REPORTABLE (33)

TM SUPERMARKETS (PRIVATE) LIMITED

v

(1) AVONDALE HOLDINGS (PRIVATE) LIMITED

(2) SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 12, 2014

T Matinenga, for the applicant

F. Girach, with him *T Magwaliba,* for the first respondent

No appearance for the second respondent

Before: CHIDYAUSIKU CJ, In Chambers

This is an urgent chamber application seeking the stay of execution of a High Court judgment pending an appeal noted under SC 255/14. When this matter was set down before me on 12 June 2014 I dismissed the application with costs and intimated to the parties that the reasons would follow in due course. These are they.

The background of the dispute is as follows.

The applicant has been a lessee of the first respondent since 9 October 1978. The first respondent and Greatermans Stores (Rhodesia) Limited entered into a notarial deed of lease

agreement in 1968, which lease was renewed from time to time. Greatermans Stores (Pvt) Ltd then, by notarial deed, assigned the lease to the applicant, who then became the first respondent's tenant. There has been litigation between the parties before. Suffice it to say that, in terms of an arbitral award dated 18 June 2009, the lease between the parties was to end on 28 February 2014. On 1 October 2010 one of the applicant's directors wrote to the first respondent, indicating that it would not contest the first respondent's right to take back the premises at the expiry of the lease, that is on 28 February 2014. On 29 January 2014 the applicant's lawyers wrote to the first respondent's lawyers, indicating that the letter of 1 October 2010 did not have the effect of waiving its right to occupation of the premises beyond 28 February 2014. The first respondent responded by informing the applicant that it had always been the understanding between the parties that the premises would be vacated by 28 February 2014 and that the applicant had actually allowed the first respondent's personnel to visit the premises in 2013 to prepare for the restructuring and refurbishment of the premises. The parties could not agree and the applicant stated that it would remain in occupation of the premises as a statutory tenant.

On 3 March 2014 the first respondent issued summons for ejectment out of the High Court and served the summons on a receptionist in the applicant's employ at Jaggers Msasa, along Mutare road. The receptionist refused to accept service and a copy was left on her desk. The applicant did not defend the matter and default judgment was entered against it on 6 May 2014. The allegation is that there was no proper service on it of the summons and it did not know that it was being sued for eviction. A writ of execution was drawn up and the applicant was evicted by the second respondent on 16 May 2014.

The applicant proceeded to file an application for rescission of judgment under HC 4562/14 and filed an urgent chamber application for stay of execution under HC 4018/14. The application for stay of execution was dismissed by the High Court and the applicant noted an appeal before this Court under SC 255/14. That appeal is yet to be heard. The applicant has filed this application for stay of execution pending the hearing of that appeal.

The applicant needs to lay a strong case for the grant of the relief sought. The summons was served on one Nancy Mazodze, who refused to accept service. The applicant has tried to disown this version of events, as detailed by the second respondent.

The law is settled that in order to disprove the contents of a return of service prepared by the Sheriff, there is need for positive evidence to rebut the presumption of regularity of a return of service which is in the prescribed format.

In *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) GUBBAY JA (as he then was) had this to say at 230E-231A:

> "I am satisfied, therefore, that the messenger's return, stating as it did that personal service of the summons had been effected on 9 February 1985, cast the *onus* upon the appellant to prove, by the adduction of clear and satisfactory evidence, that the return was wrong. In other words, it was for the appellant to rebut the presumption of personal service arising from what was contained in the messenger's return.
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> It was Mr Rajah's alternative contention that the appellant's bald allegation that the summons was not served upon him was sufficient to discharge the *onus* or rebut the presumption. I am unable to agree. The appellant did not claim to be at his place of employment on the morning of Saturday, 9 February 1985. Nor did he even profess an inability to remember precisely where he was or what he was doing. But assuming he suffered a lapse of memory (which would be understandable for the summons in question was allegedly served nine months before the civil imprisonment summons), he could

> nonetheless have given some indication to the court, supported by the affidavit of a third party, of how he normally spends his Saturday mornings. For instance, whether he usually goes shopping, plays sport, visits relatives, or takes the children to the park. No attempt was made to say where he thought he may have been on the morning in question."

The maxim *omnia praesumuntur rite esse acta* applies to a return of service effected by the messenger of the court; *Gundani* v *Kanyemba supra*.

The applicant's version is that the summons was never served on it. It said that the receptionist, on whom the second respondent says it served it, was not authorised to accept service of legal process. There is no affidavit from the applicant explaining who was authorised to accept service on behalf of the applicant. In the absence of such an explanation, there is no reasonable explanation to disprove the version of events as stated by the second respondent.

The applicant in its founding affidavit alleged that the application was for stay of execution pending the appeal noted under case number SC 255/14. There is an apparent defect on the notice of appeal. It does not state the court which gave the judgment appealed against. This is a fatal defect incapable of amendment. The authorities are clear on this. The attempt by the applicant's counsel to file an amendment is at best regrettable. This does, however, create an insurmountable problem for the applicant. The application is predicated on the validity of that notice of appeal. The notice of appeal, defective as it is, makes it difficult for the applicant to move its application because it has no founding basis at all. The application can be disposed of on this point and on other points as well.

I now move on to the other aspects of the application. In *Zimbabwe Open University* v *Magaramombe and Anor* 2012 (1) ZLR 397 (S), I had occasion to comment as follows at 402A-E:

> "In this Chamber application, as I have already stated, the University seeks the relief that the appeal be set down on an urgent basis and that the execution of the arbitral award be stayed pending the hearing of the appeal. Two issues fall for determination in this Chamber application – (1) whether or not this matter should be set down on an urgent basis; and (2) whether or not the University is entitled to the interim relief of a stay of execution of the arbitral award pending the determination of the appeal.
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> I will deal with the second issue first, namely the entitlement of the University to the interim relief of a stay of execution.
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> The factors to be taken into account in considering the grant of interim relief are now well settled. These are –
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> (1) whether or not the party seeking the relief has a *prima facie* right, *in casu*, whether the University has a *prima facie* right to stay the execution of the sale of the attached property pending the determination of the appeal;
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> (2) whether or not the applicant, in this case the University, will suffer irreparable harm if execution of the arbitral award is not stayed and the appeal succeeds; and
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> (3) the balance of convenience."

The first aspect would relate to the presence or otherwise of a *prima facie* right. The writ in question, as already noted, was issued pursuant to a default judgment. There is no reasonable explanation for the default in the application before me. The relationship between the applicant and the first respondent was governed by a lease which terminated by effluxion of time on 28 February 2014. The *prima facie* right can only arise if there was some right for the applicant to stay on the first respondent's premises beyond 28 February 2014. The applicant claims it became a statutory tenant after 28 February 2014. The first respondent claims that the applicant could not have become a statutory tenant because there was a prior agreement that the applicant would vacate

its premises on 28 February 2014 and that there would be no renewal of the lease. There is, therefore, a need to look at the circumstances surrounding the interactions of the parties to get to understand the true nature of the relationship between the parties.

On 1 October 2010 one B J Beaumont wrote to the first respondent on behalf of the applicant, indicating that it would not contest the first respondent's right to take back its premises upon the expiry of the lease, that is on 28 February 2014. The subsequent letters by the applicant's legal practitioner to the first respondent, indicating that the applicant would not vacate the property, are clearly at variance with the position indicated on 1 October 2010. The first respondent strenuously resisted the applicant's claims that there would be a lease beyond 28 February 2014. In light of the indications made in 2010 and in light of the first respondent's resistance of a further lease, whether by way of statutory tenancy or otherwise, the only reasonable conclusion is that there was an understanding between the parties that their relationship would end on 28 February 2014. That being the case, the applicant had no right to occupy the premises post the expiry of the lease on 28 February 2014. The applicant has not shown a *prima facie* right to protect here. It needed to show that, on the face of it, it was entitled to occupation of the premises beyond 28 February 2014. Assuming that the applicant had indeed turned to being a statutory tenant, it would have no right at all to be reinstated into the premises since it had lost possession of the premises. This point will be dealt with below. All this goes to show that the applicant has no *prima facie* right to protect, whichever way one looks at the matter.

The law is settled that an application is decided on the basis upon which it is made. It stands or falls on its founding affidavit. In *Muchini* v *Elizabeth Mary Adams and Others* 2013 (1) ZLR 67 S)ZIYAMBI JA opined at 70A-E:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See Herbstein & van Winsen *Civil Practice of the Superior Courts in South Africa* 3 ed p 80 where the authors state:
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> > 'The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out'.
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> This was the principle applied by the court *a quo*. It said:
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> > 'In his founding affidavit, the appellant submitted that the sale should be upheld because the widow or first respondent "had ostensible authority to dispose of the property by virtue of being the surviving spouse of the late Alvin Roy Adams". Now, in law, the applicant's case falls or stands upon what is said in the founding affidavit. It cannot be propped up by what may chance in the respondent's opposition. However, the issue of ostensible authority seems to have been abandoned during the proceedings in the court *a quo*. It certainly is not part of the grounds of appeal. On this basis alone, the conclusion would have been inescapable that the sale of the property fell foul of the peremptory provisions of s 21 of the Administration of Deceased Estates Act [*Chapter 6:01*].'
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> In my view, the stance adopted by both courts below is unassailable."

Applying this principle to this case, in light of the facts of this case, the applicant would be treading on thin ice indeed. The application, by the applicant's own words, is one for stay of execution pending the determination of an appeal. The execution has already taken place. The applicant in its founding affidavit conceded that execution has already taken place and it has been

ejected. At any rate, the first respondent, in its notice of opposition, confirmed this position and attached various pictures which show that the applicant is no longer in possession of the premises.

In the light of the fact that execution has already taken place and that this is an application for stay of execution, there can be no *prima facie* right to protect because the "right" to occupy the premises was already interfered with by a lawful process of court. There can be no stay of something that has already happened. The applicant knew, at the time the application for stay of execution pending the application for rescission was filed, that it had already been evicted. It knew as at that point that execution could not be stayed. In fact, its founding affidavit also shows that the applicant pursued the wrong relief in the court *a quo* as well.

The applicant's right to occupy the premises would have had to be based on a lease with the first respondent. The lease in question was due to end on 28 February 2014, by virtue of effluxion of time. The applicant wrote to the first respondent, unequivocally confirming that it would vacate the premises on 28 February 2014 should the first respondent wish to repossess it.

The applicant alleged that it had become a statutory tenant and therefore protected by ss 22 and 23 of the Commercial Premises (Rent) Regulations 1983 SI 676/1983 ("the Regulations"). Section 22(2) of the Regulations provides as follows:

> "**22. Limitation on ejectment**
> (2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -
> (a) continues to pay the rent due, within seven days of due date; and
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> (b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that -

(i) the lessee has declined to agree to an increase in rent; or

(ii) the lessor wishes to lease the premises to some other person."

Section 23 of the Regulations provides:

"**23. Rights and duties of statutory tenant**

A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:

Provided that, notwithstanding anything contained in the contract of lease, a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee."

The applicant in the same affidavit avers that it has been ejected. It would mean at law therefore that it has no right to be reinstated into the premises. In *Delco (Pvt) Ltd* v *Old Mutual Properties and Anor* 1998 (2) ZLR 130 (S), GUBBAY CJ held at 135A-D:

"The *Makhubedu* cases [1947 (1) SA 19 (W) and 1947 (3) SA 155 (T)] did not have to decide what the position would have been if the magistrate's judgment had been a nullity without any force and effect *ab initio* or at the time of execution. Yet, the remarks of BARRY JP at p 60, in reference to *Brown* v *Draper* [1944] 1 KB 309, seem to indicate that in such an event the evictee perhaps could be treated as being still in possession. Subsequently, in *Maisel* v *Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C), it was held that a statutory lessee who had lost occupation of premises by virtue of a judgment which was a nullity was entitled to be reinstated (see at 379, *per* WATERMEYER AJ).

In my opinion, the law as expounded in the *Makhubedu* judgments is wholly applicable to the present matter. I perceive of no basis upon which to adopt a different interpretation to s 22(2) as read with s 23 of the Regulations. The purpose behind the two sets of provisions is identical. It is to protect the right of the statutory lessee in actual

> physical possession of premises to resist eviction; and not the right to regain occupation of premises lost through ejectment under a wrong judgment or order.
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> The reversal on appeal of the High Court order does not mean that it was a nullity or an order given without jurisdiction. It was wrong in the sense that the proved facts did not warrant the eviction of the appellant from shops 5 and 13. Nonetheless, it was an order lawful and binding at the time."

The protection accorded to statutory tenants is one that is accorded to tenants in actual possession of the premises and not those who have lost occupation of the premises. This, unfortunately for the applicant, means that it has no *prima facie* right to occupation of the premises, as the authority above clearly details. This would affect the urgency or otherwise of the matter as well. The remedy of restoration to the premises is not available to a statutory tenant who is not in possession of the premises. Therefore, there would be no urgency as the other remedies available, like damages, would not require the treatment of the matter as urgent. There being no right to restoration to the premises, there would be no urgency. This application is ill fated either way.

As already noted, the applicant was ejected, so the relief it seeks is wholly incompetent. The first order sought is for the stay of the ejectment. This cannot be done since execution has already taken place. The second is that, in the event execution has taken place, the applicant be restored occupation. This is no possible, as shown above.

It is on the understanding of the letter of 1 October 2010 that the eviction order, albeit granted in default, was premised. The applicant waived any right it had to occupation of the premises beyond 28 February 2014. One cannot, by use of stay of execution, seek to revive a right that it gave away by lawful process.

In *Chidziva & Ors* v *Zimbabwe Iron & Steel Co Ltd* 1997 (2) ZLR 368 (SC) MUCHECHETERE JA said at 379B-F:

> "In the present case, no real attempt was made to show that the appellants abandoned their rights with full knowledge of those rights. All that was submitted was that the appellants accepted the retrenchment packages. The respondent should have gone further to show that they did this with full knowledge that they were abandoning their rights. On this I also cite with approval the passages at p 489 of Christie's above cited book (*The Law of Contract in South Africa* 3 ed) where the learned author said:
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> > '… there is ample other authority that it must be clearly proved that *the person who is alleged to have waived his rights knew what those rights were*. A party who fails to prove this necessary ingredient of waiver may still be able to raise the defence of estoppel against any attempt to enforce the rights in question. *When it cannot be proved that the party alleged to have waived knew what his rights were it may appear that his ignorance is properly classified as ignorance of law.* It can now be regarded as settled, despite VAN DEN HEEVER J'S decision to the contrary in *Schwarzer* v *John Roderick Motors (Pty) Ltd* 1940 OPD 170 at 185, that in this connection ignorance of the law is excusable provided it is *iustus et probabilis*' - justifiable and probable. This is especially so since *Willis Faber Enthoven (Pty) Ltd* v *Receiver of Revenue* 1992 (4) SA 202 (A) which equates mistake of fact and mistake of law for purposes of the *condicto indebiti*. MURRAY J'S words in *Ex p Sussens* 1941 TPD 15 at 20 may be taken as a correct statement of law:
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> > > "The necessity for a full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract, in which one party is taken deliberately to have surrendered his rights: there must therefore be proof of an intention as to surrender, *which can only exist where there is knowledge both of the facts and the legal consequence thereof*."
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> > The necessity to prove knowledge of the rights allegedly waived before it can be said that conduct in question amounts to waiver, applies equally to a case where the act of alleged waiver has been performed not by the party to the contract himself but by his agent (*Pretorius* v *Greyling* 1947 (1) SA 171 (W) at 177)' (my emphasis)."

Assuming for a moment that the applicant had the right to stay on as a statutory tenant beyond 28 February 2014, this right was unequivocally waived by the contents of the 1 October 2010 letter authored on behalf of the applicant by one B J Beaumont. In light of this incontrovertible fact, it becomes difficult to understand how the applicant can assert a *prima facie*

right to the relief sought. By virtue of the letter, the applicant renounced any right it had, or could have, to the occupation of the premises beyond 28 February 2014. The applicant simply has not shown that it has a *prima facie* right to occupation of the premises.

I agree with what CARLISLE J said in *Watson* v *Hunter & Another* 1948 (3) SA 1106 (D & CLD) at 1114:

> "Now it seems to me that the applicant must come to Court with a very strong case before the Court will stay the execution of its judgment."

In an application for stay of execution of a judgment of the Court, it is not enough for the applicant merely to allege hardship. He or she must satisfy the Court that he or she would suffer irremediable harm or prejudice if execution is granted –see *Chibanda* v *King* 1983 (1) ZLR 116 (HC). This is so because the grant of stay of execution denies a successful party in a judgment the opportunity to execute that judgment, in other words, to enjoy the fruits of that judgment. The applicant in its founding affidavit has mentioned that it has suffered serious harm and refers to an annexure "H", which does not in any way detail the financial harm suffered by the applicant. It is a collection of numbers which, unexplained, do not mean anything. He who alleges must prove. There is no such proof in this case. Considered from another angle, the aspect of irreparable harm ought not to arise at all. Once the finding is made that the applicant has no right of restoration, no harm can arise from the non-restoration.

The balance of convenience, therefore, lies in the dismissal of the application. This is so because the applicant has no *prima facie* right to occupation of the property and it does not stand to suffer any irreparable harm because it has no right to protect.

It is for these reasons that I dismissed the application with costs.

Honey and Blackenberg, applicant's legal practitioners

Magwaliba and Kwirira, first respondent's legal practitioners