KENSINGTON CENTRE (PRIVATE) LIMITED
versus
VALIS BAKERY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE; 27 March & 24 April 2025

Opposed application for a declaratur

T Zhuwarara, for the applicant
T Mpofu & A Rubaya, for the respondent

MUSHURE J:

INTRODUCTION

[1] I have before me an opposed application for a declaratur and consequential relief filed in terms of s14 of the High Court Act [*Chapter 7:06*]. The applicant seeks the following order:-

1. The application for a declaratur be and is hereby granted.
2. It is declared that the respondent is not a statutory tenant of the applicant and enjoys no statutory protection under the Commercial Premises (Rent) Regulations, 1983.
   Consequently
3. The respondent, and all those claiming occupation through it, be and are hereby ejected from a certain commercial premises being shops 10 and 11 Kensington Centre, Kensington, Harare.
4. The respondent shall pay costs of this application

BACKGROUND

[2] The facts emerging from this suit are largely common cause. I summarise them as follows- The applicant has been leasing its commercial premises being stand 66 Kensington Estate measuring 2951 square metres in extent, commonly known as shops 10 and 11 Kensington Centre, to the respondent. The lease has subsisted for a period in excess of twenty-five years. To give effect to the lease, the parties have been entering into periodic lease agreements. The last lease agreement, for the period 1 September

2019 to 31 December 2020, was executed on 12 September 2019. This lease agreement is the genesis of the legal dispute between the parties. From the record, the applicant unilaterally increased the rentals payable by the respondent contrary to the terms of the lease agreement. This dispute spilled into the magistrates' court at the instance of the applicant where it obtained an order for the cancellation of the lease agreement, the eviction of the respondent, payment of arrear rentals and levies/ operating costs, payment of holding over damages, interest and costs of suit.

[3] Both parties raised grievances with the decision of the Magistrates' Court and appealed to this court under CIV 'A' 416-22. In this court, the applicant prayed for part of the Magistrates' Court order to be set aside only to the extent that it did not specify the period from which the respondent was supposed to pay holding over damages. Unfortunately, the applicant was not successful on the basis that it had filed its cross-appeal out of time. On the other hand, the court found in favour of the respondent and allowed the appeal in its entirety. The appeal turned on the unilateral increase of the rentals.

[4] Pursuant to the appeal, the applicant offered the respondent a new one year lease for 2024. The parties failed to agree. On 6 December 2023, the applicant issued the respondent with a notice to vacate its commercial premises within seven days of receipt of the notice. The respondent did not budge. The applicant approached the Magistrates' Court seeking confirmation of the termination of the lease agreement, the respondent's ejectment, holding over damages and costs of suit. According to the magistrates' court record, three issues had been referred to it for trial, namely whether s22 and 23 of the Rent Regulations Act (*sic*) still form part of the law in light of the High Court declaratur in *Elnour United Engineering Group* v *Ministry of Industry and Commerce* HH81-23, whether the matter was *res judicata* and whether the respondent had any legal basis to remain in occupation of the applicant's premises.

[5] At the end of the applicant's case, the magistrates' court granted the respondent's application for absolution from the instance. In coming up with its decision, the magistrates court found that the applicant's sole witness had not presented any proof that she was a duly authorised representative of the applicant. The court also found that the applicant had not addressed an issue relating to the prescription of its cause of action on

31 December 2023 and that the applicant was supposed to have instituted proceedings against the respondent on the basis of the lease agreement having expired on 31 December 2020. The court further found that the decision in *Elnour United Engineering Group supra* is yet to be confirmed by the Constitutional Court. The court ruled that no allegation of breach had been made on the part of the respondent. The court *a quo* concluded that

> "In *casu*, the court was satisfied that plaintiff (applicant herein) did not present sufficient evidence warranting putting defendant (respondent herein) to its defence. No proof of authorization was presented, the judgment being relied on was not confirmed by the constitutional court and the aspect of prescription was not addressed. The court was therefore not satisfied that a *prima facie* case was presented."

[6] Aggrieved by the Magistrates' Court decision, the applicant instituted the current proceedings seeking a declaratur that the respondent is not its statutory tenant and cannot shelter under the provisions of s22 and s23 of the Commercial Premises (Rent) Regulations, 1983 as such provisions were adjudged to be *ultra vires* the Commercial (Lease Control) Act. The application is being resisted by the respondent.

[7] When the matter was placed before me for set down, it struck me that the applicant was aggrieved by an extant decision of the Magistrates' Court. The issue that exercised my mind was the procedural competency of the application in light of the Supreme Court decision in *Elephant College* v *Chiyangwa & Anor* 2020 (1) ZLR 1287 (S). In that case, the Supreme Court settled the position of the law that the discretion granted by s14 of the High Court Act to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that the person approaching it cannot claim any relief consequential upon such determination, is not exercisable where the right or obligation has already been determined by another competent court. Such an extant judgment can only be vacated by way of appeal or review.

[8] On 14 March 2025, when the matter was initially due for argument, Mr *Zhuwarara*, for the applicant, and Mr *Mpofu*, for the respondent, requested to see me in chambers. They alerted me that Mr *Mpofu* had put Mr *Zhuwarara* on notice that he intended to raise a preliminary point on the procedure adopted by the applicant on the authority of *Nyaguwa* v *Gwinyayi* 1981 ZLR 25. Both parties had agreed to seek a postponement of the matter to allow Mr *Zhuwarara* time to prepare supplementary heads of argument on the issue. I

obliged them and at the same time, took the opportunity to bring to counsel's attention the decision in *Elephant College supra* so that they could address their minds to the decision, if necessary. Per their agreement, Mr *Zhuwarara* would file his supplementary heads of argument by not later than the 18th of March 2025, and the respondent would file its supplementary heads of argument, if need be, by not later than the 20th of March 2025. By consent of both parties, I postponed the matter to 27 March 2025, for argument. Mr *Zhuwarara* only filed his supplementary heads on 24 March 2025.

[9] In the supplementary heads of argument, Mr *Zhuwarara* took the position that the application was procedurally competent and substantively tenable. He drew the attention of the court to the decisions in *MC Plumbing (Private) Limited* v *Hualong Construction (Private) Limited* 2015 (1) ZLR 138 (H); *Sibanda* v *Chikumba & Anor* 2014 (1) ZLR 219 (H), *Tshuma* v *Musemburi & Ors* 2001 (1) 342 (H), *Streamsleigh Investments (Private) Limited* v *Autoband Investments (Private) Limited* 2014 (1) ZLR 736 (S) and *Bulawayo Bottlers (Private) Limited* v *Minister of Labour & Ors* 1988 (2) ZLR 129 (HC).

[10] Mr *Zhuwarara*'s main argument was that the present matter is distinguishable because the magistrates' court ruling is an absolution from the instance and is not dispositive of the matter. He argued that an absolution from the instance does not preclude a party from instituting fresh proceedings founded on the same cause of action barring prescription. He contended that the decision in the magistrates' court cannot serve as the basis for a plea of *res judicata* as contended by the respondent. He contended, further, that declaratory orders lie in the exclusive jurisdiction of the High Court and such an order may be sought even where prior litigation has occurred in a forum lacking such competence. It was his submission that a party who has previously instituted eviction proceedings in the magistrates' court is not precluded from approaching the High Court for a pronouncement on the legal status of the parties' rights and obligations. He submitted, further, that the availability of alternative remedies such as appeal or review did not *ipso facto* oust the jurisdiction of a superior court to grant declaratory relief where a justifiable controversy persists. He argued that declaratory proceedings, in their nature and purpose, serve to authoritatively determine legal uncertainty and to avert protracted and convoluted litigation.

[11] At the hearing of the matter, both parties maintained their respective positions. Mr *Mpofu* relying on the decision in *Nyaguwa* v *Gwinyayi supra*, urged this court to decline to hear the matter on the basis that there is an extant decision of the magistrates' court over the same issue and it would be improper to adjudicate over this matter in any other form other than an appeal or review. Per *contra*, Mr *Zhuwarara*, while accepting that the applicant was aggrieved by the decision of the magistrates' court, insisted that the court could hear the application for a declaratory order because the magistrates' court had only absolved the respondent from the instance, so the matter had not been definitively dealt with. He argued, further, that the effect of the absolution from the instance in the magistrates' court was that the matter could be instituted afresh.

ISSUE ARISING FOR DETERMINATION

[12] I understand the bone of contention to be the procedural regularity of approaching the High Court seeking a declaratur in the face of an extant Magistrates' Court order which has not been set aside on appeal or review.

[13] I have taken the robust view that this issue must be disposed of first before delving into the merits of the application as it is dispositive of the matter.

[14] A finding that the application is procedurally incompetent puts the whole matter at rest. In the case of *Gwaradzimba N.O* v *C J Petron and Co (Private) Limited* 2016 (1) ZLR 28 (S), at p 32 B, the Supreme Court pronounced that a court must generally determine all the issues raised by the parties "unless the issue so determined can put the whole matter to rest." Having made these observations, I turn now to determine the question of whether or not the application is procedurally competent.

WHETHER OR NOT THE APPLICATION FOR A DECLARATUR IS PROCEDURALLY COMPETENT

[15] As alluded to, the applicant approached the magistrates' court claiming confirmation of termination of the 12 September 2019 lease agreement between itself and the respondent, ejectment of the respondent and holding over damages. Three issues that were referred for trial namely whether sections 22 and 23 of the Rent Regulations Act (sic) still form

part of the law in light of this court's judgment in *Elnour supra*, whether the matter is *res judicata* and whether the defendant has a legal basis for remaining in occupation of the plaintiff's premises. In determining the matter, the magistrate observed that:-

> "The defendant highlighted that the judgment in *Elnour United Engineering Group* being relied on by plaintiff is yet to be confirmed by the constitutional court and that all laws derive their validity from the constitution. It was submitted that without confirmation of that order, the regulations remain extant. The plaintiff in its submissions did not address the issue of confirmation and stated that this decision is binding on the inferior courts.
> Another case of *Otto Drives Construction (Private) Limited* v *Shanes Autoelectrics and 2 others* HH780-22 made a finding that statutory tenancy still forms part of the Zimbabwean law. The same was stated in *C and T Mining (Private) Limited* v *Zimbabwe Progress Fund and Others* HH80-24 that statutory tenancy is still part of the law. **In light of the conflicting judgments, the court is in agreement with the submission by counsel for defendant that the order relied on by plaintiff has to be confirmed by the constitutional court**. .." [Emphasis mine]

[16] Following that decision, the applicant approached the High Court. It was aggrieved by the magistrate's decision, a fact which was emphatically confirmed by Mr *Zhuwarara* in his oral submissions. For completeness, I find it necessary to reproduce paragraphs 10 to 14 of the applicant's founding affidavit which appear under the head 'CAUSA FOR THE DECLARATION':-

> 10. Following the respondent's refusal to enter into a new lease agreement the applicant instituted eviction proceedings in the magistrates' court under C-CD60/24. As appears from the judgment of the magistrates' court….the respondent was absolved from the instant' on account of the allegation that such respondent was now applicant's statutory tenant.
> 11. **It is the contention herein that the respondent is not the applicant's statutory tenant and cannot shelter under sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 as such statutory provisions were adjudged by this court to have been *ultra vires* the Commercial Premises (Lease) Control Act**.
> 12. **Put more sharply the applicant seeks a declaration that the respondent is not the applicant's statutory tenant as such legal status is no longer part of our law following this court's determination in *Elnour United Engineering Group P-L v Minister of Industry & Commerce & Ors* HH 81 of 2023.**
> 13. The delimitation of the applicant's rights and the respondent's legal status is a question determinable under the auspices of section 14 of the High Court Act. The enquiry is not merely academic as the respondent has since managed to obtain absolution from the instance thereby, illicitly resisting the applicant's legitimate and immutable right to recover its immovable property.
> 14. The applicant has been advised, which advise it accepts, that this Court is under section 14 of the High Court Act empowered to opine on the respondent's illusionary status of statutory tenancy viz the legal reality that legal provisions actuating statutory tenancy being sections 22 and 23 of the Commercial Premises

> (Rent) Regulations were set aside in *Elnour United Engineering Group P-L v Minister of Industry & Commerce & Ors* HH 81 of 2023 as being ultra vires section 5 (1) and (2) of the Commercial Premises (Lease Control) Act" [Emphasis added]

[17] It presents quite clearly to me that, regardless of whatever semantics the applicant may attempt to use to give complexion to the present matter, the applicant in essence seeks to overturn the finding of the magistrates' court that statutory tenancy is still part of our law. While the applicant has every legal right to test the correctness of the magistrates' court decision in the High Court, the authorities coming out of this jurisdiction do not permit the applicant to do so in the form of a declaratur. I demonstrate this by reference to just a few of such authorities.

[18] *Nyaguwa* v *Gwinyayi supra* was a matter in which the respondent had issued summons in the magistrates' court seeking cancellation of a lease agreement between her and the applicant. She further claimed an order for ejectment and costs. The respondent went on to obtain a default judgment. The applicant reacted by filing an urgent chamber application for the issue of a rule *nisi*, calling on the respondent to show cause, on the return date, why the applicant could not be allowed to regain occupation of the premises pending the outcome of an application for rescission of the default judgment. In considering the matter, PITMAN J made the following seminal remarks at p27A-C:

> "I was of the opinion that in this country, each court is a creature of Statute, and its powers are created and defined by statute. The function of every civil court is to recognize what it believes to be the rights of the parties before it. Once a civil court has given such recognition, that recognition must be accepted by each of the other courts, whatever its relative position in the hierarchy of courts may be, unless authority to overrule such recognition has been conferred upon it by statute. If one court were to claim that it has some inherent power to overrule another court, instead of a power specifically created by statute, in effect it will be claiming the power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts in the country. As no power to overrule the decisions of magistrate's courts has been vested in the General Division of the High Court, I considered that this court could not grant the order sought by the petitioner".

[19] In *Toro* v *Vodge Investments (Private) Limited & 2 Ors* SC15-17, the Supreme Court had occasion to deal with a matter which had started off as a claim for the appellant's eviction by the first respondent in the magistrates' court. The appellant entered appearance to defend. The first respondent applied for summary judgment which the appellant opposed on the basis of the first respondent's lack of *locus standi* to evict him. The magistrates' court made a finding that indeed, the first respondent did not have *locus standi*.

Unperturbed by the magistrates' court's decision, the first respondent made an application for eviction in the High Court. The appellant resisted the application and argued that the matter was *res judicata*. The court found that the matter was not *res judicata* and granted the eviction. On appeal, UCHENA JA writing for the Supreme Court bench stated that:

> "Mrs *Mabwe* for the appellant submitted, that the Magistrate's decision that the first respondent did not have *locus standi* to evict the appellant extinguished the first respondent's claim to evict the appellant. She relied on the cases of *Nyaguwa v Gwinyayi* 1981 ZLR 25 and *Chimponda & Anor v Muvami* 2007 ZLR (2) 326. Miss *Makamure* for the first respondent supported the court *a quo's* decision that the Magistrate's decision was "founded purely on adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter". I do not agree.
>
> *The tag of incompetence placed on the first respondent by the Magistrate is definitive and final until set aside by a competent court*. The High Court had no authority to set it aside as it was not sitting as a review or an appellate court." [Emphasis mine].

[20] In *Elephant College* v *Chiyangwa & Anor supra*, the Supreme Court pronounced at p.1290 A-D that:

> "Whilst the position regarding when the High Court may grant a *declaratur* is settled, it however presents itself quite clearly to me that in exercising the discretion granted to it by s 14 of the High Court Act, that court may not determine a right or obligation that has already been determined by another competent court. In other words, it cannot issue a declaratory order in respect of a right or obligation which has been defined and given content to by an extant judgment.
>
> A number of settled legal principles and broad considerations the discussion of which is not necessary for this judgment, combine to forbid a court from revisiting a dispute that has already been resolved. These include the principles of issue estoppel and *res judicata*, quite apart from the broad considerations that emphasise the need to see finality in litigation.
>
> Thus, the general position of the law is that, following the passing of a judgment in the dispute between the parties, proceedings filed thereafter by the same parties over the same dispute other than as a review or appeal, are incompetent to the extent that they do not seek to set aside or correct the extant judgment……"

[21] Turning to the facts of this matter, it is not in dispute that the applicant is aggrieved by the decision of the magistrates' court. More particularly, the applicant has petitioned this

court to declare that the respondent is not its statutory tenant. It seeks that declaration on the basis of this court's decision in *Elnour supra*. The magistrates' court has determined that the decision in *Elnour supra* has not been confirmed by the Constitutional Court. By pronouncing itself as it did, the magistrates' court, by implication, ruled that statutory tenancy is still part of our law. It is common cause that that decision is extant. The applicant now seeks, by way of a declaratur, for this court to determine its rights and the respondent's obligations on the basis that it has a view different from that expressed in the magistrates' court decision on the implications of the decision in the *Elnour* case. In my view, it is incompetent for the applicant to seek a declaratur in the circumstances of this case. It is my view that the applicant cannot seek to circumvent the implications of the extant judgment of the magistrates' court by filing this application. It is my further view that the magistrates' court decision defined and gave content to the question of statutory tenancy and consequently robbed this court of any discretion in the matter in the first instance. I find that following the magistrates' court pronouncement that the *Elnour* decision has not been confirmed by the Constitutional Court and by implication statutory tenancy is still part of our law, it was procedurally incompetent for the applicant to approach this court over the same dispute other than by way of appeal or review, to the extent that the applicant is not motivating this court to set aside or correct the extant determination of the magistrates' court. I can only exercise my powers to overrule an extant decision of the magistrates' court by way of appeal or review.

[22] There is another issue warranting brief discussion. As correctly submitted by Mr *Zhuwarara*, there is ample authority on the position of the law that where a defendant has been absolved from the instance, the plaintiff may reinstitute the action, provided that it has not prescribed. See for example *MC Plumbing (Private) Limited* v *Hualong Construction supra* and *Sibanda* v *Chikumba supra*.

[23] If I have correctly understood the authorities, then while a plaintiff is not barred from re-instituting the action, it does not seem to me that a plaintiff can argue that he is entitled to totally abandon a claim in a lower court and institute fresh proceedings in a superior court impliedly impugning the decision of the lower court under the guise of 'reinstituting the action'. I do not understand the position to be that seeking a declaratory order in a

superior court under such circumstances as the present matter fits into the category of 'reinstituting the action' following absolution from the instance in a lower court.

[24] For the purposes of determining this application, it is also necessary that I relate to Mr *Zhuwarara*'s other argument that on the authority of *Streamsleigh Investments supra*, the course of action adopted by the applicant is proper because only the High Court is empowered to grant declaratory order. To the extent that only the High Court can grant declaratory relief, I agree. But that is as far as I do. I do not agree that a litigant can use a court system to undermine a judicial process. GOWORA JA (as she then was) confirms this position of the law in the *Streamsleigh Investments* case[1]. In any event, the point of departure in *Streamsleigh Investments supra* was that the dispute between the parties commenced in the High Court, and not in the magistrates' court.

[25] In the final analysis, whilst it is trite that only the High Court can grant declaratory relief, the Supreme Court has already determined in *Elephant College supra* that the discretion under s14 of the High Court Act is not exercisable where the right or obligation has already been determined by another competent court. I find that this is precisely what the applicant is seeking to do in the present matter. This is procedurally untenable for the reasons I have already outlined above.

DISPOSITION

[26] In view of the foregoing, it is ordered that:

1. The application for a declaratur be and is hereby dismissed with costs.

MUSHURE J: .....

Corious & Co Attorneys, applicant's legal practitioners
Rubaya & Chatambudza, respondent's legal practitioners

[1] See p744G-H & 745A of the judgment