My view is that on the basis of (a) and (b) above, this application cannot succeed.

Initially, in its Heads of Argument, the applicant had submitted that what was before the court was an application for summary judgement. However, at the hearing of the application that position was abandoned and its counsel then argued as follows:-

> "This application is meant to enforce liabilities of a co-principal debtor and surety. It is open to the applicant to proceed this way. The applicant can use the judgement as a cause of action."

I do not agree with the above submission. The court has been thrown into a situation where it has to guess what type of application is before it. The applicant has correctly accepted that it cannot be an application for summary judgement as provided for in our High Court Rules 1971.

Having admitted that the process before the court is not defined anywhere in our rules, the applicant remains shy to say it should have joined the respondents or issued summons against them separately. The respondents are entitled to be heard in the same manner as the entity they guaranteed was heard. Accordingly one cannot dismiss their defences without allowing them to be heard in terms of our rules of court. That means they can only be heard when the applicant approaches the court properly i.e. with a defined court process.

I agree that the court order may bring into play a cause of action but that is only in relation to the parties to that order. The form of "execution" against the respondents that the applicant seeks to invent is not provided for in our civil law. I have not been able to find any authority which states that once a judgement is obtained against the principal debtor, the grantors become automatically liable and be executed against.

The foregoing demonstrates that the nature of the application before the court has not been defined and as such, my view is that there is no proper application before the court. If the respondents were responding to a proper court process, I would, indeed, have been obliged to consider all the preliminary points they raised and probably also then proceed to determine the matter on the merits. I cannot do that in the absence of a proper process before the court.

I therefore find no reason why I should not dismiss this undefined application as prayed for by the respondents.

The application is dismissed with costs.

Messrs Gill, Godlonton and Gerrans, applicant's legal practitioners
Messrs Khanda and Company, respondents' legal practitioners