C&T MINING (PVT) LTD

Versus

ZIMBABWE PROGRESS FUND

And

COURTNEY HOTEL (PVT) LTD

And

TAWANDA MAZULA

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 3 July, September 2023 & 6 March 2024

Opposed application

E. Muhlekiwa for applicant
L.Matapura for the respondents

CHILIMBE J

BACKGROUND

[1] Before me is a landlord and tenant dispute. The tenant filed the main application which the landlord resisted. The landlord additionally responded with a counter-application which the tenant dutifully opposed. The counter-application was withdrawn mid-flight. It stands all but resolved save for the issue of costs.

[2] The premises forming subject of the dispute are located at 88 Ahmed Ben Bella (Central) Avenue in Harare. They are a familiar city landmark commonly known as Courtney Hotel. For convenience and distinction, I will refer to the property hereunder as "The Premises".

THE PARTIES AND THEIR RELATIONSHIPS

[3] The applicant in the main ("C & T Mining") is the tenant. First respondent ("Zim Progress Fund") is described as a shareholder in, and agent of the second respondent ("Courtney Hotel"). Courtney Hotel- the entity- in turn, is the lessor and owner of The Premises (as stated these are also known as Courtney Hotel).

[4] The third respondent ("Mr. Mazula"), is described as an agent of Courtney Hotel as well. The relevance of his role was not apparent from the papers. But Rosemary Mazula, the managing director of Courtney Hotel, deposed to the affidavits filed herein on behalf of the respondents in main. She also executed one of the two written lease agreements subject of the present dispute.

THE DISPUTE

[5] The pillars of the dispute can be summarised as follows; - C&T Mining prayed for a declaratur asserting its tenancy rights. It sought to pre-empt attempts to eject it from The Premises. It claimed the right of occupancy rights are claimed from its status as a statutory tenancy. On that basis, C&T Mining argued that the rei vindicatio counter-application could not succeed against extant tenant rights.

[6] The uncontested facts are that C& T Mining and Courtney Hotel concluded a written lease agreement on 20 May 2019. The tenancy was for the duration of one year (1 June 2019 to 1 June 2020) and at a rental of US$400 per month. On 1 November 2022, a letter in the following terms was addressed by Courtney Hotel to its tenant; -

> *"Re: Notice of Termination of Lease Agreement.*
>
> *We refer to the above matter.*
>
> *We write to inform you that your Lease will be terminated on the 1st of February 2023.*
>
> *Consequently, please arrange your affairs so that you give us vacant possession of the premises, without demand, on or before the 1st of February 2023.*
>
> *We now require the premises for our own use.*
>
> *Be guided accordingly"*

[7] C&T Mining objected to, and disregarded this demand. Its argument being that; - firstly, the letter was invalid in that it purported to terminate a contract at a future date. C&T Mining drew support in this regard from the Supreme Court decision of *Waste Management Services [Pvt] Ltd v The City of Harare* SC 126-02. The court therein referred with approval to the self-explanatory remarks in *Ganief v Hoosen* 1977 (4) SA 458 (C) per DE KOCK J at 460 A-F that; -

"The basis of the argument is that a notice of cancellation to be effective must clearly and unambiguously convey to the guilty party the innocent party's election to bring the contract to an end. It must embody an unqualified, immediate and final decision to treat the agreement as at an end. It cannot stipulate for a termination at some future time."

STATUTORY TENANCY

[8] Secondly, C&T Mining contended that the letter was ineffectual. It purported to terminate a non-existent lease. Thirdly and associated with this point, it was argued that upon expiry of the original lease, C&T Mining reverted to a statutory tenant. Statutory tenancy is defined by s 23 as read with s 22 of the Commercial Premises (Rent) Regulations SI 676/83 ("the Rent Regulations"). I set out the relevant sections hereunder; -

(1) For the purposes of subsection (2), "rent due", in relation to commercial premises, means—
(*a*) where the determination of a fair rent in terms of Part II is in force in respect of premises, the rent fixed thereby, as varied from time to time in terms of that Part; or
(*b*) in any other case, the rent due in terms of the lease.
(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—
(*a*) continues to pay the rent due, within seven days of due date; and
(*b*) performs the other conditions of the lease;
unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that—
(i) the lessee has declined to agree to an increase in rent; or
(ii) the lessor wishes to lease the premises to some other person.

23. Rights and duties of statutory tenant
A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:
Provided that, notwithstanding anything contained in the contract of lease, a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee.

[9] Mr. *Matapura* argued that these provisions were struck down by this court in *Elnour United Engineering Group (Pvt) Ltd v Minister of Industry and Commerce N. O and 2 Ors* HH 81-23. He proceeded to outline the basis of the court`s decision in that matter. Therein, the court had merely tested the validity of complaints that sections 22 and 23 of the Rent Regulations were *ultra vires* their enabling statute the Commercial Premises (Lease Control) Act [Chapter 14:04].

[10] The court`s findings were that indeed, the attacked provisions of the regulations were *ultra vires* s 5 of the enabling Act and struck them down. The court made no pronouncement on constitutional invalidity. As such, there was no referral to the Constitutional Court for confirmation needed. The court had duly taken note of the principle of subsidiarity and correctly followed *Jonathan Moyo v Sergeant Chacha & 3 Ors* CCZ 19-17. In *Elnour United Engineering,* the court held as follows at page 3-4; -

> "Before delving into the matter, I wish to address applicant's draft order, particularly, paragraph (b) to the draft order which reads:
>
> "Section 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 be and are hereby declared to be unconstitutional as they violate Section 44, 56, 64, 71, and 86 of the Constitution of Zimbabwe No. 20 of 2013 and are accordingly invalid."
>
> The relief sought in paragraph (b) relates to the constitutional invalidity of specified provisions of the Regulations. Noticeably, there is no declaration sought to the effect that the provisions of the Commercial Premises (Lease Control Act are unconstitutional in that they (in any way) infringe any of the fundamental rights and freedoms. Thus, it is not the business of this court to grant such relief. If only a portion of the subordinate legislation is *ultra vires,* this court can annul the offending portion only and leave intact the valid portion(s). I will address the preliminary points."

[11] Counsel concluded his submissions by asserting that per *Elnour United Engineering*, statutory tenancy was certainly no longer part of our law. The application before the court was therefore incompetent. It was predicated on an impugned law. Mr. *Muhlekiwa* abandoned an

earlier position that (a) *Elnour United Engineering* was wrongly decided, and (b) needed confirmation by the Constitutional Court before its ruling on ss 22 and 23 of the Rent Regulations could take effect. The concession was associated with an implicit abandonment of part of the relief sought.

THE CONCESSIONS

[12] Counsel admitted that those aspects of applicant`s prayer based on statutory tenancy were no longer sustainable. But he insisted on an order declaring the termination letter invalid. Counsel said nothing about costs. Before addressing the concessions, I set out the order originally prayed for by C&T Mining; -

1. "The second respondent`s notice of termination of the lease agreement between the applicant and the first respondent in respect of the commercial premises known as number 88 Central Avenue, Harare be and is hereby declared to be legally invalid.
2. The applicant be and is hereby declared to be a statutory tenant.
3. The first respondent be and is hereby ordered to accept the applicant`s tender of payment of rent for the month of February 2023 and every month`s rent to be paid by applicant during the applicant`s tenure as a statutory tenant.
4. Respondents` jointly and severally liable, the one paying the other to be absolved, be and are hereby ordered to pay costs of suit on a legal practitioner and client scale."

[13]. With the concessions made by Mr. *Muhlekiwa,* paragraphs 2 and 3 of the draft order automatically collapse. Paragraph 4 on costs must suffer the same fate. Counsel made no submissions regarding costs following the concessions. That omission was perhaps inconsequential. I say so because the remaining prayer (paragraph 1 of the draft), seeking declaration of invalidity of the notice letter, was doomed to fall as well. I say so for the following reasons; -

[14] Firstly, That letter was still-born. Even before invoking the principle in *Waste Management Services [Pvt] Ltd v The City of Harare (supra),* the letter purported to terminate a lease agreement that had long lapsed. It was effectively terminating nothing. Secondly, herein the application seeks a declaratory order. That being discretionary relief extended to a party upon fulfilment of the established requirements (See *Johnson v AFC* 1995 (1) ZLR 65 (S)).

[15] Herbstein and Van Winsen in The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa [5th edition] state as follows at page 1438 on the discretionary nature of a declaratur; -

> "A court has the discretion on whether to grant or refuse an application for a declaratory order. Some factors which could be taken into account are the utility of the remedy, and whether, if granted it will settle the question at issue between the parties, the existence or absence of an existing dispute, some tangible or justifiable advantage in relation to the applicant`s position must appear to flow from the grant of the order sought, and that, despite the fact that no consequential relief is being claimed, yet justice and convenience demands that a declaration be made, or that the order will be of practical significance, considerations of public policy, the availability of other remedies, and a substantial delay in bringing the proceedings."

[16] I find nothing in that wide array of considerations to justify deploying the jurisdiction of this court to endorse the tepidity of an ineffectual letter already disowned herein by its author. The application must necessarily fail in its totality. Before disposing the outstanding question of costs [on the withdrawal of the counter-application], I comment briefly on *Elnour Engineering.*

WHAT EXACTLY IS THE HIGH COURT`S POSITION ON STATUTORY TENANCY?

[17] In *Otto Drives Construction (Pvt) Ltd v Shanes Autoelectrics & 2 Ors* HH 780-22, this court held as follows per CHIRAWU-MUGOMBA J at page 4 thereof; -

> "The net effect of the setting aside of the Commercial Rent Regulations is that they violate *S134 (c)* of the Constitution. Therefore, it is an order of constitutional invalidity. The High Court has no power to set aside any law outside of the Constitution. Without confirmation by the Constitutional Court, the regulations are still extant. This is supported by s167(3) which reads as follows: -
>
> "(3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force."
>
> He submitted therefore that the defendants therefore have a defence and are complying with statutory tenancy. I fully agree with the submissions made by Mr

> *Mapuranga.* Statutory tenancy is still part of the law of Zimbabwe." [Underlined for emphasis]

[18] Neither counsel herein referred to this decision. Nor did Mr. *Muhlekiwa* try to salvage the collapse of his statutory tenancy argument through the principle in *Total Zimbabwe (Pvt) Ltd v Appreciative Investments (Pvt) Ltd* HH 268-10[1]. Therein, KUDYA J (as he was) held that statutory tenancy was effectively synonymous with the contractual principle of tacit relocation. The Learned Judge, as he was, then held that; -

> "In my view, there does not appear to be much of a difference between a statutory tenancy and a tacit relocation. Like in a tacit relocation, the terms and conditions of the original lease that are incident to the relationship of landlord and tenant and consistent with the provisions of the Commercial Premises Rent Regulations as opposed to those that are collateral and independent are renewed. See *Chibanda* v *Hewlett, supra* at 220E. I find that the plaintiff pleaded the renewed agreement by making reference to the original agreement in the declaration."

[19] This decision was referred to with approval in *Otto Drives* That aside, *Otto Drives* is an extant decision of the court. It made a pronouncement contrary to that in *Elnour Engineering*. It infused a new lease of life into ss 22 and 23. Effectively therefore, this court issued conflicting positions on the status of statutory tenants. I am precluded from reconciling the dichotomy herein because such strays beyond "*resolving the real issues between the parties*[2]" Nonetheless, the variant positions require further ventilation and resolution. Hopefully soon.

[20] It may however, be helpful to recognise that in *Otto Drives*, the court cited *Elnour Engineering*, not by its unreported judgment number HH 81-23, but by its case number HC 333-21. In addition, *Otto Drives* specifically referred to the order rather than judgment in *Elnour Engineering*. A simple explanation abounds. The reasons for judgment in *Elnour Engineering* were handed down on 6 February 2023. *Otto Drives* had been earlier decided on 13 October 2022.

DISPOSITION

[1] Washmate Motors (Pvt) Ltd v City of Harare HH 32-13
[2] *Chibanda* v *Hewlett* 1991 (2) ZLR 211 (H)

[21] The respondents withdrew their counter-application during the hearing. Costs were duly tendered. But C&T Mining however, insisted on costs on a punitive scale. Mr. *Muhlekiwa* justified that drastic prayer on the basis that the respondents had persisted with a lost cause. They had been duly warned of the pointlessness of their cause by the pleadings and heads of arguments. Yet they delayed capitulating until the last moment.

[22] The fate of the application in main suggests that applicant may itself, be visited with the very same accusations. Its case eventually collapsed and failed. Both sides made eventual self-immolation concessions. I see no reason to grant the order of costs sought. It must be recognised that the purview of law covers an infinite spectrum which cannot be chequered with absolute certainty. Well-meaning citizens with legitimate claims or defences must be able to approach and defend their perceived rights in the courts. Undaunted by the fear of unduly heavy costs.

[23] Obviously, meritable litigation must be distinguished from purposeless intransigence quarrelling with everything including established law. The latter amounts to abuse of court process and clearly deserves the court`s displeasure. The Supreme summed up the position as follows in *Newton Elliot Dongo v Joytindra Natverial Naik & 5 Ors* SC 52-20 at [19]; -

> "It is settled law that costs are at the discretion of the court. The award can only be set aside where the discretion was not exercised judiciously. It is also settled that costs on a higher scale are granted in exceptional circumstances. The grounds upon which the court would be justified to make an award for costs on a legal practitioner and client scale include dishonest or malicious conduct, and vexatious, reckless or frivolous proceedings by and on the part of the litigant concerned."[3]

[24] Further, I note that routine prayers for costs on a legal practitioner and attorney scale now characterise every other matter filed before the courts. They have also percolated into the profit seeking value chains of commerce. Consensus as well as the need to mitigate the deleterious effects of defaulting debtors and counter parties are cited in justification. The courts will continue to interrogate the issue of costs based on the set principles. In conclusion, this is a matter is which each party must be saddled with its own costs given the eventual outcome.

Accordingly is hereby ordered that; -

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[3] *Mahembe v Matombo* 2003 (1) ZLR 148 (H) where the court made reference to Rubin L Law of Costs in South Africa Juta & Co (1949). See also *Mariyapera v Eddies Pfugari (Pvt) Ltd & Anor* SC 3-14; *Mutunhu v Crest Poultry Group (Pvt) Ltd* HH 399-17.)

1. The application for a declaratur be and is hereby dismissed.
2. The counter-application for rei vindicatio be and is hereby withdrawn
3. That each party, in both instances shall bear its own costs.

Muhlekiwa Legal Practice -applicant`s legal practitioners
Mafongoya and Matapura-respondents` legal practitioners

[CHILIMBE J____ 6/3/24]