POLYBRANDS IRRIGATION AND INDUSTRIAL SUPPLIES
versus
ZESA HOLDINGS (PRIVATE) LIMITED
and
SHERIFF OF HIGH COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 August 2018 & 16 November 2018

Urgent chamber application

P. Chiutsi,for the applicant
O. Mutero, for the 1st respondent
No appearance, for the 2nd respondent

MANGOTA J: I heard this application on 10 August, 2018. I dismissed the same with costs after I had heard the parties. I did so through an *ex tempore* judgment.

On 10 September, 2018 the High Court Registrar addressed a letter to me. He advised that the applicant appealed my decision. He requested for any reasons for the same. These are they:

The applicant and the first respondent enjoyed a lesee - lessor relationship. They did so in terms of the commercial lease agreement which they signed on 22 October, 2015. The lease related to the first respondent's immovable property known as Stand 3325 Salisbury Township commonly called Old Central Stores, Harare which the applicant leased from the first respondent at a monthly rental of $905 as well as operating costs of $282 per month.

The applicant defaulted in its payment of rent and operating costs. These came to a cumulative figure of $8782 which was computed as follows:

(i) arrear rentals = $6244 - and

(ii) arrear operating costs = $2538.

On 17 March, 2016 the first respondent sued the applicant. It claimed from it payment of:

(a) arrear rentals of $6244;

(b) arrear operating costs of $2538;

(c) interests on the sum of $6244 at 5 % per annum reckoned from 1 March, 2016 to the date of full payment;
(d) holding over damages in the sum of $1322.75 per month with the effect from 1 March 2016 to the date of the applicant's vacation from its property;
(e) an order ejecting the applicant and all those claiming right of occupation through if from its property i.e. Old Central Stores No. 14 Barrow Road, Southerton, Harare-and
(f) costs of suit on legal practitioner and client scale.

The applicant did not defend the suit. It instead entered into a payment plan with the first defendant as a result of which it paid a total sum of sum of $9000. It paid the sum as follows:

(i) $3000 on 19 April, 2016-and
(ii) $6000 on 22 June, 2016.

Because the applicant did not oppose the suit, the first respondent obtained default judgment against it. It did so on 3 May, 2016 and under HC 2839/16. It instructed the second respondent to attach and take into execution the movable goods of the applicant.

The attachment of the goods took place on 3 August, 2018. The same gave birth to the current application. The applicant applied for stay of execution. It stated that it was not aware of the default judgment until 4 August, 2018 when it was served with the warrant of execution and ejectment. It insisted that it paid the debt which it owed to the first respondent in full. It averred that it did not know how the sum of $15067 which the first respondent intends to recover from it was computed. It alleged that it made improvements on to the property of the first respondent. The improvements, it said, were to the tune of $42 581.13. It stated that it instituted proceedings for the setting aside of the warrant of execution. It said it did so under HC 7213/18 which, according to it, was still pending. It, accordingly, moved the court to stay execution pending the determination of HC 7213/18.

The first respondent opposed the application. The second did not. May assumption is that he intends to abide by the decision of the court.

The first respondent's *in limine* matter was that the application was not urgent. It insisted that the applicant was aware of the judgment which had been entered in its favour as far back as 9 June, 2016. It attached to its opposing papers a copy of the e-mail which its legal practitioners addressed to the applicant on the mentioned date. It marked it Annexure A. It

stated, on the merits, that the applicant breached the payment plan which it put forward to it and, because of the breach, it obtained default judgment against it.

It explained the circumstances under which the sum of $15067 which it states in the warrant of execution came about. The sum, it said, is part of holding over damages which the court granted to it in the default judgment. It denied the allegation that the applicant made any improvements on its property. It moved the court to dismiss the application with costs which are on a legal practitioner and client scale.

I mention, in passing, that an application is not urgent just because the applicant says it is. An application is urgent when, from a reading of all its circumstances, it cannot wait and when any delay in its hearing carries with it adverse consequences upon the interests of the applicant.

Where a litigant chooses to lay before the court only circumstances which, in his view, will persuade it to hear him on the basis of urgency and leaves out any matter which, if it was known, would disqualify the application being heard urgently and the truth of the same eventually surfaces from the respondent's notice of opposition, the court will have no difficulty in drawing adverse inferences against him.

The above-stated matters fall squarely into the circumstances of the applicant. It realised that its correspondence of 9 June, 2016 with the first respondent would not persuade the court to hear its case on the basis of urgency. It, therefore, made up its mind not to refer to it all. The same only came to the attention of the court when the first respondent attached it to its opposing appears.

The applicant's statement which is to the effect that it became aware of the default judgment on 4 August, 2018 cannot hold. The e-mail, Annexure A, which the first respondent's legal practitioners addressed to it on 9 June 2016 removes the distortion of events which the applicant sought to create in the mind of the court. The applicant, I assert, was aware of the existence of the default judgment which had been entered against it on 9 June, 2016. It knew that the first respondent had a court order which was entered in its favour on a day which preceded the date of its receipt of the e-mail.

I, for the avoidance of doubt, quote the contents of the e-mail *in extenso*. The quotation will, it is hoped, place the same in context. It reads:

> "On Thu, June 9, 2016 at 2.26AM, O. Mutero wrote:
> Mr Nyashanu

> The debt should have been settled by now. Kindly ensure that all the arrears are cleared by the 30th of June 2016, failing which we shall instruct the Sheriff to evict you as well as attaching your property for sale in execution.
>
> OSTERN MUTERO
>
> SAWYER & MKUSHI LEGAL PRACTITIONERS" [emphasis added]

The applicant's terse response to the above was made on the same day at 1:17pm. It reads:

> "SUBJECT: RE: ZESA HOLDINGS P/L v POLYBRAND P/L
>
> Dear Mr Mutero
>
> We note your concerns. We will do our best.
>
> M. Nyashanu
> Polybrand"

The applicant knew, as of the mentioned date, that the first respondent could not instruct the Sheriff to evict it or to attach its property for sale in execution without a court order. The contents of the e-mail sufficiently informed it of the stated matter. It did not ever suggest that they were unclear or ambiguous. Nor can it ever state as much.

If the contents of the e-mail were unclear to it, it had every right to seek clarification of the same from the first respondent. It could, in the alternative, have ascertained the meaning and import of the e-mail from its legal practitioners. Nothing prevented it from seeking clarification. The fact that it did not shows that its mind was very clear on what the first respondent threatened to carry out if it failed to comply with what was communicated to it in the e-mail.

It is for the mentioned reason, if for no other, that the applicant made up its mind not to make any mention of the e-mail when it filed this application through the urgent chamber book. It remained alive to the fact that any mention of the e-mail would not allow its application to be heard on the basis of urgency. It failed to acquit itself on the same when the first respondent drew the court's attention to the contents of the e-mail.

Given that the applicant was aware of the court order of 3 May 2016 on 9 June, 2016 its application cannot be said to be urgent at all. It cannot, by any stretch or imagination, be suggested that a matter which the applicant allowed to wait for over two years running has suddenly became urgent on the basis of the warrant of execution which the second respondent

served upon it on 4 August, 2018. That is, if anything, self-created urgency. It is not the type of urgency which the rules of court contemplate.

The applicant's statement which is to the effect that it paid the debt which it owes to the first respondent in full is misplaced. It remains oblivious to the fact that the order which the court entered for the first respondent carries with it the component of holding over damages. That component is not static. It moves on a month-by-month basis. It moves from the date that the order was made against it to date.

The first respondent explained, to the satisfaction of the court, the circumstances which relate to the sum of $15 067 which it is claiming from the applicant. Paragraph 3 of its opposing papers is relevant in the mentioned regard. It appears at p 5 of the same. It reads:

> "There was no cause for the applicant to be shocked. Our legal practitioners warned it that execution and eviction would be effected if payment was not made (Annexure A). The applicant in terms of the court order is supposed to pay $1 322-75 per month with effect from the first of March 2016, todate of vacation as holding over damages. The total amount of holding over damages from the first of March 2016 todate is $38 649-75 (i.e $1 322-75 x 29 months). Of this amount. the applicant to date has paid a total sum of $23 581-85 leaving a balance of $15 067-00 which amount is due and payable, hence the execution. This is the reason why the applicant has not attached any proof of payment for the period 1 March 2016 todate" (emphasis added).

In all the correspondence which it addressed to the first respondent, the applicant did not ever raise the issue of improvements which it alleges it effected on the property of the first respondent. It raised the same only in this application. It states that it attached to the application the list of improvements which it made on the property as Annexure H. The annexure is, for reasons known to it, not attached to the application.

The first respondent denies that the applicant made any improvements on its property. It insists that the property is in the state that the applicant took occupation of it save for fair wear and tear.

The fact that the applicant did not contest the first respondent's claim when summons was served on it points in the direction that the issue of improvements of the property was raised by it only as a way of running away from the first respondent's claim. If it made such improvements, it would have raised the same and counter-claimed for a set off when the first respondent sued it. It did not because it made no improvements. All it did, on its receipt of the summons, was to put forward to the first respondent a settlement proposal of the debt which it owed. Its conduct in the mentioned regard is not consistent with that of a litigant who has a genuine counter-claim against his adversary. Its allegations of improvements do, at any rate, raise a material dispute of fact which the court cannot resolve on the papers.

The applicant failed to prove, on a balance of probabilities, the urgency of its application. The same stands on nothing. It is devoid of merit. It is, accordingly, dismissed with costs.

P Chiutsi, applicant's legal practitioners
Messrs Sawyer & Mkushi, 1st respondent's legal practitioners