DISCOVERY FOODS (PVT) LIMITED
and
STANLEY FORWARD MADLAZI
versus
HELLEN MAKAMURE
and
SHERIFF HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 15 August 2022

Urgent Chamber Application

P Mufunda, for the applicant
P T Chakanyuka, for the 1st respondent

MANYANGADZE J:

INTRODUCTION

This is an urgent chamber application for stay of execution. After hearing argument from both parties, I delivered an *ex tempore* judgment in which I ordered that the matter be removed from the roll of urgent matters. The applicants have requested full reasons for judgment. These are they:

FACTUAL BACKGROUND

The second applicant, in his capacity as a director of the first applicant, entered into an agreement of sale of motor vehicles with the first respondent. In terms of this agreement, the first respondent sold to the applicants 7 motor vehicles, mainly steel body tippers, for a total amount of US $ 335 000.00.

Pursuant to the agreement, the applicants made some payments, leaving a balance of US $ 215 000.00. Sometime in July 2021, the second applicant signed an acknowledgement of debt on behalf of the first applicant for the amount of US $215 000.00. The acknowledgment of debt contained a repayment schedule running from August 2021 to December 2021.

Subsequent to the signing of the acknowledgment of debt, the applicants only paid US$18 000.00, leaving a balance of US$197 000.00.

On 1 October 2021, the first respondent issued summons for the recovery of the outstanding debt, that is, US$197 000.00.

On 19 January 2022, this court (per MHURI J) granted the first respondent (as plaintiff) an order against the applicants (as defendants) for the payment of the sum of US$197 000.00. The order was granted in default of the applicants' appearance.

On 20 April 2022, the first respondent moved to execute the said judgment. To this end, a writ of execution was issued. This was followed by a Notice of Seizure and Attachment on 27 April 2022. These moves then prompted the applicants to file an application for condonation of late filing of an application for rescission of judgment, an application for rescission of judgment and urgent application for stay of execution.

POINTS *IN LIMINE*

Both parties raised some points *in limine*.

Applicants' point *in limine*

(i) The notice of opposition is fatally defective as it is not accompanied by an affidavit.

Respondent's points *in limine*

(i) The matter is not urgent
(ii) The certificate of urgency is defective
(iii) The relief sought is incompetent

Ordinarily, it is the respondent(s) who raise preliminary points, in which they seek to have the applicant(s)'s case thrown out before it is heard on the merits. This is precisely what the respondent *in casu* seeks to achieve by raising the three preliminary points listed above.

There are however, instances where the applicant(s) raise preliminary points. The objective usually, is to place the respondent(s) in a default position by invalidating the notice of

opposition. *In casu*, the applicants seek to have the notice of opposition vitiated by reason that it does not comply with the rules of court as it is not accompanied by a valid affidavit.

I will start by considering the applicant's point *in limine*. This is so because the applicants aver that there is no opposition to their application. It therefore becomes necessary to determine whether or not the notice of opposition is validly before the court, before considering the merits of the points raised in the opposing papers.

The gist of the applicant's preliminary point is that the notice of opposition infringes r 59(7)of the High Court rules, 2021, which requires that such a notice be accompanied by one or more affidavits.

The notice of opposition contains an opposing affidavit deposed to by the first respondent on 8 August 2022. The first respondent was based in the United Kingdom at the time of the deposition. It was done before a Notary Public named Pawel Stolarek, at Nottingham, England, and bears the Notary Public's seal of office.

The applicants contend that the first respondent's affidavit is only a verified statement of her by a Notary Public and not an affidavit. They further contend that "*first respondent statement was notarized outside Zimbabwe instead of commissioning.*"

The first respondent, on the other hand, avers that the notice of opposition is properly before the court. The sworn statement by the first respondent is an affidavit. The Notary Public in Nottingham commissioned an affidavit. The first respondent pointed out that the provisions of r 85 of the High Court rules, 2021, do not exclude documents that have been properly commissioned by a Notary Public.

In resolving this point, the court found that the Notary Public signed a sworn statement. The first respondent as deponent, opens the statement with the expression;

"I *Hellen Makamure, do hereby make oath and state that* :-"

The statement ends with;

"*SWORN to at NOTTINGHAM, ENGLAND this 8th day of August in the year 2022*"

It is clear the Notary Public administered an oath. The document bears all the essential characteristics or features of an affidavit. The applicants have not shown that a Notary Public in England cannot administer or commission oaths. It seems to me a hairsplitting argument to say that he notarized but did not commission the sworn statement, and therefore it is not an affidavit.

There is no evidence indicating that by administering the oath, he acted *ultra vires*, having regard to the laws of England designating commissioners of oaths.

In the absence of evidence to the contrary, the Notary Public can properly be presumed to have administered the oath in question. The notice of opposition thus incorporates the requisite opposing affidavit and is properly before the court.

The applicants' point *in limine* is accordingly dismissed.

I must now turn to the first respondent's points *in limine*.

The first point taken by the first respondent is that the matter is not urgent.

The law on urgency is well settled. It was succinctly stated by CHATIKOBO J in the following terms in *Kuvarega* v *Registrar General & Another* 1998(1) ZLR 188, 193 F-G:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

MAKARAU JP (as she then was) highlighted and clarified the above remarks, in *Document Support Centre Ltd* v *Mapuvire* 2006(2) ZLR 240, at 243 C-H;

> "I understand CHATIKOBO J in the above remarks to be saying that the matter is urgent if when the cause of action arises giving rise to the need to act the harm suffered must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

In casu, the details emerging from the papers, as outlined in the factual background above, are that execution commenced in April 2022. The process forced the applicants to make some direct payments towards liquidating their indebtedness to the first respondent. Further payments were made from proceeds of the initial sale in execution.

The sale did not fully realize the debt owed. The first respondent caused the second respondent to conduct another sale in execution in August 2022. This sale can really be viewed as a continuation of the initial process of execution, not a new and separate act.

The applicants raised no alarm whilst those processes were going on. The first sale went on without any complaint. Some payments were in fact made as a consequence thereof.

Curiously, the founding affidavit does not shed light on those developments and the applicants' inaction. The applicants point to para 5 of the founding affidavit as one that adverts to this aspect. Paragraph 5 is too terse to constitute an explanation for the inaction. It simply states;

> "The second respondent is the Sheriff of Zimbabwe who executed applicants' property in satisfaction (*sic*) a default order, HC 5217/21"

One does not comprehend this terse paragraph until one goes through the opposing affidavit. That should not be the case. Averments made in the founding affidavit should be clear *ex facie* the founding affidavit. You do not need to understand the applicant's case only after going through the opposing papers. Very often, this means applicant would have withheld some significant information relevant to the resolution of the case. The picture only becomes clearer after going through the opposing affidavit.

Infact, it is not only para 5 of the founding affidavit that is terse and rather incomprehensible. The terseness and vagueness is reflected in other paragraphs. For instance, para 16 states;

> "The first respondent then went to court in HC 5217/21 to recover the outstanding amount albeit from an erroneous agreement from a common mistake by both parties"

Paragraph 26 is equally cryptic:

> "The agreement of the second applicant and the first respondent was a nullity *ab initio* as it hangs on nothing being a genuine mistake both parties were not aware of as the parties never intended to cheat each other."

Infact, the entire founding affidavit is difficult to follow. It could have been more elegantly drafted. It is only when one reads it side by side with the opposing affidavit that one gets to appreciate the flow of the story.

Gleaning from the founding affidavit and submissions made on their behalf during the hearing, the applicants seem to be saying that they were cheated into signing the acknowledgement of debt and were unaware of the urgency of their matter. They were alerted to this by their legal practitioners.

It seems to me it is the applicants who should see the urgency in their situation. It is the litigants, not their lawyer, who has been pushed against the wall and needs to act urgently. The matter does not assume urgency because a lawyer, much later, advises that their matter is urgent and they were mistaken in not treating it as urgent.

The chronology of events already outlined in this judgment, does not satisfactorily establish urgency. This is a classical instance of waiting until the day of reckoning. There is therefore considerable merit in the first respondent's point *in limine* that the matter is not urgent. The proper course of action is to remove it from the roll of urgent matters.

In light of this, it is not necessary to proceed to the other preliminary points raised by the first respondent.

DISPOSITION

In the result it is ordered that;

1. The matter be and is hereby removed from the roll of urgent matters.
2. The applicants bear the first respondent's costs.

Mufunda and Partners Law Firm, applicant's legal practitioners
Mtetwa and Nyambirai, first respondent's legal practitioners