BATORE IMPORT & EXPORT (PVT) LTD
versus
BAYSWATER (PVT) LTD
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 November 2014

Urgent Chamber Application

K. Musimwa, for the applicant
E. Jera, for the 1st respondent
2nd respondent in default

MATHONSI J: It is amazing how an applicant seeking relief from a court of law by urgent application could possibly anchor such application on falsehood, half-truths, mendacious and outrightly dishonest assertions and still hope to obtain relief from the court. It is also becoming in vogue at the moment for litigants who find themselves with execution being levied against their property to invariably approach this court seeking a stay of that execution even where there is not the slightest basis upon which execution can be stayed. We are increasingly having to deal with so many of such applications which have no merit whatsoever other than that debtors will now simply not bow to execution without putting up a fight, a fight which they cannot possibly win. It is an unacceptable abuse of process especially as what the present applicant says in its founding affidavit is not borne by the true facts of the matter.

The applicant seeks a stay of execution of a magistrates court judgment for its eviction from shop number 7, 83 Kaguvi Street, Harare and payment of $4 940-00 in arrear rentals given in favour of the first respondent on 7 August 2014. The judgment was granted in default. In the founding affidavit of Admire Tore the applicant's managing director, the applicant states that execution has already been levied following service of a warrant of execution and notice of attachment on 17 October 2014, which was a surprise to the applicant because it had paid all rentals due.

Admire Tore states that the applicant never received the summons in that matter and that the magistrates court record in case number 7400/14 does not contain any return of service of the summons. He goes on to say that the applicant did not defend the action by reason that it was not served with the summons and the service of the warrant of execution therefore came as a surprise.

Tore says that the applicant has since noted an appeal against the judgment of the magistrates court, which he does not specify and he does not even attach the notice of appeal although he maintains that the appeal has prospects of success. He attaches a copy of a rescission of judgment application which the applicant made at the magistrates court and emphatically states that following the noting of an appeal "no application for execution pending appeal has been filed," and the first respondent "did not obtain an order to execute pending appeal."

Tore insists that the applicant's property has been attached and removed on the basis of an order obtained on a non-existent claim, no proper service of summons and without giving the applicant the requisite 48 hours notice of removal. He therefore, craves an order aforesaid together with punitive costs.

The true facts on the ground are substantially at variance with what the applicant alleges. In fact the same Admire Tore who deposed to the founding affidavit in this matter did the same in an application for rescission of judgment in the magistrates court where he categorically stated at para 5:

> "5. I submit that I was served with summons in this matter under cover of case no 7400/14 upon which I sought the legal services of Messrs Manase and Manase to assist me in handling the matter. On the 19th of May 2014, I entered a Notice of Appearance to Defend the action. I then waited upon my legal counsel to advise me as to the next stage.
>
> 6. I was only shocked and disappointed to learn at the latest stage that my legal practitioners had received a Notice to Plead and failed to convey the message to myself. I only came to know of the said Notice to Plead when I was served with a copy of the default judgment and the notice of eviction and removal which were brought to my attention by the 2nd respondent on the 22nd of August 2014. Attached hereto is (sic) Annexure 'A' is a notice of eviction and removal."

If the applicant was served with a notice of removal on 22 August 2014 and removal was only executed on 17 October 2014 then it is demonstrably false that it was not given 48

hours notice of the removal. It was in fact given 26 days notice. More importantly, it is not true, as the applicant now alleges in this application, that it was not served with summons and did not enter appearance to defend. The same deponent, Admire Tore stated under oath in an earlier court application that the applicant had been served and did enter appearance.

Although the applicant now alleges that it does not owe any amount in rent arrears, in earlier correspondence between the parties as appears in the first respondent's opposing papers, the applicant did concede being in rent arrears. In a letter dated 8 October 2014 to the first respondent's legal practitioners, Messrs *Rubaya* and *Chatambudza* then representing the applicant, wrote:

> "**RE: GUEST AND TANNER REAL ESTATE (PVT) LTD VS CRIMPLATE INVESTMENTS (PVT) LTD AND BATORE IMPORT AND EXPORT (PVT) LTD**
>
> We refer to the above matter particularly the court hearing set down for tomorrow. We kindly advise, as previously communicated to your Mr Jera by the undersigned, that both our clients being in business do admit being in arrear rentals, however both our clients are desirous to continue in occupation of same as they feel being evicted or even leaving the premises voluntarily would impact negatively upon their business and to that extent they are willing to abide by any such condition(s) that may be imposed by yourselves including payment of your legal fees. Could you kindly advise as to your position or prepare a deed of settlement encompassing any such terms.
>
> Yours faithfully
>
> Rubaya A (Mr)
> RUBAYA AND CHATAMBURA"

Following a meeting held on 3 October 2014 between the first respondent's estate agent and Mr Tore the applicant's managing director, the latter signed a letter on 4 October 2014 confirming an admission made during the course of that meeting that it owed a sum of $13 000-00 in rent arrears. It is therefore false that the applicant does not owe any arrears.

Although the applicant was adamant that there was no application for leave to execute pending appeal, we have now been told by the first respondent that indeed such an application was made. Significantly an order granting such leave with the current applicant to pay costs of suit on a legal practitioner and client scale, was made by consent on 14 October 2014. The applicant was represented by a legal practitioner of its choice at that hearing.

What has also exercised my mind is whether the applicant's appeal against the judgment of the magistrate dismissing his application for rescission of judgment has the effect of suspending the default judgment entered against the applicant in that court. The default judgment in question has remained intact and Mr *Musimwa* for the applicant conceded that point. It has not been suspended and to the extent that an application to rescind it was made, it cannot be said that such application suspended the judgment in the absence of a court order to that effect. The application for rescission of judgment was itself dismissed and the applicant appealed against that dismissal. So what? I take the view that such appeal had no effect whatsoever against the default judgment which was not appealed against but sought only to be rescinded.

It may well be that in seeking leave to execute pending appeal, which it obtained by consent, the first respondent was engaging in fruitless activity and superfluity. In addition to that Mr *Jera* for the first respondent has stated that applicant conceded at the hearing of the application for leave that the appeal was defective, hence the consent to judgment. Even if I am wrong in that conclusion, the fact remains that leave to execute was granted by consent. This was not disclosed by the applicant which has exhibited an unbelievable affinity for misleading the court.

I find myself having to repeat what I stated in *Moyo & Anor* v *Central Africa Building Society & Anor* HH 431/14 at p 1 that:

> "The utmost good faith must be observed by all litigants who approach this court seeking the indulgence of being heard on an urgent basis or *ex parte*. An applicant in such a matter is required as a matter of course to disclose all facts relevant to the matter which have a bearing on the outcome. The courts will always discourage urgent applications whether *ex parte* or not which are characterised by material non-disclosures."

The applicant has premised this application on falsehood and fed the court with half-truths in the process of withholding crucial information. The courts will always discourage such applications: *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) 555 C-D; *Loubser* v *Minister of Lands Land Reform and Resettlement & Anor* HH 507/13; *Shungu Engineering (Pvt) Ltd* v *Songondimando & Anor* HH 99/12.

An application which is not only based on falsehood but in which the applicant withholds vital information in order to mislead the court in the hope of obtaining an

undeserved relief cannot succeed. In such a situation, in dismissing the application, the court will also make an adverse or punitive order for costs as a seal of its disapproval of *mala fides* or dishonesty on the part of the litigant.

Accordingly, this application is hereby dismissed with costs on a legal practitioner and client scale.

Musimwa & Associates, Applicant's Legal Practitioners
Moyo & Partners., Respondent's Legal Practitioners