PATIENCE SILIBAZISO MOYO

And

ZIVANAYI MWEDZI

And

ANDREW BALENI

And

MARGRET MREWA

And

EDMORE GOCHAI VETERAI

And

MATIONESA NYABEREKA

And

LUCIA PHIRI (representing the late John Phiri)

And

CHARLES D SHONHIWA

And

MUDZO MASHAYAMBOMBE

And

FRANK LUNGU

Versus

BULAWAYO KNITWEAR (PVT) Ltd

And

MESSENGER OF COURT, BULAWAYO DISTRICT

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 11, 14 AND 20 MAY 2010

N Ndlovu for applicants
N Mazibuko for respondents

Urgent Chamber Application

KAMOCHA J: On 11 November 2009 the applicants applied for and were granted a provisional order whose terms were that pending the final determination of that application and the outcome of a review application which they were to institute within 7 days of the order, the writ of eviction and execution in case numbers 268/09; 666/09; 659/09; 660/09; 667/09 and 663/09; be set aside and its operation be suspended.

In the event that at the time of the order they already had been evicted, the order would act as an order restoring to them the possession of the flats they had hitherto occupied and would entitle them to the return of all property which may have been removed pursuant to the writ of eviction.

The parties agreed to anticipate the return date. The final order which the applicants are seeking is as follows:-

"It is ordered that:-

1. The decision of the Bulawayo magistrate's court in case numbers 268/09; 666/09; 659/09; 659/09(sic); 660/09; 667/09; 664/09; be and is hereby set aside for want of jurisdiction of the court; and
2. First respondent pay the costs of the application."

The facts giving rise to these proceedings can be summerised thus. The applicants are all tenants of the first respondent – "the company".

On 28 July 2009 the company filed an application in the magistrates' court seeking the eviction of all the tenants from Worthmore Building, 15th Avenue/ Fort Street, Bulawayo. The reasons why the evictions were being sought were:-

(a) That the company required the flats to house its own employees; (b) that the tenants were not paying rentals; and (c) that they also did not pay operational costs.

Only three of the eleven tenants filed opposing papers while eight of them did not. On 13 August 2009 a default judgment was entered against the 8 who had not filed any opposing papers. The case of the 3 who had filed opposing papers was postponed.

About a month later the 8 against whom default judgment had been entered filed an application for rescission of the default judgment. Their application together with the company's application against the 3 who had filed opposing papers were set down for 13 October 2009.

On the appointed date the 8 failed to attend court resulting in their application for rescission being dismissed. Similarly the 3 who had filed opposing papers failed to attend resulting in the court entering a default judgment against them.

It is common cause that there was no certificate issued by the appropriate board to the effect that the requirement that the lessees vacate the flats was fair and reasonable. While the company accepted that any order for eviction issued without the said certificate would be void *ab initio* it nevertheless contended that it did not only rely on the fact that it required the flats for its employees but was relying on the points that the tenants had failed to pay rentals and operational costs.

That contention has its own problems too in the light of the fact that the application for eviction was filed in the magistrates' court on 28 July 2009 when the Rent Board had not yet determined what the fair rental for the flats was. The Rent Board only made that determination on 7 August 2009. When the application was launched the cause of action had not yet arisen. It only arose after the application had been filed. Thus, at the time process was issued no cause of action had accrued to the company. The rentals and operational costs only became due after the rent board had determined fair rentals for the flats and not before. In relation to this proposition I can do no better than what KORSAH JA had to say in *Ngani* v *Mbanje & Anor* 1987 (2) ZLR 111 at 114G-115E quoting with approval from the case of *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 at 23.

"It seems to me that the process initiating action in the court, whether it be by the issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties at the time that it is filed in the registry. So that, if at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process. Put another way, the plaintiff or applicant should, at or before filing the initiating process, have a complete cause of action against the defendant or respondent.

It is clear from the record that the notice of motion proceedings initiated by the respondents on 27 April 1987 were commenced before their right to eject the appellant on 1 may 1987 accrued to them. Therefore, the respondents had no cause of action against the appellant at the time the initiating process was filed at registry, and the fact that the application was entertained some six days after a right of action had accrued to the respondents does not affect the relative positions of the parties at the time of commencement of the action. "There can be no action before anything is due and owing." Voet, Book 5, 1.27 …

This objection *in limine* is, in my view, not a mere technical point affecting some provisions of adjectival law; it strikes at the very root of the action. It is so fundamental as to render the initiating process a nullity. If there is no cause of action then a judgment pronouncing that a non-existence cause exists is void and of no effect. As LORD DENNING observed in *Macfoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (Pc) at 1172 l:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity." My underlining

The learned judge of appeal at page 117B concluded thus:-

"I am of opinion that the commencement of action before a cause of action accrued to the respondents renders the default judgment void and of no effect."

Similarly the default judgments entered in favour of the company against all the tenants suffer the same fate. They are void and of no force or effect. The company shall bear the costs of this application.

The resolution of this matter also disposes of the following cases which were founded on it: case No. HC 1944/09 with the company bearing the costs of suit; case No. HC 188/10 with the company paying the costs; case No. HC 524/10 with the company paying costs of suit; and case No. HC 544/10 with the company paying the costs of suit.

Mlweli Ndlovu & Associates applicant's legal practitioners
Calderwood, *Bryce Hendrie & Partners*, respondent's legal practitioners