HC 99/16
HC 503/16

PELLADILLO INVESTMENTS (PVT) LTD

Versus

RWAINDEPI MADONGORERE

And

DEPUTY SHERIFF GWERU N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 8 & 31 MARCH 2016

Urgent Chamber Application

S. Murambasvina for the applicant
B. Dube for the 1st respondent

TAKUVA J: On the 14th day of January 2016 a default judgment was entered against the applicant. The 1st respondent subsequently obtained a writ of execution which he used to attach several of applicant's property on 23 February 2016. Upon being served with the inventory and a copy of the relevant default judgment, applicant filed an application for rescission of the default judgment. This therefore is an application for stay of execution on an urgent basis pending the finalisation of the application for rescission of judgment.

Applicant contended that this application is urgent in that its valuable property was attached on 23 February 2016 with the removal set for anytime after the 26th day of February 2016. Applicant filed this application on 29 February 2016. It was further submitted that if the property is sold and the application for rescission succeeds thereafter, there is no guarantee that 1st respondent who is now unemployed and carries out no known business will be able to replace it. Given the fact that applicant had no sight of the summons and removal of its goods is imminent this application is clearly urgent.

As regards prospects of success in the application for rescission, it was submitted that applicant has bright prospects of success. Taking into account that the critical factor for

consideration is whether there is good and sufficient cause to rescind the judgment, it was contended that *in casu* there is indeed good and sufficient cause to have the default judgment rescinded for the following reasons:

(a) Applicant was not in willful default when it failed to enter appearance to defend the main action in that its representatives never saw the summons and declaration which was served at "Bayhorse Road, Hanz Cross Farm Chakari by way of affixing to the outer principal gate after a male employee refused to accept service for fear of victimization." Also annexure G which is the security guard's "occurrence book" does not reflect a record of any such visit by the 2nd respondent.
(b) Applicant operates a gold milling site at No. 34 Chakari which is opposite Hanz Cross Farm. There is a main gate entering into applicant's gold milling site. On the other hand, there is also a main gate entering into Hanz Cross Farm main gate. Further, it was argued that 2nd respondent attempted to attach property at Hanz Cross Farm where he had earlier on served summons. He was then re-directed to applicant's mine. Finally, it was submitted that 2nd respondent was mistaken as to applicant's precise location. Consequently, it cannot be said that applicant was knowledgeable of the action, its legal consequences and consciously and freely took a decision to refrain from giving notice of intention to defend.

Applicant contended that it has a good defence to 1st respondent's claim where he was awarded US$4 000,00 for fire burns and US$20 000,00 for mercury poisoning. Firstly, as regards fire burns, it is applicant's contention that 1st respondent voluntarily assumed risk when he lit a gas stove at 11pm in a thatched house in a sleepy state. He subsequently fell asleep only to wake up in an inferno. It is his sleepiness that caused the fire and the extent to which he suffered burns. This therefore absolves the applicant from any liability whatsoever.

Secondly, regarding damages relating to inhalation of mercury, applicant submitted that it still has a good defence in that it relied on 1st respondent's skill and expertise as a mine manager in providing whatever material 1st respondent requested. In that respect, 1st respondent is to blame for failing to procure what was necessary to maintain a safe working environment including fire protection.

The application was vigorously opposed by the 1st respondent who went as far as accusing the deponent of the founding affidavit of perjury. It was contended that the papers were

served on the applicant and that service is proper. Reliance was placed on the return of service which is Annexure A. First respondent argued that the fact that the same address for service is the same address where attachment was carried out shows that service was effected on the correct address. The averment that process was served on the wrong address remains bold, unsubstantiated and unreasonable in that no supporting affidavit was attached from the alleged employee at Hanz Cross Farm who re-directed 2nd respondent after he got lost.

As regards the merits, 1st respondent submitted that the cause of the fire was the absence of fire protection or prevention at the mine and that flammables were kept at and near the house where 1st respondent was staying. He denied volunteering information during investigations over the cause of the accident. The attached Annexure G1 does not in any way prove that it was 1st respondent's responsibility to abide by the standards of a milling company especially the failure to abide by the standards in the use of mercury and other chemicals. He finally submitted that applicant has no defence to offer on the merits and was in willful default. He prayed for the dismissal of the application with costs on a higher scale.

The 2nd respondent did not oppose this application but contested the prayer to pay costs. In paragraph 4 of his report, the Additional Sheriff states; "4. Summons were not affixed on the Hanz Cross Farm main gate as alleged. However, a diligent consultation was sort (sic) at Hanz Cross Farm before affixing at the principal gate (boom gate) for the applicant." (my emphasis)

What boggles the mind is that the deputy sheriff denies what is exactly on his return of service. It shows that summons and declaration were served at "Bayhorse Road, Hanzy Cross Farm Chakari". This is not applicant's address. The correct address of the applicant is 34 Chakari which is opposite Hanz Cross Farm. The deputy Sheriff does not provide further details of the location of the applicant's milling site. He does not describe what was written on the gate and why he believes the applicant's address for service is Hanz Cross Farm. In my view, where there is a challenge, the Sheriff must do more by way of giving precise details of the location of the party's physical location. *In casu*, his report is brief and does not assist the court in deciding the key issue. See *Croco Properties* v *Swift* HH-20-13.

For these reasons, I find that applicant has established the requisites for an application for stay of execution pending the determination of an application for rescission of the default judgment. Accordingly, it is ordered that pending the return date, the applicant is granted the following relief:

1. That execution of the judgment issued by this court on 14 January 2016 be and is hereby stayed and if 2nd respondent has removed any of applicant's property pursuant to execution he is hereby ordered and directed to release the removed property upon service of this order.

Messrs Jarvis Palframan, applicant's legal practitioners
Gundu & Dube c/o Dube-Tachiona & Tsvangirai, 1st respondent's legal practitioners