Judgment No. HB 1/06
Case No. HC 2260/05

THE EXECUTIVE ASSISTANCE TRAINING CENTRE (PVT) LTD

Versus

ZESA PENSION FUND

And

BARD REAL ESTATE (PVT) LTD

And

VIKING PLASTICS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO, 9 AND 19 DECEMBER 2005 & 19 JANUARY 2006

S Mazibisa for applicant
Shenje for 1st and 2nd respondents
B Ndove for 3rd respondent

Urgent Chamber Application

BERE J: The facts of this matter which are common cause can be summarised as follows:

On 28 June 2005 the applicant and the 1st respondent entered into a one year lease agreement commencing from the 1st day of December 2004 and ending on 30 November 2005. The lease had a provision for renewal for a period of six months commencing the 1st day of December 2005 to 31 May 2006. The applicant had secured the lease agreement in question to enable it to run educational institutions from pre-school right up to post secondary professional courses.

At the instance of the Ministry of Education the applicant had

to relocate some of its operations to another premise. When it did so it did

sublet the vacated space to the 3rd respondent without seeking permission from its landlord, the 1st respondent.

When the 1st respondent got wind of the arrangement between applicant and 3rd respondent it sought clarification and warned applicant against breaching some provisions of the lease agreement which forbade subletting of the leased premises. Annexure 'B' to applicant's papers fully captures the 1st respondent's concerns.

The applicant's concerns were allayed by Annexure 'C' which was to the effect that there was no subletting and that the space in question was being used by applicant's sister company. (my emphasis)

As fate would have it the applicant started having serious problems with 3rd respondent over the sublet portion of the leased property and it became apparent to 1st respondent that applicant had made certain misrepresentation to it concerning the occupation of the premises by 3rd respondent. On 17 November 2005 1st respondent registered its displeasure to applicant and purported to terminate the lease agreement with applicant. See annexure 'F' to applicant's papers.

On 28 November 2005 1st respondent filed an *ex parte* application in the Provincial Magistrates' Court, Matabeleland North

seeking the eviction of applicant from the leased premises. Subsequent to the filing of the *ex parte* application on the same date, the court issued a *rule nisi* returnable to the same court on 12 January 2006 calling upon applicant to *inter alia* show cause why its lease agreement with 1st respondent should not be cancelled or terminated.

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Applicant anticipated the return day and filed its opposition to the order sought by 1st respondent and set the matter down for hearing in the same court on 15 December 2005. Judgment in that court was reserved until 19 December 2005.

On 29 November 2005 applicant filed the instant urgent chamber application seeking interim relief couched in the following terms:

> "**Terms of the final order sought**
>
> That the provisional order granted by this honourable court be confirmed in the following manner:
> a) The lease agreement [Annexure 'A'] to the papers be and is hereby declared to be binding as between the parties [Applicant and 1st respondent] and all disputes between the parties are to be resolved under the lease agreement by referral of arbitration.
> b) The 2nd respondent only be and is hereby ordered to pay costs of suit on an attorney-client scale.
>
> **Interim relief granted**
>
> "Pending the finalisation of the matter, the applicant be granted the following relief:
> 1. The purported summary termination of the lease agreement between the applicant and 1st respondent be and is hereby declared null and void for lack of compliance with the lease agreement.
> 2. The purported statutory lease agreement and 3 months notice period extended to the 3rd respondent by the 2nd

respondent be and is hereby declared null and void for lack of compliance with the lease agreement.

3. The respondents jointly and severally be and are hereby directed to give full access to the applicant to the premises as fully stated in the lease agreement attached to the papers as Annexure 'A" to prepare for its January 2006 programmes or courses.

Service of this application and provisional order

That this provisional order and application shall be served upon the respondents t the address stated in the application by the deputy Sheriff, Bulawayo."

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The basis of this application by the applicant was that it had already enrolled students for the year 2006 to pursue their studies on the disputed leased premises and that "expensive advertisements" to this effect had been placed in copies of the *Chronicle* newspaper.

When the matter came up for argument before me on 16 December 2005 applicant's counsel did not advise the court of the fact that the 1st respondent had filed a similar case in the Magistrates' Court seeking substantially the same remedy like the one sought in this same court. Applicant's counsel did not advise the court that on 13 December 2005 he had prepared and filed court papers in the lower court opposing the order sought by the 1st respondent. Applicant's counsel did not advise the court that he had personally appeared in the lower court to defend the applicant's position on 15 December 2005 and that the lower court had reserved its ruling to 19 December 2005. To him it was business as

usual. There was nothing by way of supplementary affidavit from his client to try and properly appraise this court of the other salient but important features of this case.

Naturally when the two counsels for the respondents in the instant application got the opportunity to address the court they attacked applicant's counsel for not being candid with the court by failing to disclose all material facts in this matter.

I propose to deal with this aspect of non-disclosure.

Authorities are clear that litigants have a duty to disclose all material facts which are relevant to their cases. The court must have a clear

purview of the issues before it. The duty to disclose is heavier on a legal practitioner because he is an acknowledged officer of the court. He owes a concormittent duty to the court. His natural position does not give him room to deceive or mislead the court.

My brother judge NDOU J in the case of *Graspeak Investment (Pvt) Ltd* v *Delta Operations (Pvt) Ltd & Anor* 2001(2) ZLR 551(H) dealt at length with the aspect of good faith and full disclosure of all material facts particularly in urgent *ex parte* applications. After making a fairly extensive reference to cases decided in other jurisdictions and other legal publications the learned judge summed it up at page 555D in the following words:

> "The courts should, in my view discourage urgent applications, whether *ex parte* or not, which are characterised by material non-disclosures, *mala fides* or dishonesty on the

party of litigants”

I agree.

I wish to take it further and say that whereas it is bad for a litigant to fail to disclose relevant facts, it is unforgivable for a legal practitioner to conceal such information. In a proper case such conduct must attract censorship from the Law Society. It is dishonourable conduct.

The view the court takes in this matter is that this was not only a matter of non-disclosure but a calculated manoeuvre to do so.

I would probably understand it if applicant’s counsel’s argument was that at the time he filed the instant application he was not aware of the proceedings in the lower court. But what about on 13 December 2005 when he on behalf of the applicant filed a notice of opposition in the lower court and his subsequent attendance to seek the discharge of the *rule nisi*

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in the lower court on 15 December 2005? What about on 16 December 2005? Was he at that stage not aware that his client was pursuing a parallel remedy on substantially the same matter in two different courts? It is the view of this court that by adopting the approach he did applicant’s counsel’s actions amounted to a fishing expedition. His actions were clearly an abuse of court process.

What is even more disturbing in this matter is that when the other two counsel for 1st , 2nd and 3rd respondents highlighted to

applicant's counsel about his lack of professionalism he adopted a defensive attitude. He was unrepented. He remained intransigent.

On this basis alone I would not hesitate to dismiss the application with costs.

But I wish to take the debate further. Is the instant application urgent?

The issue of urgency has come before our courts on many a time. The guiding legal principles have been stated and re-stated. I prefer the instructive remarks by the late CHATIKOBO J in what has probably become the leading case on the subject, namely the case of *Kuvarega* v *Registrar General and Another* 1998(1) ZLR 188(H) at page 193F-G where the learned judge had this to say:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. ..."

The dispute between the applicant and the 1st respondent in this matter started building up on 11 February 2005 when the 1st respondent wrote to applicant questioning the arrangement which the applicant in its letter of 10 November 2005 openly revealed was subletting. Never mind how the applicant tries to justify it or what it prefers to call the arrangement.

The applicant knew or ought to have known that if this matter was not resolved in time it was always going to present problems

with its continued occupation of the leased premises.

Despite this full knowledge the applicant went on to advertise the imminent use of the disputed premises by its students and or pupils. The result of this miscalculation by the applicant is that it now finds itself in a dilemma which has prompted the instant application. In my view the situation the applicant finds itself in is self induced. The applicant by inviting a third party (3rd respondent) to the leased premises in what appears to have been a clear violation of the lease agreement created the situation now on the ground. It is not the court's intention at this stage to make a finding on whether or not the applicant violated the lease agreement as that issue has to be determined in a proper forum and in terms of the lease agreement.

In the light of the above consideration the court was still going to be constrained in accepting this matter as one of urgency requiring to be dealt with on urgent basis.

The message must go loud and clear that this court will naturally frown at those litigants who wish to get favourable decisions from the court by choosing not to disclose material facts surrounding their cases. This situation is compounded in *ex parte* application which in many cases tend to compromise the *audi alteram partem rule.*

In the final analysis the court's firm view is that the applicant's

application be dismissed with costs.

Messrs Cheda and Partners applicant's legal practitioners
Messrs Shenje and Company 1st and 2nd respondent's legal practitioners
Messrs T Hara and Partners 3rd respondent's legal practitioners