HB 105/18
HC 1123/18
X REF HC 723/18; HC 155/18;
HC 3276/17 & HC 763/17

BOTTON AMARTURE WINDING

Versus

CLEMINSON & PLASKIT (PVT) LTD

And

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 & 26 APRIL 2018

Urgent Chamber Application

S. Chamunorwa for the applicant
T. Masiye-Moyo for the 1st respondent

MATHONSI J: Ever since this court issued a consent order in HC 763/17 on 9 November 2017, per TAKUVA J following the signing of a deed of settlement by the applicant and the 1st respondent regarding outstanding rentals, rates and what was to be paid as monthly rent for premises belonging to the 1st respondent but occupied by the applicant, located at No. 6 Cowden Road, Steeldale, Bulawayo, the applicant has filed 3 urgent applications in this court. In all the applications it has sought to prevent the execution of the court order issued by consent.

In that earlier case the 1st respondent obtained an order by consent following the signing of a deed of settlement for payment, *inter alia*, of sums of $150 565,77 as outstanding rentals, $67 834,61 as outstanding rates and $6 000,00 monthly rentals from 1 September 2017. The arrears were to be paid on terms set out in the court order including a sum of $20 000,00 which was to be paid on or before 31 October 2017 towards the "arrears stipulated". In terms of clause 8 of the court order, in the event of the applicant's failure to comply with the terms, the 1st respondent would be entitled to the full amount owing and to evict the applicant from the premises.

When the applicant failed to pay in terms of the court order the 1st respondent agitated for execution. It issued 2 writs, one of ejectment and the other of execution to realise the outstanding amounts stated above. The applicant would have none of it. In HC 3276/16 it made an urgent application to interdict execution pending a determination of whether or not it had breached the terms of the court order. This court, per MAKONESE J, granted a provisional order on 15 December 2017 staying execution. 22 February 2018 was the return date of that provisional order and on that date the same judge discharged the provisional order and dismissed the application after concluding that the applicant had indeed breached the consent order thereby opening itself up for execution of the order.

The applicant moved quickly on 23 February 2018 to note an appeal to the Supreme Court in SC 155/18 against the judgment of the court discharging the provisional order. That appeal is yet to be determined by the apex court. It would be recalled that the consent order remained extant and effectual as the applicant never sought to have it rescinded, varied or corrected. It never appealed against the said order either. Therefore the noting of an appeal against the judgment of MAKONESE J discharging the provisional order he had himself granted to the applicant on 15 December 2017 did not change anything. The consent order remained enforceable and effectual.

The 1st respondent continued to move for its execution prompting the applicant to file yet another urgent application in HC 723/18 seeking to interdict the 1st and 2nd respondents from executing the consent order in HC 763/17 as it had noted an appeal against the judgment discharging the provisional order which had stayed execution. That application was heard by MOYO J on 15 March 2018 who then reserved judgment. The judgment is yet to be delivered.

On 16 April 2018 the applicant filed this urgent application a third one seeking the following interim relief:

"Interim relief granted

Pending determination of this matter the applicant is granted the following relief:

1. The 2nd respondent be and is hereby ordered to restore the applicant into occupation of the premises known as No. 6 Cowden Road, Steeldale, Bulawayo."

No matter how one wants to interpret that relief, it can only mean that a party can only be restored to premises whose possession it has lost. The applicant however did not disclose to the court that it has been evicted by the 2nd respondent in execution of an ejectment writ issued on 13 December 2018 on 8 April 2018. We now know, courtesy of the 1st respondent's notice of opposition to which is attached the Sheriff's return of service of that date, that:

> "A warrant of ejectment (was) executed and all those claiming occupation (were) ejected at 14:20 hours."

In his founding affidavit, Wisted Nkhata, the applicant's Finance manager, tried to sugar coat the eviction only stating that on 9 April 2018, the Sheriff "attended at the premises and locked them up." He went on to say that when efforts were made to engage the Sheriff to unlock the premises he only responded that he would unlock the premises if the applicant is successful in its application awaiting judgment, that is HC 723/18. The applicant then complained that the Sheriff has acted unlawfully by pre-empting the judgment of the court in that matter by locking the premises.

The applicant craved for the grant of a mandatory interdict pending the determination of the matter before MOYO J and the appeal by the Supreme Court. As is apparent from the wording of the interim relief sought by the applicant it is a misnomer to say that what is sought is an interdict because the applicant actually desires to be restored into the premises following the successful eviction of a valid and extant court order which was in fact granted by consent.

In its opposing affidavit deposed to by its Managing Director, Colin Mervyn Kendall, the 1st respondent took the view that the notice of appeal against a judgment discharging a

provisional order does not revive the provisional order which "dies" on the return date whether confirmed or discharged. This is so because even when confirmed, it is the terms of the final order which take effect and not the interim relief initially granted, which are confirmed. As shall become apparent hereunder, it is not even necessary for me to pronounce myself on that issue.

The 1st respondent also advanced the point that as long as the consent order was not challenged, there was nothing at law preventing its execution. Throughout the impasse, it had always made it clear to the applicant that it intends to execute the consent order, which position was also made clear to MOYO J who heard the 2nd urgent application for an interdict against execution. That the judge did not do anything to stop the execution can only mean that the applicant came out with nothing, so the 1st respondent argued.

More importantly, the 1st respondent stated, the applicant having been lawfully evicted consequent upon a lawful and binding order, there is no legal or factual basis for restoration of occupation. The applicant has already been ejected on 9 April 2018 which fact the applicant deliberately avoids stating as it is aware that ejectment cannot be reversed in the circumstances. A preventive interdict is no longer possible either.

The issues to be decided herein are very limited indeed. Is the consent order issued on 9 November 2017 valid and enforceable? If it has been carried into execution can that process be lawfully reversed by the restoration of the applicant to the premises?

I must express my disappointment at the applicant's failure to disclose vital information useful for the determination of the dispute. I have already stated that the applicant presented a case of a lock-up of the premises as opposed to eviction. The Sheriff's return of service, which is *prima facie* evidence of the action taken by the officer of the court, discloses that full eviction was carried out on 9 April 2018. It is an eviction which was carried out in execution of an order of the court which is extant and has not been appealed against or in any way impugned.

Indeed there is no doubt that there was nothing standing in the way of eviction because the eviction order was extant. The noting of an appeal against the discharge judgment of MAKONESE J issued on 22 February 2018 was a non-event in so far as the order being carried into execution was concerned. It is significant that the applicant did not disclose that full eviction was carried out on 9 April 2018 deliberately electing to be vague about it only stating that the premises were locked. Yet *Mr Chamunorwa* for the applicant did not attempt to impugn the Sheriff's return of service.

It is trite that the utmost good faith is required of those who approach the court on an urgent basis or *ex parte*. An urgent application which is not only based on falsehood but in which the applicant withholds vital information in order to mislead the court in the hope of obtaining undeserved relief cannot succeed. Where an application is punctuated by material non-disclosures this court, in dismissing such application, will, as a seal of its disapproval of *mala fides* make an adverse or punitive order for costs. See *Batore Import & Export (Pvt) Ltd* v *Bayswater (Pvt) Ltd & Anor* HH-614-14; *Basira* v *Manemo* HB-46-18; *Graaspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at 555C-D; *Moyo & Anor* v *Hassbro Properties (Pvt) Ltd & Anor* 2010 (2) ZLR 194 (H) at 197A-B.

The applicant is obviously aware of the position of the law as formulated by the Supreme Court in *Delco (Pvt) Ltd* v *Old Mutual Properties & Anor* 1998 (2) ZLR 130 (S) to the effect that a tenant who has lost possession of premises through an ejectment in pursuance of a court order, even if that order is wrong, cannot regain possession of the premises. I say so because the applicant's legal practitioner cited that authority in a letter written to the Sheriff on 6 March 2018 long before this application was filed. It is that knowledge which informed its decision to withhold the crucial information that the eviction has already taken place. It is a deliberate non-disclosure which this court frowns at.

In this case the applicant is not only seeking to regain possession following a lawful eviction, which cannot be done in our law, but it also seeks to interdict that which has already

occurred. It is untenable. The consent order of 9 November 2017 is valid and enforceable as it has not been challenged. The Sheriff is obliged to carry it into execution. He has already carried it into execution by fully evicting the applicant and those claiming through it. By the authority of *Delco (Pvt) Ltd, supra*, a lawful eviction cannot be reversed. It is therefore incompetent to seek restoration into premises from which the applicant was lawfully evicted. There is therefore no merit in the application.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

Calderwood Bryce Hendrie & Partners, applicant's legal practitioners
Masiye-Moyo & Associates incorporating Hwalima, Moyo & Associates 1st respondent's legal practitioners