NONOS INVESTMENTS (PRIVATE) LIMITED
t/a SUB SAHARA AFRICAN BUSES
versus
ZIMBABWE UNITED PASSENGER COMPANY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 July and 25 July 2014

Urgent Chamber Application

Ms M. Tshuma, for the applicant
C. Daitai, for the respondent

MANGOTA J: Up until 3 December 2012, the applicant and the respondent enjoyed a lessee-lessor relationship respectively. They did so in terms of a lease agreement which they concluded between them on 14 March 2012.

The lease allowed the applicant to occupy the remaining extent of Lot 22 S/D A & B of Locknivar, Salisbury Township situated in Harare and known as Willowvale Depot (the premises) for a period of three (3) years with effect from 1 April 2012 and at a monthly rental of $3 500-00.

On 4 December 2012, the respondent sued the applicant and prayed for:

i) Cancellation of the lease agreement
ii) Ejectment of the applicant from the premises
iii) Arrear rentals in the sum of $22 900-00
iv) Holding over damages in the sum of $3 500-00 per month from January 2013 to the date of vacation of the premises - and
v) Costs of suit on a higher scale.

The applicant entered appearance to defend action, filed its plea and the matter was set down for a Pre-Trial Conference which took place on 19 November 2013. It was during the conference that the parties, through their legal practitioners, signed between them a handwritten Deed of Settlement which the conference judge also signed. The contents of the

Deed appear in Annexure B which the respondent attached to its opposing papers to the present application.

Two days after the Deed had been signed, the respondent prepared, through its legal practitioners of record, a typed Deed of Settlement capturing what was contained in the annexure and forwarded the same to the applicant's legal practitioners for the latter's signature. These did not sign the typed Deed as a result of which the respondent's legal practitioners did, on 20 February 2014, write to the Pre-Trial Conference judge seeking directions on the matter. The judge, according to the respondent, caused the parties to appear before him on 28 March 2014 and he, on the mentioned date, made it clear to them that the signed handwritten Deed of Settlement remained valid until the applicant applied to court to have it varied or nullified.

On 10 April 2014, the respondent filed with the court what it termed Chamber Application For An Order In Terms of the Deed of Settlement. It did so under case number HC 3015/14 and it cross-referenced its application to the main case which fell under case number HC 13932/12. The applicant opposed the application. It did so on 22 April 2014.

For reasons which remained unclear to the court and, in a way, pretty confusing, the respondent did, on 2 June, 2014 withdraw the application. It then proceeded to have judgment entered in its favour on the basis of the handwritten Deed of Settlement which the parties' legal practitioners and the Pre-Trial Conference judge signed on 19 November 2013 as clarified to the parties by the judge on 28 March 2014. The applicant referred to that "judgment" or "*consent order"* as Annexure E of its papers. The annexure is dated 28 March 2014 and its heading reads:

> "It is ordered by consent that:
>
> 1. …….
> 2. …….
> 3. …….
> 4. ……."

On 9 July 2014, the applicant received a notice of ejectment from the premises. The applicant did not specify the person or authority who or which served the notice upon it. The notice advised that execution would take place on 14 July, 2014. The notice, according to it, was based on the *consent order* which was dated 28 March, 2014. Aggrieved by the above

described set of circumstances, it, on 12 July 2014, filed the present application. It prayed the court to order, as an interim relief, that execution of the *consent order* be stayed pending finalisation of the chamber application which the respondent filed with the court under case number HC 3015/14 and, as a final relief, that the *consent order* under case number HC 13932/12 be declared null and void.

The applicant's main argument was or is that the Deed of Settlement which the parties' legal practitioners and the Pre-Trial Conference judge signed on 19 November 2014 was signed without its knowledge, consent or authorisation. It stated that the conduct of its legal practitioners in the mentioned regard soured the relationship which existed between its legal practitioners and itself to a point where the legal practitioners had to, and did actually, renounce agency. It attached to its application notice of renunciation of agency which it marked Annexure A. The annexure is dated 10 March 2014. It averred that if execution was allowed to proceed on the basis of the Deed of Settlement the existence of which it was disputing, that would result in a serious miscarriage of justice as well as irreparable harm to its interests. It insisted that it had a right to be heard and that the application which the respondent filed under case number HC 3015/14 had to be disposed of first before execution could proceed.

The respondent opposed the application. It informed the court and the applicant that the application which it filed with the court under case number HC 3015/14 was withdrawn on 2 July 2014. It attached to its opposing papers the notice of withdrawal which it marked Annexure A. The annexure is dated 2 June, and not 2 July, 2014. It insisted that the certificate of urgency was not valid as it was based on wrong facts. It then addressed the court on the substantive aspects of the application. It did so in a fairly convincing manner, in the court's view.

But for one or two matters which militate against the respondent in a very strong way, the court would have had little, if any, difficulty in dismissing the application which is before it. That would have been so because the applicant was, as far back as 28 March 2014, aware of the existence of the Deed of Settlement which it said its esterwhile legal practitioners signed with the respondent without its knowledge or consent. It became aware of that matter when the parties appeared before the Pre-Trial Conference judge on 28 March, 2014. The judge, the respondent said, clarified to the parties then present that the handwritten Deed of Settlement remained valid until the applicant applied to court to have it varied or nullified. That knowledge on its part notwithstanding, the applicant did nothing to protect its interests

from 28 March, to 9 July, 2014 when, in response to the notice of ejectment, it filed the present application with the court. If the applicant had a serious dispute which related to the coming into being or the contents of the Deed of Settlement, as it would have the court believe, the applicant would not have waited for three consecutive months to assert what it said was or is its right to protect its interests which it said were under threat until it received the notice of ejectment. Its assertion which was to the effect that the present application was urgent would have fallen on all fours on the abovementioned basis.

During the hearing of this application, the court made an effort to ascertain from the applicant the latter's reasons for inaction. Its response was simply that it awaited the outcome of the respondent's application under case number HC 3015/14. This is an extremely lame excuse which the court cannot condone let alone entertain.

The concept of urgency, as defined in the rules, connotes such a desperate situation as will compel a court which is seized with a matter of that nature to put aside all matters it is dealing with and proceed to attend to it with a view to arresting a potentially dangerous or injurious event which, if not timeously arrested, will bring about catastrophic consequences which are too ghastly to contemplate. An urgent matter cannot be allowed to wait its turn in the que-ue. It has to, and must, be addressed as expeditiously as is reasonably practicable in the circumstances of that envisaged urgency.

A party which sits on its laurels for three consecutive months, as was the case *in casu*, and only jumps to its feet to act when it thinks that its interests which it should have protected some three months ago are, in a real and substantial sense, under threat does not qualify to have its application treated with any form of urgency. It waited for three months before it moved to assert what it considered to have been its rights. It can, therefore, still wait for a further period until its turn in the que-ue is availed to it.

The applicant received the notice of ejectment on 9 July 2014. It prepared and filed this application on 12 July 2014. It stated in the application that, if the court did not entertain it on an urgent basis and before 14 July 2014, it would suffer irreparable harm as the respondent would come and eject it from the premises on the basis of a court order the substance of which it was contesting. This is, without doubt, self-created urgency which the court will not entertain at all.

The respondent stated in its opposing papers that when the parties appeared before the Pre-Trial Conference judge on 28 March 2014, the applicant pleaded with the judge that it be granted an extension of time within which it would leave the premises as well as pay arrear

rentals to it. The applicant did not controvert that assertion of the respondent. It, in fact, confirmed that to have been what it said. It made words to the same effect during the time that this application was being heard. It is evident that the applicant has no tangible defence to the claim of the respondent. What it wants is time to wind down its operations from the premises and vacate the same, in the court's view.

The court stated elsewhere in this judgement that if the respondent had not committed one or two serious errors in the manner that it dealt with the applicant, the court would have had no difficulty in dismissing the present application. The two errors, in the court's view, compel the court not to regard the respondent's side of events as not having been without blemish.

The first, and more serious, error which the respondent made is that which relates to the withdrawal of its application under case number HC 3015/14. The respondent stated in its opposing papers that it withdrew the application on 2 July 2014. It attached to its papers the notice of withdrawal which it marked Annexure A. The annexure shows that the withdrawal was made on 2 June, and not 2 July, 2014 as the respondent had stated in its papers. The respondent accepted that it did not serve the notice of withdrawal upon the applicant. It accepted further that it only served that notice on the applicant on the day that the present application was heard. It did not profer any plausible reason which compelled it not to serve the notice upon the applicant before the hearing of the application. The respondent could not and cannot have the court believe that it did not have the means or the will to serve the notice of withdrawal on the applicant for forty-four (44) days running and only managed to do so on the day that the application was going to be heard. Its conduct in the mentioned regard gives a distinct impression that it aimed at ambushing the applicant and yet courts encourage parties to always exchange notes between themselves regarding the stage at which one party has reached in the interests not only of progress but also of fairness. *In casu,* the applicant was, as it were, caught flat-footed when it learnt, for the first time at the hearing of the application, that the certificate of urgency which had been prepared in support of its case was invalid for the reason that it was based on an application which had already been withdrawn.

The respondent stated that when the parties appeared before the Pre-Trial Conference judge on 28 March 2014, the judge did not make it clear that he had accepted its request to have the order issued in terms of the written Deed of Settlement. It stated that it, as a result, filed the chamber application for an order in terms of the Deed of Settlement.

Annexure E which the applicant attached to its affidavit is the court order which the respondent prepared on 28 March, 2014 – the date on which the parties appeared before the Pre-Trial Conference judge - and filed with the court on 24 June, 2014. The annexure is date-stamped 24 June 2014. One is, accordingly, left to wonder on whether, or not, the respondent did have an occasion to seek from the judge clarification of the matter which it said the judge had not made clear to it during the period which extended from 28 March, to 24 June, 2014. The probabilities of the matter are that it did not do so, but that it worked upon the fact that the order, as signed by the judge on 19 November 2013 and clarified by him on 28 March 2014, was valid which it was and it proceeded to have it issued by the registrar of this court on 24 June, 2014. Such clandestine manner of conducting court business should be shunned by all litigants, legal practitioners in particular, as their duty to the court takes precedence over anything else which their profession calls upon them to perform.

It is because of the above-mentioned reasons that the court made up its mind to strike what it considered to be a happy medium between the parties which were both to blame in so far as their handling of the matters which relate to case numbers HC 13932/12 and HC 3015/14 were or are concerned. The court has considered all the circumstances of this application. It, accordingly, orders that:-

a) the applicant be and is hereby granted leave to remain at the premises it occupied in terms of the lease concluded on 14 March 2012 from 15 July, 2014 to 15 October, 2014.

b) execution of the *consent order* dated 28 March, 2014 be and is hereby suspended for the period 15 July, 2014 to 15 October, 2014.

c) the applicant be and is hereby ordered to pay to the respondent monthly rentals of $3 500-00 during the period that execution of the *consent order* dated 28 March, 2014 remains suspended.

d) the respondent be and is hereby granted leave to enforce all its rights in terms of the *consent order* dated 28 March, 2014 if the applicant defaults in the payment of rentals due to the respondent for the period 15 July, 2014 to 15 October, 2014.

e) The applicant be and is hereby ordered to wind up its operations located at the premises and hand over to the respondent vacant possession of the premises upon or before close of business on 15 October, 2014.

f) the respondent be and is hereby granted leave to recover from the applicant in terms of the *consent order* dated 28 March, 2014 arrear rentals it is owed by the applicant.

g) the applicant be and is hereby ordered to pay costs of this application.

Masawi & Partners, Applicant's Legal Practitioners
Magwaliba & Kwirira, Respondent's Legal Practitioners