

CONTINENTAL FASHIONS (PRIVATE) LIMITED
(Under Judicial Management represented by Mr Cecil
Madondo, Provincial Judicial Manager N O)

versus

OLD MUTUAL INVESTMENT CORPORATION
(PRIVATE) LIMITED

and

THE MASTER OF THE HIGH COURT

and

THE DEPUTY SHERIFF OF ZIMBABWE N O

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 17 June 2011 and 1 February 2011

H Zhou, for the applicant

E Jori, for the respondent

Chamber Application

BHUNU J: The applicant leased stand 4624 Kelvin Road, Graniteside, Harare from the first respondent. On 13 October 2010 and under Case Number HC 3292 the respondent obtained the following order against the applicant company:

“IT IS ORDERED THAT:

- a) The cancellation of the agreement in terms of which plaintiff leased to defendant its property known as Stand 4624 being number 6 Kelvin Road, Graniteside, Harare be and is hereby confirmed.
- b) The defendant together with its subtenants, assignees, invitees and all other persons claiming through it be and are directed to vacate forthwith from the plaintiff’s premises described in para (a) above.
- c) The defendant shall pay to the plaintiff the sum of US\$30 972-30.

- d) The defendant shall pay to holding over damages to the plaintiff in the sum of US\$10 862-10 per month from 1 April 2009 to the date of the defendant's ejection.
- e) The defendant shall pay the plaintiff's costs of suit on the legal practitioner and client scale."

On 5 November 2010 the first respondent obtained a writ of execution against the applicant authorizing the Deputy Sheriff to effect ejection and execution against the applicant's movable property.

On 26 November 2010 the Deputy Sheriff commenced the ejection and execution procedures in terms of the writ of execution. It so happened that before the Deputy Sheriff had completed his mandate the applicant was placed under judicial management on 6 April 2011.

In terms of s 213 of the Companies Act [*Cap 24:03*] the placement of the applicant under judicial management by court in the winding up process had the effect of freezing all judicial processes against it as at that date. The section provides as follows:

"213 Action stayed and avoidance of certain attachments, executions and dispositions and alteration of status

In a winding up by the court—

- (a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;
- (b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;
- (c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

The parties are agreed that whatever the sheriff or his deputy had done in execution of the order before 6 April cannot be reversed. The law requires that the *status qua ante* as at 6 April 2011 be maintained.

At the instance of the court the Deputy Sheriff has now submitted a report detailing what he had done as at that date in terms of his mandate. The report is dated 15 June 2011. It is lucid but

detailed and self explanatory such that there is need to reproduce the report in order to put the matter in its correct perspective. It reads:

- “1. We received instructions in this matter in November 2010 from the Plaintiff’s Legal practitioners, Gill, Godlonton & Gerrans. The instructions required us to eject Continental Fashions (Private) Limited from Old Mutual’s premises at number 4624 Kelvin Road, Graniteside, Harare and to attach and cause Continental Fashions’ property to be sold in order to realize the amount owed to Old Mutual as rentals, holding over damages and interest. The premises in issue fell under my jurisdiction so I had to carry out the instructions.
2. On the 26th of November 2010, I went to number 4624 Kelvin Road, Graniteside. Attached and removed certain goods to Ruby Auctions where they would be sold. Some of the goods could not be removed easily or was expensive to remove to Ruby Auctions and I decided together with the Auctioneers to request Old Mutual for permission to sell this property on he premises, I also served an Notice of eviction which I was going to carry out on the 2nd of December 2010.
3. On the 2nd of December 2010, I was supposed to carryout the eviction in accordance with the Notice I had given on the 26th of November 2010. Old Mutual’s lawyers where (sic) however, served with an Urgent Chamber Application so they instructed us to stop the execution and await further instructions.
4. On the 8th of December 2010, on instructions from Gill, Godlonton & Gerrans, I proceeded to carry out the eviction. I also ascertained that Continental Fashions had leased out one wing of the premises to a sub-tenant called Loan Holdings (Private) Limited. I did not carry out the eviction of the sub tenant on this date.
5. On the 10th of December 2010, I returned to the premises to continue with the eviction of Continental Fashions. What was left for was the machinery to be sold in situ as discussed and agreed between me, the Auctioneers and Old Mutual. Since I had completed the eviction proceedings. I changed the locks and gave Ruby Auctions a set of the keys so that they could carryout an inventory and put its security details in charge of the property pending self of the property in situ on the 28th of January 2011.
6. When I had almost removed everything from the premises, occupied by the sub tenant the eviction was stopped by Old Mutual on the basis of an agreement reached with the sub tenant. This sub tenant claimed that it was involved in construction of a dam called Kunzwi Dam which project was of national importance as confirmed by the involvement of the presidium. The

sub tenant discussed the matter with Old Mutual who agreed to allow the sub tenant to continue in occupation of the wing until the 30th of December 2010 on which date it would vacate the premises voluntarily.

7. On the 30th of December 2010, I went to the premises and discovered that the sub tenant had in fact vacated the premises as agreed with Old Mutual.
8. The property which had been removed to Ruby Auctions was sold on the 9 December 2010 and realized US\$867-93 which amount was paid to the Deputy Sheriff's Office and before the company was placed under Judicial Management.
9. The sale in situ was not carried out because an application for placement of Continental Fashions (Private) Limited under judicial management was made and we received a letter from Tudor House Consultants on the 1st of April 2011 advising same. I duly advised Ruby Auctions to stop the sale in execution in situ and to return the keys to me so that we could hand them over to the Provisional Judicial Manager to allow him to take possession of and remove the unsold property as the sale in execution would no longer go ahead. I consequently issued a return of service dated 5 April 2011 to the effect that that the sale in execution had been stayed and the writ of execution returned to Old Mutual's legal practitioners.
10. I confirm that as of 6th April I had completed eviction of Continental Fashions (Private) Limited and handed over the premises to Old Mutual and Ruby Auctions to facilitate the sale in execution of the equipment on the premises. I confirm that consistent with completion of the process of eviction, I had changed the locks on the premises and installed new keys which I handed over to Ruby Auctions and Old Mutual on 10th December 2010."

The Deputy Sheriff is an independent officer of the court who has no motive for misrepresenting the facts. His averment to the effect that as of 6 April 2011 he had completed the eviction of Continental Fashions (Private Limited) and handed over the premises to Old Mutual and Ruby Auctions is beyond question.

He had also placed all the machinery under the custody of Ruby Auctioneers who opted to auction the massive machinery at the place it was situated without dismantling it. Thus as at 6 April 2011 the machinery was under the custody, detention and control of Ruby Auctioneers pending sale in execution.

This court therefore finds that as at 6 April 2011 the applicant had already been evicted and its property placed under Ruby Auctioneers for sale in execution. As the

parties are agreed that whatever the Deputy Sheriff had done as at that date cannot be undone the applicant's application which seeks to reverse the eviction and placement of property in the hands of the auctioneers for sale in execution cannot succeed. Once the applicant had been evicted its on rights it might have had in respect of the leased premises were extinguished.

In the result it is ordered that the application be and is hereby dismissed with costs

Matsikidze & Mucheche, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners