ROUSSLAND ENTERPRISES PRIVATE LIMITED
and
SMITH CHUKS OKONKWO
and
DADIRAI V.T. OKONKWO
versus
LOCAL AUTHORITIES PENSION FUND
and
THE SHERIFF OF ZMBABWE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 9 September 2015

Urgent Chamber Application

T. A Toto, for the applicants
Ms *D. Ndawana*, for the 1st respondent

NDEWERE J: The applicants were tenants of the first respondent at 1st floor, Mezzanine West, LAPF Centre at corner Chinhoyi Street and Jason Moyo Avenue in Harare. They operated a hair salon and a beauty shop. The lease agreement was entered into in May, 2012 between the first applicant and the first respondent. The second and third applicants bound themselves as sureties and co-principal debtors to the first applicant in terms of a suretyship agreement which became part of the lease agreement. In terms of the lease agreement, the first applicant was obliged to pay its rentals monthly in advance to the first respondent. The rental amount was US$1 655-00 up to 30 May, 2012. The rental was subject to review after 30 May, 2012. In addition, the first applicant was obliged to pay operating costs of US$ 666-00 per month. The first applicant failed to pay the rentals and operating costs as agreed in the lease agreement, resulting in arrears of up to US$5 076-97 for rentals and US$8 572-61 for operating costs. In a bid to settle the matter amicably, the first respondent entered into a Deed of Settlement with all three applicants on 30 April, 2013 wherein the applicants undertook to settle the total of

US$13 649-58 outstanding and US$800-00 legal costs plus 15% VAT by monthly instalments of US$2 430-00 per month with effect from 3 April 2013. The Deed of settlement further stated in its last paragraph that in the event of breach of the Deed of Settlement, the first respondent shall have the right to immediately cancel the lease agreement and demand vacant possession of the leased premises.

The applicants failed to fulfil the provisions of the above Deed of Settlement. The first respondent then issued summons against the applicants. The applicants were served on 12 December 2014. After service of the summons, the applicants made further undertakings to settle the debt, without success.

On 11 March, 2015 the first respondent obtained a default judgment against the applicants. Pursuant to that default judgment, the first respondent obtained a Warrant Execution on 25 March 2015 against the applicants. Through the second respondent, the first respondent attached the applicants' movable properties on 8 June 2015 in the presence of the third applicant. The goods were to be removed on 11 June 2015. The first respondent also obtained a warrant for the eviction of the applicants from the rented premises on 25 March 2015. On 8 June, a notice of seizure and attachment for the eviction of the applicants from the rented premises was served on the third applicant, with 11 June, 2015 being the date of eviction indicated on the warrant.

According to the Sheriff's return of service, the eviction and removal of goods was carried out on 11 and 12 June 2015 respectively. The time is not indicated. There is also an inventory of the goods received from the Sheriff which was done by Revelations Auctioneers which is dated 12 June 2015. The actual time the goods were received by Revelations Auctioneers is not indicated.

On 12 June 2015, the applicants filed an urgent chamber application for stay of eviction and removal of goods. In para(s) f and g of the application, the applicants' legal practitioners said:

> f. "Today, the 11th day of June, 2015, 2nd Respondent has commenced the removal of the movable property that was attached on 8 June 2015."
>
> g. "Today the 11th day of June, 2015, 2nd Respondent has also commenced the eviction of the 1st applicant from the leased premises."

The above paragraphs confirm that the removal and eviction commenced on 11 June, 2015, as indicated in the Sheriff's return. The legal practitioner's letter is dated 11 June, 2015.

In the founding affidavit, the third applicant says in para 10:

> "2nd respondent is in the process of evicting the 1st applicant from the rented business. He is also in the process of the removal of the attached movable assets including the fittings in the hair salon and beauty boutique."

The above affidavit was sworn to on 12 June 2015, once more confirming the Sheriff's return which says removal and eviction took place on 11 and 12 June, 2015. It appears that while the applicants were busy compiling court papers, the second respondent was busy with the eviction and removal of attached goods.

The Sheriff says he completed removal of the goods and eviction on 12 June 2015. The court has no basis to dispute what the Sheriff says in view of the corroboration from the applicants themselves that eviction and removal started on 11 June 2015 and continued on 12 June 2015. The applicants have said they dispute that the removal was completed on 12 June 2015, but they do not provide any evidence to the contrary. All the court has is their bare denial that the removal and eviction was completed on 12 June 2015.

That being the case, the applicants' application has been overtaken by events on the ground. The applicants are already out of the premises and the attached goods have already been removed. The court has no legal basis in this application to have the applicants or their goods returned to the first respondent's premises.

The applicants have attacked the propriety of the default judgment which formed the basis of the attachment and eviction. They have said it was erroneously obtained because they had filed an appearance to defend although it was not served on the first respondent. In my view, the determination of the applicant's submission is reserved for the application for rescission of the default judgment if it will be done. According to the applicants founding affidavit, no application for rescission has been done as yet, and before an application for rescission can be filed, condonation will have to be sought because of the lapse of time.

The applicants may well succeed in an application for rescission if they can prove that the default order was not properly obtained. But until the court order of 11 March 2015 is set aside by a competent court following a rescission application, that court order remains valid and executable. The attachment and eviction by the respondents are therefore lawful and valid because the order of 11 March, 2015 has not yet been set aside.

Consequently, the urgent application, having been overtaken by events, is hereby dismissed with costs on the ordinary scale.

T. A. Toto Attorneys, applicants legal practitioners
Messrs Gill Godlonton & Gerrans, 1st respondent's legal practitioners