Judgment No. HB 43/07
Case No. HC 685/06
X Ref 2591/04

BHADALA DEBT P B

Versus

ESTATE LATE H M B GAIBEE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 APRIL 2006 AND 22 MARCH 2007

C P Moyo, for the applicant
S S Mazibisa, for the respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the final order sought

That you show cause to this honourable court why an order should not be made in the following terms:

1. The lease entered into by the parties on January 3, 2006 be and is hereby held to be binding between the parties.
2. Respondent be and is hereby ordered to pay the costs of this application on a higher scale.

Interim relief granted

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

(a) respondent and the Deputy Sheriff be and are hereby interdicted from evicting or causing the eviction of applicant from the premises at 1st floor Kaymer House, 105 R G Mugabe Way, Bulawayo."

In brief the applicant states that it seeks "an urgent order to stay the eviction of the applicant from its business premises situated on 1st floor, Kaymer House, 105 R G Mugabe Way, Bulawayo."

Briefly the applicant has been a tenant of respondent for a number of years. In 2001, respondent engaged the services of Knight Frank Estate Agents to manage the property subject matter of these proceedings. The respondent instituted proceedings under case number HC 2591/04 for the applicant's eviction. On March 24, 2005 the respondent obtained judgment by default against the applicant. In terms of the said

judgment the lease between the parties was cancelled and an order for the applicant's eviction was granted to the respondent with costs on a higher scale. This judgment still stands. The applicant seems to suggest that it has "expired". It is foolhardy for the applicant to hold such a view as the judgment did not have expiry date or "best before" date. After the applicant made some payments in terms of judgment, the parties started talking about the possibility of signing a new lease agreement in the form of settlement proposals emanating from the respondent. The applicant failed to honour the settlement proposals including a specific and particularised lease agreement. In the end the parties never signed any lease agreement and never negotiated one. The applicant took away a draft written lease and never returned with it and as such no agreement was ever concluded. The applicant in fact tried to mislead the court by saying in the founding affidavit, "11. Having paid in full applicant and respondent negotiated a new lease. On January 3, 2006 we signed the agreement." (emphasis added). This averment is not true and is misleading. This court disapproves of urgent applicants which are characterised by dishonesty and may, in appropriate cases dismiss the application on that fact alone – *Barclays Bank* v *Giles* 1931 TPD 9; *Hall and Anor* v *Heyns & Ors* 1991(1) SA 381(C); *Venter* v *Van Graan* 1929 TPD 435 and *Graspeak P/L* v *Delta Corporation P/L & Anor* 2001(2) ZLR 551(H). This misleading averment is material because, without a signed lease agreement there is no cause of action on which this application is based.

Further, the founding affidavit has no averment on the urgency. Urgency is only alleged in the certificate of urgency. This is clearly a case of self created

urgency. I say so because the applicant has been threatened with eviction, in writing, from as far back as 17 January 2002. This threat was repeated in writing on 13 March 2006 and 14 March 2006. In fact, the bulk payments were made as a result of these threats of eviction. The applicant knew what to do in order to ward off the eviction. Soon after making what it considered to be the final instalment the applicant "demanded" that the

parties enter into a fresh lease agreement. When he received no joy from the respondent he approached this court to enforce a non-existing written lease agreement. This conduct should be discouraged by an award of costs on a punitive level.

Accordingly, I find that the application is not urgent and it should fail on that account. In the event that my finding on question of urgency is wrong, the application should fail on account of the above mentioned dishonesty. The application was brought in bad faith. Finally, if I am wrong in the above two findings still the application must fail on the basis that, without the lease agreement, the applicant has no cause of action. So whichever way one looks at the application, it is devoid of merit.

Accordingly, the application is dismissed with costs on the legal practitioner client scale.

Majoko & Majoko, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners