

CHITRINS GARAGE (PVT) LTD
(In Provisional Liquidation)

versus

CHYCRY TRADING (PVT) LTD
and
DUMISANI MUTORERA

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 6 FEBRUARY AND 5 MARCH 2015

Advocate *H. Moyo* for applicant
Mr *N. Mazibuko* for respondents

Urgent application

MOYO J: This is an urgent application wherein the applicant seeks an order that the Deputy Sheriff be authorized to enter the premises leased by the respondents and attach and seize all movable assets therein including motor vehicles. The applicant alleges that respondents owe a total sum of \$52 950 in rental arrears since May 2013. The applicant alleges that the lease agreement expires on 1 February 2015 and therefore they are apprehensive that respondents will flee without making good the arrears. It is important to note at this stage that this application was in fact heard after 1 February 2015. The applicant has instituted legal proceedings for the recovery of the rentals in HC 360/13 a matter which is still pending before this Honourable court.

Applicant alleges that it was prompted into action by respondent's plea filed of record in HC 360/13. Applicant further alleges that the plea was filed and served on 2 December 2014, prompting it to file this application on 19 December 2014. It further alleges that the plea is frivolous and vexatious.

Paragraph 9 of the founding affidavit states thus:

“On the 25th of November 2014 respondents were called upon to file a plea to the claim on the merits and such plea was filed on 2 December 2014. It is patently clear from the contents of the plea, that respondents have no *bona fide* defence to the applicant’s claim on the merits and have only raised frivolous and vexatious defences to the claim. I propose to demonstrate this by reference to material aspects of the plea.”

In paragraph 14 of the applicant’s heads of argument it is stated thus:

“*In casu*, the respondents filed their plea in the main action on the 2nd December 2014. The plea obviously caused alarm bells to ring due to the nature of the frivolous defences raised.”

The applicants’ heads of argument go further and correctly state in paragraph 12 that in the case of *Kuvarega vs Registrar General and others* 1998 (1) ZLR 188, it was held that the supporting affidavit should always contain an explanation for the non-timeous action if there is a delay. In paragraph 13 thereof, the applicant proceeds to submit that the non-timeous action is not always fatal to an application and that the court has a discretion to hear an application on the merits if there is an explanation for the delay. Applicant further submits in paragraph 15 of the heads of argument that technically the lease agreement expired on 21 November 2014, that is when applicant’s provisional liquidator was appointed.

The respondents on the other side raised points *in limine* with regard to this application. The first point that respondents raise is that of failure to seek leave to institute these proceedings by the liquidator. Respondents submit that the liquidator of applicant is mandated in terms of section 221 of the Companies Act [*Chapter 24:03*] to seek leave of the court before instituting any proceedings. The respondents aver that since no leave was sought the applicant is not properly before this court and can thus not be heard.

Section 221 (2) (a) provides as follows:

“The liquidator shall have power, with the leave of the court or with the authority mention in subsection 4 or in paragraph (a) of subsection (4) of Section 218 –

(a) To bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature and, subject to any law relating to criminal procedure, criminal proceedings ----.”

Section 221 on the Companies’ Act gives the liquidator a series of powers including the

power to institute court process on behalf of the company but such power is to be exercised specifically with the leave of court.

Section 221 (4) provides that:

“He may, with the authority of a resolution of creditors and contributories duly passed at a joint meeting, thereof, do any act or exercise any power for which he is not by this Act expressly required to obtained leave of the court.”

Respondents also contend that the case is not urgent.

Section 221 in my view specifically requires that the liquidator acts with the leave of the court in legal proceedings of any nature. This especially applies in a winding up by the court. Section 221 falls under the provisions of the Companies Act specifically applicable in a winding up by court.

The applicant’s Counsel contends that the liquidator has already been given those powers as stated in the provisional order, and that there is therefore no need for leave to have been sought first prior to instituting this application.

I do not agree with this view, for this simple reason that the provisional order in my view simply incorporated the powers as provided for in the Companies Act and did not go beyond stipulating them. The provisional order does not state that where leave need be sought to exercise the powers therein, that requirement is dispensed with. A look at the authorities also supports this view. In the case of *Gainsford and Others NNO v Hiab AB* 2000 (3) SA 635, the court held that where the liquidator requires authority to exercise any power, he may approach the court and that a litigant against whom a liquidator has instituted action without apparent authority, may except to the action.

I find the Lesotho case of *Liquidator Lesotho Bank vs Lesotho Handicraft Co-op Ltd* LSHC 8/10 to be persuasive authority in this regard. Section 188 (2) of the Lesotho Companies Act is identical to Section 221 (2) of our Companies Act. In that case challenge was being made to the action by the Liquidator in so far as failure to seek leave of the court was concerned. The court in that case held that leave of the court was required of a liquidator in a winding up by the court, and not in a voluntary members winding up. It was held in that case that in a winding up

by the court, in terms of Section 188 of the Lesotho Companies Act (an equivalent to our section 221), the liquidator was duty bound to seek leave of court before instituting court proceedings.

It is common cause that the applicant is being wound up by the court and therefore is governed by the provisions of section 221 of the Companies Act [*Chapter 24:03*].

In my view, applicant should have sought leave to institute these proceedings in terms of the law. The application should fail for want of compliance with the law. Even if one could have held otherwise on this point, the application would still fail on the basis of lack of urgency.

This is an application premised on the exercise of the landlords' hypothec where a tenant has allegedly fallen into arrears.

The papers show that as at 2013, two years ago, the tenant had fallen into arrears, the lessor was entitled as at that juncture to seek to exercise the landlord's hypothec as clearly the law of Landlord and tenant provides that the landlord's hypothec is exercisable anytime from the occasion of the tenant falling into arrears. The tenant allegedly fell into arrears dating back to 2013, no action was taken to exercise the landlord's rights except that a civil suit for the arrears was initiated. It is at that juncture that the process of exercising the landlord's lien on the movables of the tenant should have been initiated. Again, the applicant further states that the application was prompted by the imminent expiry of the lease, this in my view does not formulate any basis for urgency at all as, the applicant has always known that come February 2015, the lease expires, the applicant had all the time prior to the expiry of the lease to exercise its rights and seek protection in terms of the law. We are also not told why nothing was done to protect the landlords' interests for all this time. There is in my view no reasonable explanation for the delay to act.

The *Kuvarega* case (*supra*) states clearly that there must be a reasonable explanation for the inaction. None has been given in this case.

I accordingly uphold the points *in limine* and dismiss the application with costs.