

LIFE BRAND AGRIC SERVICES (PRIVATE) LIMITED
versus
LIAQUART PETKER

HIGH COURT OF ZIMBABWE
MAFUSIRE J & MUSITHU J
HARARE, 25 March 2021

Civil appeal

Date of *ex tempore* judgment: 25 March 2021
Date of written judgment: 2 June 2021

Ms *F.M. Majome*, for the appellant
Mr *F. Muserere*, for the respondent

MAFUSIRE J

[1] This is an appeal from the magistrate's court. The lower court dismissed an application for rescission of judgment brought by the appellant. The appellant had filed that application in terms of s 34(2) of the Magistrate's Court Act, (*Chapter 7:10*) ("*the Act*"). This is the provision that entitles any person affected by an order of the magistrate's court authorising the messenger of court to seize and attach so much of the movable property of, or under the control of, a tenant and found on the rented premises and as may be sufficient to satisfy the amount of rent due and in arrears by the tenant, together with the costs of such application, and those of any action for the recovery of the outstanding rent, to apply to set aside such order.

[2] The magistrate's court issues such an order aforesaid in terms of s 34(1) of the Act. In paraphrase, this sub-section empowers the court to issue the order upon application by a landlord alleging that the tenant is in arrears with his or her rent; that the arrear rent has been demanded for the last seven days or more, or that in the landlord's belief, the tenant is about to remove his or her property from the rented premises in order to defeat or avoid paying the rent due. The landlord gives security for any damages, costs or charges the tenant may incur by reason of such attachment, in the event that it is set aside.

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[3] The appellant was the tenant, and the respondent the landlord. In January 2020 the respondent applied *ex parte* for the s 34(1) order. He alleged by affidavit, among other things, that the appellant had not vacated the rented premises despite the termination of the lease agreement; that the appellant's rent was \$37 500-00 per month; that the appellant was in arrears in an amount in the sum of \$112 500-00 for the period since November 2019; that in terms of the lease agreement, the issue had been referred to an arbitrator and that the outcome of that was due any time in the following week. The respondent further stated that in a clear bid to avoid paying the arrear rentals, the appellant had been secretly moving some of its property from the rented premises. He further said that the arrear rentals had been demanded unsuccessfully since the day they had become due and that simultaneously with the application he had issued a summons for the recovery of those arrears. The respondent concluded that he had been advised that as landlord he had a hypothec for arrear rentals which he could execute in the circumstances.

[4] The order of court, issued on 12 February 2020, read:

"IT IS ORDERED THAT:

- a) The Messenger of Court do seize and arrest so much of the Respondent's movable property at No. 69 Belvedere Road, Belvedere, Harare, as shall be sufficient to satisfy the sum of RTGS\$112,500.00 and costs."

[5] In its application for rescission filed on 24 February 2020, the appellant impugned the order of court alleging that it had been issued in error and that the error had been induced by the respondent. It alleged that the respondent had fraudulently misrepresented to the court that the monthly rent was \$37 599, when in fact it was only \$2 500; that the appellant had been moving property in order to evade paying the arrear rent yet computations showed that the appellant's rent was paid up in advance up to May 2020 and that the respondent was in the habit of telling the court this sort of lie in order to get such an order as a way of harassing his tenants. He had done that before with the result that the appellant's certain Nissan truck motor vehicle had been attached. The matter was pending at the Supreme Court.

[6] The appellant further alleged in its affidavit in support of rescission of judgment that the dispute between the parties was pending before a neutral arbitrator. The affidavit concluded by saying that from the deponent's enquiry with the Law Society of Zimbabwe, the

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respondent's counsel of record, a Mr B Pabwe, appeared not to be a duly registered legal practitioner, and that in the absence of proof to the contrary the appellant would move to have the proceedings "removed" on the basis of fraudulent misrepresentation.

[7] The respondent opposed the appellant's application. He supported the propriety of his own application and the order issued by the court. Regarding the figures of the arrear rent and the monthly rent, the respondent stated that in terms of the lease agreement and the addendum thereto, the monthly rent was USD2 500, which on conversion at prevailing interbank rates, was \$37 599 per month in local currency. He denied that the appellant's rent was paid up in advance. Regarding the issue relating to the attachment of the appellant's Nissan truck motor vehicle, the respondent stated that the attachment had been made properly, that it had been made in respect of a period prior to November 2019, and that the appellant had lost in the magistrate's court; had lost on appeal to the High Court and that it had further appealed to the Supreme Court where the matter was pending. On Mr Pabwe, the respondent insisted that he was duly registered with the Law Society. His practising certificate would be produced at the hearing.

[8] The appellant filed an answering affidavit. It raised more issues. In substance, it alleged that at no point had it been advised of the termination of the lease agreement or required to vacate the rented premises; that the lease was still valid; that it was still in occupation of the premises and that it had no intention to vacate before the expiry of the lease period as fixed in the lease. It was further averred that in the application for attachment the appellant had failed to prove that the rent had been outstanding or that the appellant had in fact been removing assets from the rented property. It denied that it had ever done that. On the contrary, it had actually brought in more assets such as computers and printers, as it had no intention of leaving.

[9] In the heads of argument filed on behalf of the appellant in support for the application for rescission, a further point was raised that in view of the fiscal regime in force in the country, the United States dollar ranked at par with the local currency such that a rent of USD2 500 per month would convert to RTGS 2 500 per month. In that regard, the respondent's claim for arrears for three months (November 2019 to January 2020) would only amount to RTGS 7 500. Yet the respondent had misled the court into believing that the arrear rent had been a whopping RTGS 112 500.

[10] In its judgment dismissing the appellant's application for rescission, the lower court stated that the import of s 34(1) of the Act is to protect a landlord who can prove that the rent is in arrears and that he has a reasonable apprehension that the tenant will vacate the rented premises without paying the rent due. It said the court was satisfied that the respondent had done just that. It made a finding that the appellant had filed no proof of payment of the arrear rentals beyond merely noting that it was in the process of compiling it. It said one can seek release of the attached property only upon proof of payment. With regards to the issue of the rentals being pegged in foreign currency convertible to local currency upon payment, the court made a finding that the appellant had conceded the denomination of the rent in foreign currency but that it had remained silent whether such would be paid in foreign currency or would be converted to the local equivalent. Regarding the alleged non-registration of Mr Pabwe with the Law Society, the court found it to be irrelevant information. In the end, the court held that the appellant had failed to satisfy the requirements of s 34(2) of the Act to have the attachment of its property set aside, or to prove that the attachment had been wrong. Consequently, the application for rescission was dismissed.

[11] There are three grounds of appeal by the appellant. The court *a quo* is said to have erred in the following respects:

- failing to appreciate that the respondent had not met any of the requirements in s 34(1) of the Act;
- relying on terms that were not part of the lease agreement between the parties;
- concluding that the appellant was in rent arrears when there was no quantification or breakdown of the amounts claimed.

[12] At the end of argument, we dismissed the appeal and gave our reasons *ex tempore*. Now the respondent's legal practitioners (not the appellant's) have written to ask for those reasons in writing. What we stressed in our *ex tempore* judgment was that the proceedings that were brought on appeal before us were those in relation to the appellant's application for rescission of judgment, not those in relation to the attachment of the respondent's assets earlier on. Admittedly, both proceedings are interrelated. They are intertwined. They are inexorably linked to each other. But there are material differences, particularly in regards to the question of onus and the degrees of proof. Section 34 of the Act reads:

"34 Order of attachment of property in security of rent

(1) Upon an affidavit by or on behalf of the landlord of any house, land or premises situate within the court's regional division or province, as the case may be, that an amount of rent not exceeding the jurisdiction of the court is due and in arrear in regard to that house, land or premises, and that the rent has been demanded in writing for the space of seven days and upwards or, if not so demanded, that the deponent believes that the tenant is about to remove the movable property in and upon the premises in order to defeat and avoid the payment of the rent due and in arrear, and upon security being given to the satisfaction of the clerk of the court to pay and satisfy all damages, costs and charges which the tenant of such house, land or premises, or any other person, may sustain or incur by reason of the seizure or arrest hereinafter mentioned if such seizure and arrest are thereafter set aside, the court may, upon application, issue an order to the messenger authorizing and requiring him to seize and arrest so much of the movable property in or upon the house, land or premises in question, and subject to the landlord's hypothec for rent, as may be sufficient to satisfy the amount of rent due and in arrear, together with the costs of such application and of any action for the rent due and in arrear.

(2) Any person affected by the order referred to in subsection (1) may apply to have it set aside.

(3) A respondent whose property has been attached in terms of subsection (1) may, by notice in writing to the clerk of the court, admit that such property is subject to the landlord's hypothec for an amount to be specified in the notice, and may consent that such property be sold in satisfaction of the amount specified and costs; and the notice shall have the same effect as a consent to judgment for the amount specified."

[13] In the proceedings for the setting aside of the attachment in the court below, the appellant was trying to show that the earlier proceedings and the outcome thereof had been wrong. The respondent's application for attachment in the earlier proceedings in terms of s 34(1) of the Act had been brought *ex parte*. The question whether this procedure was in fact correct or not was not before us. Throughout the prosecution of this case, it was not the appellant's complaint that the proceedings had been brought *ex parte* and therefore irregular. It was not its concern. The provision itself does not say what sort of application it is.

[14] Order 22 r 1 of the Magistrates Court Civil Rules, 2019, provides that except where otherwise provided, an application to the court for an order affecting any other party shall be on no less than seven days' notice to such other person. Rule 7 then says an *ex parte* application can only be made in the following instances:

- an application for an interdict, where a child is about to be removed from the court's jurisdiction; or
- for purposes of attachment to confirm jurisdiction; or
- for Garnishee orders in terms of s 33 of the Act, or

- where the procedure is provided for under the Rules.

[15] Order 22 Rule 7(4) provides that any person affected by an order made *ex parte*, including an interdict for rent under s 38 of the Act, may apply to discharge it with costs on not less than twenty-four hours' notice. Section 38 of the Act is the provision that permits the inclusion in a summons claiming any outstanding rent for a house, land or any premises, a notice prohibiting the removal of any furniture or other effects therein or thereon which are subject to the landlord's hypothec for rent, until a court has made an order in relation thereto.

[16] Therefore, we have not decided the question whether a landlord's application for the attachment of a tenant's assets in terms of s 34(1) of the Act can be made *ex parte* or as an ordinary application. Our decision to dismiss the appeal was premised on the failure by the appellant to demonstrate the respects in which the court *a quo* had misdirected itself in dismissing its application for the setting aside of the attachment.

[17] In a s 34(1) application, the applicant, by affidavit, has to show:

- that there is an amount of rent, not exceeding the court's jurisdiction, which is in arrears and due by the tenant to the landlord in respect to the rented premises;
- that the outstanding rent has been demanded in writing for the last seven days or more; or
- that the deponent believes that the tenant is about to remove the movable property from the rented premises in order to defeat and avoid the payment of the outstanding rent due; and
- that adequate security has been given to the satisfaction of the clerk of the court to cover all the damages, costs and charges which the tenant may incur by reason of the attachment of his or her property in the event that such attachment is set aside;

[18] The order that the court issues authorises and requires the messenger of court to seize and arrest so much of the movable property on the rented premises as is sufficient to satisfy the amount of the outstanding rent, together with the costs of the application and of any action for the recovery of the arrear rent. In the court below, and to some extent in argument before us, the appellant would, in one breath, expend much energy in trying to demonstrate that in his *ex parte* application for the attachment order, the respondent had not demonstrated that there had been any amount of rent due to him that he had demanded for seven days or more. But in the

next breath the appellant would also concede that clearly the respondent had proceeded on the basis of the alternative ground for seeking such an order, namely, the landlord's belief that the tenant was removing assets from the rented premises in order to avoid or defeat the outstanding rent. Ms *Majome*, for the appellant, finally conceded that the issue relating to the issuing of a demand was irrelevant. She then focused on the quality of the belief that the landlord must entertain in order to move a magistrate's court for the attachment order.

[19] We dismissed the appeal because, contrary to the appellant's submission, the landlord needs no more than allege that in his or her belief the tenant was removing his or her property from the rented premises in order to defeat the claim for arrear rentals. He or she needs not provide proof that the tenant is in fact removing his or her assets. In their old edition of *The Civil Practice of the Magistrate's Courts in South Africa*, authors Buckle & Jones, Juta & Co. 1918 ed., discussing the subject at p 54, say that the landlord is not required to give the reasons for his belief, and that if the order is questioned the court will not require the strictest of proof that the tenant intended to remove. The authors say it will be sufficient proof if the landlord can show that he had reasonable grounds for the apprehension.

[20] Obviously the belief needs to be reasonably entertained. It has to be more than fanciful. But the landlord needs not provide proof on a balance of probabilities that the tenant is doing away with his or her property from the rented premises for the purpose of defeating the landlord's claim for the outstanding rent or to render his or her hypothec for rent nugatory. Much less, the landlord needs not prove, at this stage, the quantum of the arrear rent, except to show that it does not exceed the court's jurisdiction.

[21] We consider that all that the landlord needs to show is a *prima facie* basis for the attachment order. In the present case, the respondent had shown the court that there was a landlord and tenant relationship between himself and the appellant; that there was an amount of rent outstanding due by the appellant to him; that not only had he cancelled the lease agreement and demanded vacant possession of the premises by reason of the appellant's default, but also that the issue had already been referred for arbitration the outcome of which was being expected in the following week. Furthermore, the respondent had attached a bond of indemnity which apparently had satisfied the clerk of court as being adequate security for the purposes of the Act.

[22] The attachment order that the court issues under s 34(1) of the Act does not automatically lead to execution. It is to restore or preserve so much of the tenant's property at the rented premises as the value of which would be sufficient to satisfy any judgment of the court for the outstanding rent and costs. Such an order seems similar to an anti-dissipation interdict which is a temporary interdict intended to preserve an asset by prohibiting its disposal pending the determination of a dispute. The object is to give effect to the order of court that may be eventually granted to ensure that there is an asset to levy attachment on in the event of execution: see *Shabtai v Bar & Ors* HH 707-14.

[23] The attachment under s 34(1) of the Act is to confirm and secure the landlord's hypothec for rent that is referred to in s 38 of the Act. Under the common law, a landlord has a tacit hypothec for the rent owing by the tenant. The hypothec is over all the movable property on the rented premises and which belongs to the tenant: Buckle & Jones, *ibid*, at p 55. Under s 38 of the Act the hypothec is over the furniture and other effects of the tenant at the rented premises. In simple terms, a landlord's hypothec for rent is an encumbrance on the tenant's property as security for rent. The property remains in the possession and use of the tenant, but he or she may not remove it from the rented premises.

[24] Therefore, even before a landlord applies for the 34(1) order, he or she already enjoys certain rights over the tenant's property. That is why in our view, it should be less onerous for him or her to prove the right to attach the tenant's property as security for the outstanding rent due by the tenant. The s 34(1) order is mere confirmation of the landlord's hypothec. Therefore, to the extent that the appellant required the respondent to furnish proof on a balance of probabilities that its rent was indeed in arrears, and by how much, or that it was actually removing its assets from the rented premises in order to avoid or defeat the outstanding rent, the appeal lacked merit.

[25] On the other hand, the appellant's own application under s 34(2) for the setting aside of the attachment order required to be proved on a balance of probabilities. Among other things, it had to prove that the rent was not outstanding. The onus of proof lay on it. It was a question of fact. But despite filing two affidavits, at no stage did the appellant show in any way that its rent was or had been paid up. As a matter of fact, the respondent had gone on to issue summons and obtain summary judgment for the outstanding rentals. Therefore, the appellant's

