

WOOLCHART PROPERTIES (PVT) LTD
and
WOOLBULA PROPERTIES (PVT) LTD
versus
IDEM TRADING (PVT) LTD t/a EUROTEx
and
THE DEPUTY SHERIFF HARARE N.O

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 18 January 2012 and 20 January 2012

Urgent Chamber Application

G. Mahlangu-Simango, for applicants
E. Samukange, for 1st respondent

HUNGWE J: The applicants seek the grant of interim relief in the form of a provisional order staying execution of a writ issued against them pending the determination of an application for rescission of judgment. This follows a default judgment granted under HC 6363/11 in which matter the first respondent sued the applicants for payment of the sum of US\$5000 000-00.

The facts of this matter are that the first respondent issued summons against the applicants under HC 6363/11 in July 2011. The summons were served by the second respondent at 27 Watts Road, New Ardebennie Harare on a receptionist called Vanessa Petro of Glens Removals. Applicants did not enter on appearance to defend the action. Consequently the first respondent took out judgment by default.

Pursuant to this the first respondent caused to be issued a writ of execution. Second respondent attended at 27 Watts Road, New Ardebennie to effect execution of the writ. It turned out that the property to which the writ referred is owed by Quest Motor Corporation, but not either of the applicants. Somehow the applicants got to know of the writ and filed the present application.

Applicants state that they never were aware of the summons against them till they were alerted to the writ of execution. The applicants believe they have a good and *bona fide* defence to the first respondent claim which the applicants believe will move the court to grant

rescission. They proceeded to enumerate the various grounds constituting their defence to the claim.

The first respondent on the other hand insisted that the applicants only acted with despatch after a writ had been issued because their property was now under threat. First respondent denied that the applicant have any defence to its claim. First respondent maintained that the address for execution of the writ is the same as that for service of the summons. As such there was no basis to believe that their application for rescission will succeed as the applicants were in wilful default.

The issue for decision, in my view, is whether there was proper service of the summons in HC 6363/11. If the summons were served correctly then the applicants will be hard put to persuade this Court that they were not in wilful default and therefore entitled to rescission of judgment. If however the summons were not properly served, then it may well be easy for the applicants to discharge the onus upon them to show that they were not in wilful default on the application for rescission of judgment. It will therefore be proper to stay execution till that application is finally determined.

Order 5 r 39(2)(d) provides that where process is to be served on a body corporate such process may be served by delivery to a responsible person at the body corporate's place of business or registered office; or by delivery to a director or to the secretary or public officer of the body corporate.

The contention by the applicants is that 27 Watts Road, New Ardbennie, Harare is not the registered office of the applicants nor is it their place of business. It was never contended by the first respondent that the receptionist was a director, or secretary or public officer either of the applicants

In light of the provisions of Order 5 r 39 I came to the conclusion that there was no proper service of process on the applicants. As such their prospects in the application for rescission of judgment in HC 6363/11 are bright. The further the balance of convenience favour the grant of the interim relief since a failure to do so will imperil the rights of a third party who is not party to these proceedings.

On the premises therefore interim relief is granted as prayed for in the Provisional Order by the applicants.

There will be no order as to costs.

Bherebende Law Chambers, applicant's legal practitioners
Venturas Samukange, 1st respondent's legal practitioners