FOLITORN INVESTMENTS (PRIVATE) LIMITED
and
ARETHA MANASE
versus
FBC BANK LIMITED
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 13 July 2016

URGENT CHAMBER APPLICATION

T. Dzvetere, for the applicants
C. Malaba, for the respondent

CHATUKUTA J: This is an application for stay of execution pending the rescission of a default judgment granted against a company called Folitorn Trading (Private) Limited (herein after referred to as "Folitorn Trading") on 2 March 2016 in case number HC 6497/15. It is necessary at this stage to note that whilst the default judgment was issued against Folitorn Trading (Private) Limited, the applicant in the present application is Folitorn Investments (Private) Limited (hereinafter referred to as Folitorn Investments).

The facts giving rise to the application are common cause. The first respondent issued summons in case number HC 6497/15 against Folitorn Trading seeking an order for the ejectment of that company from premises known as 9 Inverary Road, Pomona, Harare. Folitorn Trading had previously been the owner of the property. The first respondent acquired the property pursuant to a sale in execution. The property was transferred into the first respondent's name after the sale. The first respondent issued summons on 10 July 2015 for the ejectment of Folitorn Trading from the property.

After closure of proceedings in case number HC 6497/15, the matter was set down for a Pre-Trial Conference scheduled for 2 March 2016 at 10am. The representative of Folitorn Trading and its legal practitioner where not in attendance at the designated time. The company had not filed any Pre-Trial Conference papers. Judgment was entered against the company in default on application by the first respondent. A representative of Folitorn

Trading and its legal practitioner arrived for the Pre-Trial Conference soon after the granting of the order and as the first respondent's representative and its legal practitioner were leaving the judge's chambers. They were, at that stage, advised by the first respondent's legal practitioner that judgment had been granted against Folitorn Trading.

On 3 March 2016, the applicant filed an application in case number HC 2268/16 seeking an order for the rescission of the default judgment. The first respondent, through its legal practitioner, advised the applicant by letter dated 7 March 2016 and served on the latter's legal practitioners on 9 March 2016, that the application for rescission was going to be resisted. A Notice of Removal and Ejectment, stating that execution was going to be effected on 24 March 2016, was served on the company on 21 March 2016. It is the service of the notice of seizure that prompted the filing of this application on 21 March 2016.

The application for stay of execution was opposed. The first respondent raised three points *in limine*. The first point was that the application was not urgent. The first respondent treated the applicants separately in its submissions. It was submitted that the first applicant was aware of the default judgment on 2 March 2016. By letter dated 7 March 2016 and received by the respondents on 9 March 2016, the applicants were advised that the first respondent was going to oppose the application for rescission in case number HC 2268/16. The first applicant should therefore have been aware of the impending execution since an application for rescission of a judgment does not stay execution. The need for the first applicant to act arose on 2 March 2016 at the earliest and on 9 March 2019 at the latest

Regarding the second applicant, it was submitted that the second applicant's need to act arose in May 2015 when the applicant was advised that the first respondent had taken transfer of the property and at the very latest on 23 June 2015 when she was given written notice to vacate the property. This argument was abandoned and rightly so as it totally lacked merit. The communication alluded to was a prelude to the institution of the proceedings giving rise to the default judgment. There having been no summons issued let alone a court order at the time, it is incomprehensible how the applicant could have instituted an application for stay of execution of a non-existent order.

Having abandoned the above submission, the first respondent fell back on the same submissions on urgency made with respect to the first applicant.

The second point *in limine* was that the first applicant did not have the *locus standi* to seek a stay of execution of an order to which it was not a party. The defendant in case number HC 6497/15 was Folitorn Trading (Private) Limited and not Folitorn Investments (Private)

Limited. The company and the applicant are separate legal entities. It was further submitted that the registered owner of the property was Folitorn Trading (Private) Limited and not Folitorn Investments.

The last point *in limine* was that the certificate of urgency was defective in that the deponent merely summarised the contents of the applicants' affidavits. There was no explanation for the inaction by the applicants from the time they became aware of the default judgment and the present application.

I perceive the determination of this application is dependent on my findings on the second point *in limine*. The first applicant appeared to be confused in its submissions in opposition of the point as to the explanation why the applicant was Folitorn Investments as opposed to Folitorn Trading. Initially, it was submitted that the two companies were one and the same. The different names were used interchangeably and one was a trading name without any indication as to which one of the two was the trading name. The applicant vacillated and submitted that it was an error to refer to the applicant as Folitorn Investments instead of Folitorn Trading and therefore the applicant had been misjoined. When it became apparent to the applicant's counsel that this meant that there was no applicant hence no application before the court, it was further submitted that in fact the first applicant was a non-existing company. This further submission compounded the applicant's problems.

The first applicant sought to redeem themselves in their heads of argument by conceding that there was vacillation by the applicant. It was submitted that the court should not be detained by this as it is known who the real party is. In support of this proposition, the 1st applicant referred to *Gariya Safaris (Pvt) Ltd* v *Van Wyk* 1996 (2) ZLR 246 (HC). The first applicant referred to the observations by Malaba J (as he then was) at 253 B-C where he cited with approval the statement of the law by WESSELS J in *Vuuren* v *Braun & Summers* 1919 TPD 950 at p955 that:

> "It is true that it will not be a flow in the summons if the defendant is not described as accurately as he should be. If a man is baptised "George Smith" it is no defect in the summons to call him "John Smith" because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inserting the defendant's name in court."

It is trite that an application is null and void where a non-existent person is cited as an applicant. In *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (*supra*), a case which the first applicant sought to rely on Malaba J stated at 254G that:

> "A summons has a legal force and effect when it is issued by the plaintiff against an existing or a natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void."

Malaba J cited a plethora of case authority in support of the proposition that the proceedings where the party who initiates the proceedings is non-existent are a nullity. The first applicant was clearly selective as to which part of the judgment to cite. In *Old Mutual Asset Management (Private) Limited* v *F&R Travel Tours & Car Sales* HH 53-2007 at GOWORA J (as she then was) observed that:

> "If the contention is that the plaintiff was incorrectly cited and that an amendment would cure this, then the plaintiff has a misapprehension of the situation. The plaintiff *in casu*, who has instituted proceedings is non-existent. There is no such person and consequently, there is no person before the court in the guise of a plaintiff. It is therefore an action that is doomed from the beginning as there is no party before the court. The proceedings are invalid, and they cannot be validated by the act of substituting an existent person with one that does not exist. The proceedings are thus a nullity."

The same proposition was accepted in *Masuku* v *Delta Beverages* 2012 (2) 112 (H) at 115A-116 A. (See also *Zenda* v *Emirates Airlines & Ors* HH 775-15). The difference between this application and *Masuku* v *Delta Beverages* was that the court in the *Masuku* case made a finding that the error in citing the full name of the company by omitting "(Pvt) Ltd" after "Beverages" was not fatal to the application. This prompted Cheda J to observe at 116 A-C that:

> "*In casu*, the entity whom the applicant sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that irresistibly begs an answer is, to what extent does the omission affect the identification of the respondent? The respondent is a well-known blue chip company whose fleet of cars is all over our national and domestic roads and its commercial advertisements need no introduction.
>
> In other words, Delta Beverages is known here and beyond. To me, the applicant may have technically erred in her description, but has described the respondent with sufficient clarity to the extent of eliminating any mistake either legal or factual of the respondent's identity. The applicant sufficiently described the respondent."

That cannot be said of the error in the present application. The error is that the first applicant is non-existent by the first applicant's own words. This is an error of substance that cannot be overlooked or amended.

The first applicant's predicament is compounded by the fact that the founding affidavit was deposed to by a one Preston Nhamoinesu Goredema who purported to act on behalf of a non-existent entity. The first applicant further filed a company resolution authorising Goredema to represent the non-existent company. The first applicant did not state

in its heads of argument that the first applicant was an existing company. The status of the first applicant and how it came to be cited as a party was not explained. All that the first applicant stated was that the real applicant was apparent to everyone. Without the explanations, the real applicant cannot be said to be apparent.

The application by the first applicant is therefore a nullity.

The application by the second applicant must surely face the same fatality. The cause of action is contained in the founding affidavit. (See *Mangwiza* v *Ziumbe No & Anor* 2000 (2) ZLR 489 (SC)). A supporting affidavit is what it suggests, a support of the averments set out in the founding affidavit. A case stands and falls on its founding affidavit. The founding affidavit in the present case was deposed to on behalf of a non-existent company. In view of the authorities cited above the founding affidavit is a nullity. The second applicant filed a supporting affidavit to an invalid founding affidavit. There is nothing to support.

Accordingly, there is no valid application by the second applicant either.

I have found it not necessary to determine the issue whether or not an applicant who was not a party to the proceedings which culminated in the order in HC 6497/15 does not have the *locus standi* to institute these proceedings. I believe the proposition by the first[t] respondent is not totally correct as it is trite such a party can have *locus standi* if it is an interested party and had been omitted in the proceedings.

Assuming that I am wrong in holding that the application is a nullity, I shall proceed to determine the other two points *in limine*.

The applicants' response to the first point on whether or not the application was urgent was that the need to act arose when the applicant was served with the writ of execution and the notice of ejectment on 21 March 2016. Before then, it was only necessary for the applicant to seek the rescission of the default judgment. They immediately filed this application in order to abet the harm to be caused by the execution. They expected the first respondent to await the determination of the application for rescission before proceeding with execution. It was further submitted that the harm that the applicants sought to prevent would only arise from the execution of the ejectment and not from the mere granting of the default judgment. In support of this proposition the applicants referred to the case of *Saltlake & Anor* v *CBZ & Anor* SC 438/15.

It is trite that an application is urgent when the need to act arises. (See *Kuvarega* v *The Registrar General* 1998 (1) ZLR 188, *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H), *Document Support Centre*

(Pvt) Ltd 2006 (2) ZLR 240, *Gwarada* v *Johnson & Ors* 2009 (2) 159 (H)). The dispute between the parties is when the need to act arose; with the granting of the default judgment or the service of the notice of ejectment. This issue has, in my view, been discussed in a plethora of cases. In *Independent Financial Services (Private) Limited* v *Colshot Investments (Private) Limited & Anor* 2003 (2) ZLR 494, it was stated at 496D-C that:

> "I have considered the papers filed in the opposition and came to the conclusion that the Applicant merely seeks to delay the day of reckoning by filing this application. **A matter is not urgent merely because the property has been attached. This is self-created urgency, born out of the dilatory manner in which a party conducts its affairs. It cannot be a good reason to stay satisfaction of a lawful due debt as here**". (own emphasis)
> (See also *Mike Ngoda Chivhanganye & Anor v Oacridge Properties (Private) Limited & Anor* HH 208/10

As rightly submitted by the first respondent, the consequence of obtaining an order is the execution of that order. *Mr Dzvetero* conceded that the mere filing of an application for rescission does not suspend an order of court. The order remains extant and enforceable at any time in the absence of an order staying its execution and it is within the discretion of the holder of a judgment when to execute. Therefore any diligent party against whom an order has been granted would and should anticipate its execution and the harm that will ensue from such execution and timeously take measures to forestall the harm. This the applicants did not do. They chose to wait for the notice of ejectment in order to be jolted into action. In any event, a writ of execution does not create any rights. It is the order that gives rights. A writ is issued on the strength of that order of court. It is merely a mechanism to realise the rights granted under that order.

The dilatoriness of the applicants is also evident in light of the reaction of the first respondent to the applicant's endeavour to have the judgment rescinded. It appears that on the very day that the order was granted and soon after the first respondent emerged from the judge's chambers, the applicants attempt to engage the first respondent with a view to have the order rescinded was spurned. The applicants were in no way lucky either after writing to the applicants on 2 March 2016 and filing their application for rescission the following day, the 3rd of March 2016. The first respondent responded by letter dated 7 March 2016 to the letter and the application by indicating that the application for rescission was going to be opposed. The frustrations of the first respondent are evident in the 3rd paragraph of their letter where they wrote that:

> "At our previous round table meeting, you made undertakings to make a proposal and none has been forthcoming. Our client remains of the view that any efforts to bar eviction are not *bona fides*."

Following such communication, a prudent party would have filed an application for stay of execution.

The applicants sought to persuade the court that the Supreme Court intimated in *Saltlakes & Anor* v *CBZ & Anor* SC 438/15 that the need to act arises upon the taking of a writ and service of a notice of execution. As stated by the first respondent, the Supreme Court issued an order by consent. The circumstances giving rise, not only to the consent of the parties but to the issuance of the order, are clearly not apparent on the face of the order. There are no reasons to support the applicants' proposition or any other proposition for that matter. Under such circumstances, an order cannot therefore be relied on as authority for any proposition. Any explanation by either party of the circumstances giving rise to the order would not be of assistance to the court in view of the divergent explanations so proferred.

The suggestion by the applicants that an application to stay execution of an order would have been premature thus is without legal basis.

The applicants' response was centred on the first and second preliminary issues. In fact there was no mention of the third point *in limine* in both the oral submissions and the applicants' heads of argument. It is therefore deemed that the applicants conceded to the merits of the argument advanced by the first respondent on the point. The importance that these courts attach to a certificate of urgency is now settled. A certificate or urgency assists the court in arriving at a decision whether or not an application should be considered ahead of other applications that are already in the queue. Where there has been a delay in bringing the application, an applicant must explain the delay. (See *Kuvarega* v *Registrar General* 1998 (1) ZLR 188, *Chidawu & Ors* v *Sha & Ors* 2013 (1) ZLR 260, *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank (Pvt) Ltd* 1998 (2) ZLR 301 (H) & *Mozido Africa Limited* v *Bartholomew Mswaka* HH 862/15)

The certificate of urgency did not explain why, despite filing an application for rescission of judgment on 3 March 2016, the applicant did not file the present application then. As indicated earlier, the applicant sought to persuade the court that the basis for urgency was the service of the notice of removal on 21 March 2016. I have already determined that the applicants' submissions in this regard lack merit. The certificate of urgency, like the founding affidavit, should have contained an explanation of the non-timeous action of nineteen days. The certificate of urgency is therefore fatally defective.

The application is therefore not urgent.

The first respondent has succeeded on all three points *in limine*. Having determined that there is no valid application before the court, it is accordingly ordered that:

1. The application is removed from the roll.
2. The applicants be and are hereby ordered to pay costs.

Bruce Tokwe Law Chambers, applicants' legal practitioners
Kantor and Immerman, respondent's legal practitioners