JASSAT, MAHOMED AND ESSOF (PVT) LTD
versus
OAKVIEW INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 February & 17 April 2013

I.A. Ahmed, for the applicant
P. Kumbawa, for the respondent

Opposed Application

ZHOU J: This is an application for the ejectment of the respondent and all persons claiming occupation through it from premises known as Number 61 Leopold Takawira Street, Harare, together with holding over damages in the sum of US$166.66 per day calculated from 01 August 2012 to the date when the defendant vacates the premises. The factual background to the dispute is as follows:

The respondent took occupation of the premises referred to above pursuant to a lease agreement concluded with the applicant. In April 2010 the applicant instituted eviction proceedings against the respondent after giving notice to vacate. The proceedings were instituted under Case No. HC 2634/10. At the pre-trial conference the parties entered into a deed of settlement in terms of which the respondent undertook to vacate the premises by 31 July 2012. During that period the rent would be reviewed every six months. The deed of settlement was signed by both parties' legal representatives on 30 July 2010. On 8 June 2012 the applicant through its legal practitioners wrote to the respondent reminding it of the agreement to vacate the premises by 31 July 2012. The respondent responded by letter dated 19 July 2012 indicating that it would not vacate the premises. In that letter the respondent alleges that the deed of settlement "was superseded by several agreements between the parties" which were concluded at the instance of the applicant. The respondent states that there was agreement that it would pay rent above the ruling market rates to enable it to continue with the lease beyond 31 July 2012. It further states that it was advised by the applicant that the property would be partitioned into three

premises and that the respondent would be given the right of first refusal to occupy one of the three shops to be established following the partition. According to the respondent the agreement also entailed that the respondent pay the outstanding municipal rates. In its letter dated 9 August 2012 the applicant rejected the respondent's assertion that there had been subsequent agreements which had substituted the deed of settlement.

The applicant instituted the eviction proceedings in the instant case on 5 September 2012. The application is opposed on essentially the same grounds set out in the letter written by the respondent referred to above. The objection *in limine* taken in the opposing affidavit that the applicant should have first obtained a certificate of the Rent Board before approaching this court was not pursued by the respondent in the heads of argument and in argument at the hearing. The point had no merit in the first place and was properly abandoned, as the procedure of obtaining a certificate of the Rent Board applies to leases for residential premises.

On the other hand the applicant objected to the opposing papers filed on behalf of the respondent on the ground that the notice of opposition is not in Form No. 29A as is required in terms of Order 32 Rule 233(1). In terms of Form 29A the respondent is required to state the date on which the application was served on it. The non-compliance was readily conceded by *Mr Kumbawa* who represented the respondent. No condonation was sought for the failure to comply with the requirements of the Rules. I am prepared to overlook the non-compliance, but must remind litigants that in future the Court will insist on strict compliance with the requirements of the Rules. See *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101(H) at 104A-105D.

On the merits the Court must decide whether the deed of settlement executed by the parties on 30 July 2010 was abandoned by the parties and substituted by other agreements. That fact is in dispute. Not every dispute of facts is incapable of resolution on the papers. In *Soffiantini v Mould* 1956 (4) SA 150(ED) at 154 PRICE JP said:

> "It is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

See also *Executive Hotel (Pvt) Ltd v Bennet NO 2007 (1) ZLR 343(S) at 348B-D*.

The respondent has not placed before the Court evidence of the agreements which were concluded by the parties which replaced the deed of settlement. Other than a bald statement about the existence of such agreements which is made in the opposing affidavit, the documents attached to the affidavit do not prove the facts alleged. The respondent does not state when those agreements were concluded if at all they ever existed. The fire equipment inspection reports prepared on behalf of the Chief Fire Office for Harare do not in any way relate to the existence of the alleged agreements. The mere fact that the respondent was paying a monthly rent which is different from what the Rent Board would have considered to be reasonable does not help. The letter from the Rent Board is not an affidavit. It is worded in general terms without specific reference to the premises occupied by the respondent. Given the background to the deed of settlement, it is improbable that there would be nothing in writing to confirm its abandonment. The first time that the respondent makes reference to the alleged agreements was in its letter of 19 July 2012 which was written almost two years after the deed of settlement was executed. Further, those oral agreements were only raised after the respondent was reminded of its undertaking to vacate the premises by the end of July 2012. The reference by the respondent to "several agreements" which superseded the deed of settlement is not supported by the contents of the letter of 19 July.

The respondent's assertion that the applicant is evicting it in order to lease the premises to some Chinese business people is not supported by evidence. In any event, the genuineness of the applicant's need to have the premises for the operation of its own business was not challenged by the respondent, but was accepted, at the time that the parties executed the deed of settlement.

The holding over damages in the sum of US$166.66 are based on the rent which the respondent was paying at the time that the proceedings were instituted. That amount has not been challenged by the respondent. As the respondent was supposed to vacate the premises by 31 July 2012 the damages will be calculated from 01 August 2012 up to the date that the respondent vacates the premises.

In all the circumstances, this is a matter in which the Court can readily determine the dispute on the papers without doing an injustice to either of the parties involved. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338(S)*; compare *Ex-Combatants Security Co v Midlands State University 2006 (1) ZLR 531(H) at 534*. In my view no *viva voce* evidence can tilt the probabilities in favour of the respondent. The respondent has not pointed to such evidence.

In the result, it is ordered as follows:

1. Respondent and all persons claiming occupation through it be and are hereby ejected from the premises situate at No. 61 Leopold Takawira Street, Harare.
2. In the event that the respondent and all persons claiming occupation through it fail to vacate the premises referred to above after being served with this order, the Sheriff or his Deputy shall take all steps necessary to eject them from the premises and give vacant possession thereof to the applicant.
3. The respondent shall pay to the applicant holding over damages in the sum of US$166.66 per day from 01 August 2012 to the date of ejectment.
4. Respondent shall pay the costs of this application.

Ahmed & Ziyambi, applicant's legal practitioners
C. Nhemwa & Associates, respondent's legal practitioners