HB 35/18
HC 3276/17

BOTTON AMATURE WINDING

Versus

CLEMINSON & PLASKIT (PVT) LTD

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12 & 22 FEBRUARY 2018

Opposed Application

S. Chamunorwa for the applicant
T. Masiye-Moyo for the respondents

MAKONESE J: It is a settled principle of our law that a court order is binding upon the parties unless it is set aside. An order of the court is what it is. It is an order. An order of court does not require the consent of the one ordered for it to be binding. It has to be obeyed for as long as it remains extant.

Applicant in this matter has not sought to correct or vary the court order granted by TAKUVA J on the 9th November 2017, which is now the subject of this application. Applicant alleges that there is controversy regarding that court order. Applicant seeks to introduce fresh averments in its answering affidavit. The contents of an answering affidavit must be limited to answers relating to the opposing affidavit. Applicant may not, therefore convert its urgent chamber application into an application based on Rule 449 of the High Court Rules, 1971, by claiming that the court is entitled to clarify any ambiguity in a court order. This court may not, and should not rewrite an order of the court, which remains extant and whose terms are clearly capable of enforcement. It is not desirable, in any event for a judge of this court to revise and rewrite the order of another judge in order to give such order an interpretation suitable to either of the parties.

Factual background

Applicant and 1st respondent are tenant and landlord respectively,

in respect of an industrial property at 6 Cowden Road, Steeldale, Bulawayo. Applicant fell into arrear rentals resulting in 1st respondent issuing summons under cover of case number HC 763/17. Before the matter was referred to trial and at a round-table conference, the matter was resolved by way of a Deed of Settlement which was then incorporated into an order of this honourable court. The terms of the court order dated 9th November 2017 are as follows:

"It is ordered that:

The deed of settlement entered into and signed by the parties on the 21st of September 2017 be and is hereby confirmed as an order of this court on the following terms:

1. The defendant is indebted to the plaintiff with respect to outstanding rentals in the sum of $150 565,77.

2. The defendant is indebted and liable to the plaintiff with respect to outstanding rates in the sum of US$67 834,61.

3. With effect from the 1st of September 2017, the defendant shall be and is liable to the plaintiff in the reduced sum of US$6 000 being monthly rentals inclusive of VAT and the same shall be due and payable on or before the last day of each month.

4. On or before the 31st of October 2017, the defendant shall pay a sum of US$20 000 towards the arrears stipulated above.

5. Over and above the US$6 000 rental, the defendant shall pay a further lump sum of not less than US$10 000 on or before 31st December 2017.

6. After the 31st December 2017, the defendant shall pay on a quarterly basis, lump sums of not less than US$10 000 until the outstanding arrear rentals are paid up in full. The said quarterly payments shall be due on or before the last day of March, June, September and December 2018 onwards.

7. Before the 13th of June 2018, the defendant shall both engage the City of Bulawayo to rectify an anomaly in terms of which rates in excess of US$44 000 have been credited to the wrong account relating to the property in question as well as to offset an amount of US$50 000 owed by the City of Bulawayo.

8. In the event of the defendant failing to comply with any of the terms and conditions in any of the above orders and falling to remedy such breach within fourteen (14) days of being given written notice to do so by the plaintiff, the following shall be operative;
   (a) all the sums owing at such point shall become due and payable.
   (b) the respondent shall be ejected or evicted from the property that is number 6 Cowden Road, Steeldale, Bulawayo and its property attached for disposal to liquidate the debt."

It is common cause that when the urgent chamber application for stay of execution was filed on 15 December 2017 applicant had not paid the sum of US$6 000 rentals for the month of October 2017, over and above the sum of US$20 000 which was due to be paid by the end of October 2017. Applicant's argument is that it was not obliged to pay the sum of US$6 000 rentals for the month of October 2017.

Applicant contends that its reading of the court order is that the sum of US$6 000 was part of the US$20 000 paid by end of October 2017. I observe here that the sum of US$20 000 was paid as follows:

(a) US$10 000 on 30 October 2017
(b) US$6 000 on 14 November 2017
(c) US$4 000 on 8 November 2017

On 15 November 2017, 1st respondent's erstwhile legal practitioners addressed a letter to applicant's attorney in the following terms:

"We make reference to the above matter.

Please note that your client is in breach of the deed of settlement as follows:

1. *The $6 000 with respect to the October rentals in terms of paragraph 3 of the deed of settlement has not been paid. In terms of that clause, rentals are due on or before the last day of each month.*
2. *The $20 000 lump sum payment towards arrear rentals which was due on 31st October 2017 in terms of clause 41 was not paid in full. In fact it was paid late. Of that amount there is an outstanding balance of $6 000.*

Consistent with clause 6 of the deed of settlement, we have been instructed to hereby give your client fourteen (14) days written notice within which to rectify its breach.

Yours faithfully
Coghlan & Welsh

This letter drew a swift response from the applicant's legal practitioners. On 20th November 2017 they responded to the letter calling upon applicant to rectify the breach as follows:

"We thank you for your letter of 15 November 2017.

We have taken instructions from our clients and they advise that they are not in default.

Please find herewith proofs of payment in the total sum of US$26 000.

May kindly note that in terms of the parties' agreement the rental of $6 000 is not due in the months of October 2017 when they were required to pay $20 000.

May we in this regard refer to clause 4.1 of the parties' agreement.

Yours faithfully

Calderwood, Bryce Hendrie & Partners"

This letter was followed by a series of communication between the applicant's legal practitioners and the 1st respondent's lawyers whose contents I shall not repeat. There was no resolution to the standoff. On 13th December 2017 1st respondent engaged the services of its current legal practitioners, who on assuming agency addressed the following letter to applicant's lawyers;

We make reference to the above wherein we have since assumed agency.

We have gone through the papers and taken instructions from our client. We note that what seems outstanding is our client's response to your letter of 5th December 2017 addressed to Messrs Coghlan & Welsh.

Our client's position is unchanged. We are instructed that there was never a waiver of the Deed of Settlement as insinuated by your letter. In fact a plain reading of the deed does not support the position taken by your client. This Deed of Settlement was signed way back in September 2017 and our client does not understand why it was signed in the first place if the contents thereof did not represent what was agreed. Further, the issue of the contents has never been in contest until recently. We also do not with respect, believe that there is any other interpretation that can be obtained from the Deed of Settlement except what it says. Further your client failed to pay the US$20 000 by 31st October 2017.

In the circumstances we have instructions to proceed with the process of court and enforce the judgment.

Yours faithfully

Masiye-Moyo & Associates"

On 23 November 2017, applicant's legal practitioners addressed a letter to 1st respondent's legal practitioners which reads in part as follows*;*

"……..…..

It appears to us, with respect that neither yourselves nor Messrs Coghlan & Welsh have addressed the effect of the amendment to the Deed of Settlement, prior to the parties' signature, to remove the following words, in clause 4.1 ;…..

"Over and above the monthly rentals of $6 000"

What explanation do your clients give for this amendment?

Also, what explanation do they have for the fact that clause 4.2 is worded differently from 4.1 in so far as it specifically provided that the lump sum payment of $10 000 shall be over and above the monthly rental of $6 000?

With respect to the payment of $20 000 same was paid in full and before your clients' issued their notice. This was accepted by Coghlan & Welsh and is not an issue between the parties. In view of the fact that your *client persists in having a writ of execution issued and enforced against our client, we confirm that we are now preparing an urgent application for stay of execution…*

Yours faithfully

Calderwood, Bryce Hendrie"

The writ of execution and writ of ejectment were indeed issued on the 13th December 2017 as threatened by 1st respondent's legal practitioners. An urgent chamber application was filed on 15 December 2017 for a stay of execution. I granted a provisional order on the 15th December 2017 interdicting the respondents from executing the warrants against execution and ejectment pending confirmation or discharge of the order. A certificate of service in respect in respect of the provisional order was served on 1st respondent's legal practitioners by sliding it under a door.

A notice of opposition was filed by 1st respondent on the 8th January 2017 and 1st respondent subsequently requested the court to set the matter down in the shortest possible time, as they asserted that 1st respondent was being prejudiced. This then is the background of the application before me.

Issues for determination

The first issue for determination by this court is whether the notice of opposition filed by 1st respondent is a nullity. It was argued on behalf of the applicant that the notice of opposition

is not in compliance with Rule 223 (1) of the High Court Rules. The applicant raised a point *in limine* to the effect that the notice of opposition is not in terms of Form 29A and that to that extent the notice of opposition is incurably bad. The argument is extended to state that the purpose of requiring that the notice of opposition be in Form 29A is so that the court and the applicant are informed of the date that the respondent alleges it was served with the application. Applicant contended that this is not a sterile argument about forms. The 1st respondent indicated that it was not possible to determine the exact date the papers were slid under the door at 1st respondent's offices. The papers in fact were served during the Christmas break when most law firms close their offices for the festive season. In my view, in view of the background regarding the certificate of service I would not be inclined to decide that there was non-compliance with Rule 223 (1) simply because a party has not stated in his notice of opposition the words to this effect;

"The application was served on the respondent on the … day …..… of….."

as set out in Form 29A. I would not, in these circumstances worry about form, rather than substance. It is sufficient that the notice of opposition was filed timeously and that there is no prejudice on the applicant. I would therefore dismiss the point *in limine* raised by the applicant.

Whether the arrears are clearly defined in the Deed of Settlement and Court order

The Deed of Settlement, signed between the parties on the 21st September 2017 is in my view clear in all material respects. The following observations can be made from the Deed of Settlement;

(a) Clear headings setting out each category of the Deed of Settlement have been set out, distinguishing "**outstanding rentals"** from "**monthly rentals".**
(b) Clause 4 and 5of the Deed of Settlement state that the lump sum payments of US$20 000 and US$10 000 respectively, shall be over and above the monthly rental of US$6 000. This is buttressed by the phrase in clause 4.2 referring to, "**This as well shall be**

over and above the monthly rental of US$6 000." This phrase makes the intention of the parties clear as regards the purpose of the agreement.

In clause 5.5 of the Deed of Settlement it is stated that:

"For as long as it remains in occupation of the premises" defendant shall be liable to **and indeed make payment of all monthly rentals in respect of the property**. (emphasis added)

There can be no doubt that applicant was obligated to pay all monthly rentals as defined in clause 3 of the Deed of Settlement. The applicant is bound by the *caveat subscriptor* rule. The Deed of Settlement was later reduced to an order of the court by TAKUVA J. The deed of settlement and the court order are both set out in clear and unambiguous terms. Applicant is simply clutching at straws in order to escape the obligation to pay rentals as stipulated in the deed of settlement and court order. The applicant argues that monthly rentals do not fall into the phrase "**arrears as stipulated above**," as provided for in clause 4 of the court order. The applicant raises the obscure argument that the notice issued on 15th November 2017 was not issued in terms of the court order but rather in terms of the deed of settlement. As I have already alluded to, the court order incorporates the deed of settlement by reducing it to an order of the court. The clear intention of the parties was to be bound by the terms of both the deed of settlement and the court order. The applicant has not been able to convince the court nor show that that the US$6 000 rent that was due to be paid by the end of October 2017 was in fact paid. The fact of the matter is that what triggered the letter of the 15th November 2017 was the failure by applicant to pay rentals in terms of the court order. The breach occurred the moment such rental remained unpaid. It matters not, that the letter of 15 December 2017 makes reference to the Deed of Settlement and not the Court order. Reference to the deed of settlement in that letter does not in any way render the letter invalid.

In essence the applicant is asking this court to reconstruct the parties' agreement for them. In *Magodora and Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S), the Supreme Court had this to say:-

> *"It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they freely and voluntarily accepted, even if there are shown to be onerous or oppressive. This is a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms."*

The request by applicant that certain provisions of the signed Deed of Settlement should be deleted will, in all circumstances amount to the court re-writing the contract for the parties, such as proposition is not acceptable in our law. In *Natal Joint Municipal Pension Fund* v *Endimeni Municipality* 2012 (4) 593 (SCA) the court held that:

> *"Whatever the nature of the document, consideration must be given to the language used the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known t those responsible for its production … Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to statute or statutory instrument is to cross the divide between interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made …"*

It seems to me, that a court order cannot be subjected to further determination and scrutiny by the court "or any other competent tribunal". The court order of TAKUVA J which is subject of this application is clear. The order has to be enforced. The order is unambiguous. It cannot be given any other meaning or interpretation by this court. The order provides for the terms of its enforcement in the event of a breach. Clause 8 (b) of the court order makes it clear that the tenant shall be ejected in the event of a breach. Where it is apparent is that the tenant has not complied with the terms of payment as set out in the court order, the landlord is entitled, in the event, to issue a writ of ejectment without having to institute fresh proceedings. Unless the tenant is able to show that it has complied with the terms of the court order, it is not entitled to stop execution.

Disposition

I am satisfied that the applicant breached the court order granted on the 9th of November 2017. Further the, notice issued by 1st respondent on 15th November 2017 was validly issued. The notice of breach merely attested to the factual position that a breach had occurred. Further, and in any event, there is an admission by applicant that the rental for the month of October 2017 remained unpaid as at 31st October 2017. In the result, the applicant would not be entitled to the final order interdicting the respondents from enforcing the warrants of execution and ejectment.

Accordingly, for the aforegoing reasons, I make the following order:

1. The provisional order granted on 15 December 2017 under case number HC 3276/17 be and is hereby discharged.
2. The application be and is hereby dismissed with costs.

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