

TM SUPER MARKET (PVT) LTD
versus
AVONDALE HOLDINGS (PVT) LTD
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 4 June 2014

Urgent chamber application

E. T Matinenga, for the applicant
T. Magwaliba, for the 1st respondent

CHATUKUTA J: On 6 May 2014, this court granted a default judgment against the applicant in case No. HC 1747/14 for its ejectment from Lot 3 of Lot 22 of Lot 1 Block C of Avondale (the premises). This is an application for stay of execution of the judgment pending the determination of an application for rescission yet to be filed by the applicant.

The background to the application is that the applicant and the respondent entered into a lease agreement in 1968 whereby the applicant leased the premises from the first respondent. The applicant was operating a supermarket from the premises. The lease agreement was renewed from time to time. According to an arbitral award dated 18 June 2009, the lease agreement expired in 2003 whereupon the parties entered into a new agreement which was due to expire by effluxion of time on 28 February 2014.

The applicant did not vacate the premises at the expiration of the lease. The first respondent issued summons on 3 March 2014 in case No. HC 1747/14, for the ejectment of the applicant from the premises. The first respondent allegedly served the summons on the respondent on 6 March 2014. The applicant did not enter an appearance to defend. On 21 March 2014, the first respondent applied for default judgment. The application was granted on 6 May 2014 by this court. The second respondent commenced evicting the applicant on 16 May 2014 without notice to the

applicant. Certain items belonging to the applicant were removed from the premises. The applicant instituted the current proceedings. The second respondent ceased the ejectment upon being served with this application.

It is trite that the main guiding principle for the court in determining such applications is to grant stay of execution of a judgment where real and substantial justice requires such a stay or conversely, where injustice would otherwise be done. (See *Chioza v Independent Property Development (Pvt) Limited and Another* HH 76-94 at p3; *Murumbechi v Townsend* HH 185-90; *Cohen v Cohen* 1979 (3) SA 420 (R) at 423B-C; *Chibanda v King* 1983(1) ZLR 116 (H); *Santam Insurance Co Ltd v Paget* 1981 ZLR 132 (H) and *Strime v Strime* 1983 (4) SA 850 (C).)

The applicant contended that it has prospects of success on the application for rescission and that if the application to stay execution is not granted it stands to suffer irreparable harm. It claims that it was never served with the summons commencing action and was surprised when the second respondent commenced ejecting it from the premises. It was therefore not in wilful default.

In support of this contention, the applicant filed an affidavit by one Sarudzai Muzodza. The same Sarudzai appears on the return of service as Nancy Muzodza. Ms Muzodza deposed that she is a receptionist at the applicants head office. She has been in the applicant's employment for the past 27 years.

She stated in the affidavit that the applicant established a system where legal process would be received by a duly authorized person on the first floor of the applicant's head offices at Jaggers, 194 Mutare Road Msasa. She is stationed on the ground floor and is therefore not authorised to receive legal process. She averred that the second respondent did not attend to the applicant's head office to serve the summons and declaration. Had he done so, she would have referred him to one Jane Mukwewa on the first floor who is authorized to receive the process. She further explained that the second respondent might have known her name from his previous interactions with the applicant at the head office for a period of six months before the service of the summons in issue.

Jane Mukwewa, another receptionist, deposed to an affidavit supporting Ms Muzodza's claims on the procedure regarding service of legal process.

The application was vigorously opposed by the first respondent. The first respondent contends that the applicant was in willful default and does not have prospects of success on appeal.

It was submitted for the first respondent that on 4 March 2014 the second respondent attempted to serve the applicant with the summons and the declaration at 90 Speke Avenue, Harare. He reported back to the first respondent that the applicant had moved offices. The second respondent was thereafter instructed to proceed to serve the applicant at its new head offices in Msasa.

The return of service identified the person who received the service as Nancy Muzodza. Nancy Muzodza is the same person as Nancy Muzodza. The second respondent would not have identified her by name if he did not attend at the applicant's head office.

The return of service of the sheriff or his deputy is indeed *prima facie* evidence of the matters contained therein. (See *S 20 (3)* of the High Court Act [*Cap 7:06*], *Gundani v Kanyemba* 1988 (1) ZLR 226 (S) and *Wattle Company (Pvt) Ltd v Inducom (Pvt) Ltd* 1993 (2) ZLR 108 (HC)). However, the presumption is capable of being rebutted by clear and satisfactory evidence. (See *Gundani*, (*supra*) at p 229 E-F).

The applicant did not dispute the first respondent's submission that the second respondent did attempt to serve summons at the applicant's old offices and was redirected to the new offices in Msasa. Ms Muzodza's explanation that the second respondent had been interacting with the applicant over the past 6 months and hence might have known her name does not hold water. Firstly, there is no explanation as to the context of that interaction. Secondly, it was conceded by Mr *Matinenga* that whilst Ms Muzodza's first name is stated in her affidavit as "Sarudzai" she is also known as "Nancy". The second respondent would not have known this other name unless he served the summons and declaration on Muzodza. Thirdly, if the second respondent had been interacting with the applicant "in the past 6 months" in whatever context and would meet Ms Muzodza, he surely knew that the applicant was no longer at 90 Speke Avenue, Harare. There would therefore have been no need for him to attempt to serve process on 4 March 2014 at an address he knew the applicant no longer occupied.

Ms Muzodza's averments as to the procedure to receive legal process were not supported by an affidavit from the powers that be within the applicant company given that Ms Muzodza and Ms Mukwewa are both receptionists. One would have expected the procedures to have been documented somehow in a company as big as the applicant. If they were verbal, one would have expected support from the relevant senior persons within the applicant company that a receptionist on the ground floor is not authorized to

receive legal process whilst the one on the first floor is duly authorised. This would no doubt have bolstered the applicant's case.

In the absence of such support, I find that the applicant has failed to present a reasonable and acceptable explanation for its default.

Of concern to the court is that it appears that the applicant cast unsubstantiated aspersions of fraud at the second respondent by referring to the case of *Mutebwa v Mutebwa and Anor* 2001 (2) SA 193. In *Mutebwa's* case, the situation was different. The Deputy Sheriff in that case had filed a patently false return with the court upon which divorce was granted. It was proved in that case that the applicant had been out of the country when legal process was alleged to have been personally served on him. There was therefore positive evidence challenging the service. *Mutebwa* case is an apt example of what the applicant should have proved.

There was no such evidence adduced in the present case. The mere fact that Ms Muzodza had been in the applicant's employment for 27 years did not form a basis for believing her. The applicant could not explain what the second respondent would benefit by lying that the legal process was served on the applicant.

Ms Muzodza did not state that she was not at work on the date the summons were served and therefore would not have received service. *Mr Matinenga* submitted that he could not say who between the second respondent and Ms Muzodza was saying the truth. The court would have to consider the probabilities of who was not telling the truth between an officer of the court and applicant's employee. If the applicant is having difficulties at this stage, one wonders how it would surmount the difficulties in the application for rescission.

The second respondent is a public officer who is not interested in the outcome of the case. Ms Muzodza is an employee of the applicant of 27 years who is likely to face censure for not bringing legal process to the attention of the relevant authorities. Jane is another employee like Ms Muzodza. The applicant cannot expect the court to believe that there would not be someone of higher authority in the applicant company to explain the procedure or produce documentation regarding service of process.

As submitted by *Mr Magwaliba*, the probabilities favour an officer of the court in the absence of any allegations of impropriety against the officer. The alleged recipient of the service normally has a strong motive to claim that proper service did not take place. (See *Fox and Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 (SC)).

The appellant in *Gundani*'s case, was also not able to satisfy the court that he had not been available to receive process. The court found that the appellant's denial was insufficient to rebut the presumption that the summons had been served upon him. It was further found that his failure to react to it could only be taken as a deliberate intention not to defend the action. The same fate falls on the applicant in this matter.

It is my view that the applicant will not be able to rebut the presumption that the Sheriff did indeed serve the summons and declaration on the applicant and cannot avoid the conclusion that it was in wilful default.

Turning to the merits of the claim, the applicant conceded that the lease agreement expired on 28 February 2014. It however submitted that it thereafter became a statutory tenant. The provisions of the expired lease agreement, and in particular on dispute resolution, would continue to apply. The lease provided for resolution of disputes by arbitration. This court would not have jurisdiction to determine the main claim. The default judgment was therefore improperly obtained.

It was further contended that the termination of the lease agreement was in any event unlawful as applicant, being a statutory tenant was entitled to notice in terms of s 23 of the Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983), be it in terms of the expired lease or reasonable notice as provided for in the Regulations. Such notice was not given.

The respondent disputed that the applicant was a statutory tenant. It was contended that it consented, in a letter dated 1 October 2010 written by a Mr. Beaumont, to vacate the premises at the expiration of the lease agreement. Mr. Beaumont was applicant's director then.

It was further submitted that the first respondent requested from the applicant access to the premise for its engineers and architects to commence planning the rehabilitation of the premises in anticipation of the termination of the lease agreement. The applicant allowed the first respondent access. The applicant's conduct therefore amounted to a waiver of its rights under the lease and the provisions of the lease would therefore not survive the expiration of the lease.

It was also submitted that the applicant had been given adequate notice over the years to vacate the premises upon the expiration of the lease.

It is common cause that the applicant was supposed to have vacated the premises by 28 February 2014. It is also not in issue that there was communication between the applicant and the first respondent regarding the respondent's intention to repossess the

premises. As far back as 1 October, 2010, the applicant was aware that the first respondent intended to repossess its premises. In fact such intention appears to have been the subject matter of the arbitration resulting in the 2009 Arbitral Award.

On 1 October 2010, Mr B. J. Beaumont wrote to the first respondent expressing the applicant's intention to hand back the premises at the expiration of the lease. The letter reads:

"We refer to our discussion this morning and we acknowledge that we fully understand that you will not entertain any negotiations with us regarding either an extension of existing (sic) lease or a new lease. We would however, like to have discussions with you to share some ideas which we have regarding the property and reiterate that we have no intention of contesting your right to take back the premises at the expiration of the present lease. (Own emphasis)"

The applicant, during oral submissions, attempted to disown Mr Beaumont as having had authority to represent the applicant. He was referred to as having been the chief executive of Meikles and then a board member for the Meikles Group of Companies which is the holding company of the applicant. However, it is clear that as at 1 October 2010, he was a director of the applicant and wrote a letter in relation to applicant's business and on applicant's letter head. His capacity to represent applicant, is in my view, not in issue.

The applicant further attempted to explain that the letter, despite the highlighted portions, was not a reflection of the applicant's intention to vacate the premises. Mr Beaumont was said to have expressed intentions "to share ideas" regarding the property and according to the applicant this meant that the applicant had not consented to vacate the premises.

It was not clear whether there was any "sharing of the ideas" intimated between 2010 and 2013. The applicant did not allude to any "sharing of ideas" about the property. All that was placed before me relating to that period are letters from the applicant dated 19 March 2013 and from its legal practitioners dated 27 November 2013 to the applicant restating the notice being given to the applicant to vacate the premises at the expiration of the lease agreement.

In both letters, the first respondent expresses its intention to repossess the premises. It is further clear in the letter dated 25 February 2014 from the first respondent's legal practitioners to the applicant's legal practitioners that the applicant had in fact consented to the first respondent accessing the premises with its engineers and architects to prepare for the rehabilitation of the premises in anticipation of the applicant vacating the premises on 28 February 2014.

It is my view, as submitted by Mr *Magwaliba*, that the applicant waived its rights to have the dispute resolved by arbitration by consenting to vacate the premises at the expiration of the lease on 28 February 2014. The arbitration clause cannot survive the lease. The applicant cannot now seek to rely on the provisions of the lease to oust this court's jurisdiction to determine the matter. The judgment in case no HC 1747/14 was in my view properly obtained.

The applicant did not dispute the first respondent's claims that it has already engaged engineers and architects who have commenced working on the redevelopment and rehabilitation of the premises. This work has been commenced under the watch of the applicant and with its consent and in anticipation of the applicant vacating the premises on 28 February 2014. The first respondent obtained an order of this court on the strength of these facts and it would be unjust to prevent the applicant from enjoying the benefits of that order.

The application is accordingly dismissed with costs.

Honey & Blanckenberg, applicants' legal practitioners.

Magwaliba & Kwirira Legal Practitioners, first respondent's legal practitioners.