Judgment No. HB 63/11
Case No. HC 2157/10
Xref No. HC 2512/10 & HCA 130/10

TAFARA CHATORA **1ST APPLICANT**

AND

FRANCO MUNETSI KATSANDE **2ND APPLICANT**

AND

MELUSI NDLOVU **3RD APPLICANT**

AND

ENOS NDLOVU **4TH APPLICANT**

AND

THE CHAIRPERSON, WESTERN REGION RENT BOARD **1ST RESPONDENT**

AND

P D S INVESTMENTS (PVT) LTD **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 MAY 2011 AND 12 MAY 2011

Mr N Mazibuko for the applicants
Mr Dube-Banda for 2nd respondent

Opposed Court Application

MATHONSI J: The 4 Applicants were tenants at a block of flats known as Bertha Court situated at the corner of Herbert Chitepo Street and Connaught Avenue in Bulawayo which property is owned by the second Respondent. They respectively occupied Flat numbers 1, 22, 14 and 3 at Bertha Court. When their lease agreements expired they continued in occupation as statutory tenants by virtue of the provisions of the Rent Regulating Statutory Instrument 32/2007.

When a rent dispute arose, it was referred to the Western Region Rent Board which determined the rent the Applicants were required to pay. The applicants do not have a problem with the rent fixed at US$70-00 per month. It is the recurrent expenses of US$73-63 per month relating to rates, electricity

for common lighting, caretaker's wages and insurance, which they have disputed arguing that while the Rent Board is entitled in terms of section 19(a) of the rent regulations to take into account recurrent expenses in arriving at a fair rent it has no power to make a stand alone order for recurrent expenses. There is nothing on the papers to suggest that the Rent board made such an order and in the papers filed in the magistrate's court, second Respondent alleged that these were agreed between the parties.

The four applicants, acting in unison, refused to pay the recurrent expenses alleging that no such agreement existed. The second Respondent alleged that the tenants also failed to pay rent and fell into arrears.

It then approached the Rent Board for eviction certificates to be issued against each one of them which was done in May 2010.

Subsequent to that, the second Respondent instituted eviction proceeding in the magistrates' court against each of the applicants alleging non payment of rent and recurrent expenses. In respect of the first, second and fourth applicants the eviction proceedings have not been finalised with the matters still pending before that court. The third applicant's matter was determined by the magistrates' court which granted summary judgment against him. He was subsequently evicted from Flat 14 Bertha Court Bulawayo on 25 November 2010.

It should be stated that after the eviction order was granted by the magistrates' court against third applicant he noted an appeal to this court against that order under case number HCA 130/10 on 1st September 2010. That appeal is still pending and is yet to be set down for argument. It should also be stated that according to the applicants, the rent board did not issue an order for recurrent expenses. This is contained in paragraph 6 of the First Applicant's founding affidavit.

It however issued eviction certificates in May 2010 presumably on the basis of non-payment of rent.

The applicants did not do anything to challenge the eviction certificate and eviction proceedings were commenced at the magistrates' court. Much later, while the proceedings against first, second and fourth applicants were still pending in the magistrates court (they are still so pending), and an appeal had been noted to this court in respect of fourth applicant, (it is still pending), all the applicants filed this application on 18 October 2010 seeking an order declaring that;

(a) the order for payment of recurrent expenses made by the first respondent is invalid and that it be set aside.

(b) the certificates of eviction issued by the first Respondent are invalid as they were issued in breach of the Rent Regulations.

(c) any judgment made by the magistrates' court based on the eviction certificates is invalid and that it be set aside.

The application is strongly opposed by the second Respondent but the first Respondent has not filed any opposition. Instead she deposed to an affidavit on 25 March 2011 which the applicants' counsel filed on 1 April 2011 without leave of the court, long after an answering affidavit had been filed, it having been filed on 16 November 2010.

The second Respondent objected to the admission of that affidavit on the basis that it had been filed without leave of the court. *Mr Mazibuko* for the applicants made an application from the bar for the admission of the first Respondent's affidavit pointing out that when other papers were filed it was not available. He relied on the provisions of Order 32 Rule 239(b) of the High Court Rules, 1971 which provides:

> "At the hearing of an application the court may allow oral evidence."

Clearly that rule has nothing to do with the admission of additional affidavits in violation of Order 32 Rule 235. That rule provides:

> "after an answering affidavit has been filed no further affidavits may be filed without the leave of the court or a judge."

In this case the applicants did not seek leave to file the affidavit of Mrs Phathekile Msipa. They merely filed it. I agree with *Mr Dube-Banda* that the leave envisaged by rule 235, is not one sought from the bar after the affidavit had already been filed of record, especially regard being had to the fact that it was filed on 1 April 2011 well before the matter had been set down for hearing. The applicants had ample time to seek leave for the admission of that affidavit. They did not.

As if that was not enough, on 21 April, 2011the second Respondent's legal practitioners addressed a letter to the Applicants' legal practitioners registering their objection to the inclusion of that affidavit before leave had been sought and obtained. At that stage, the applicants still had ample time to regularise the filing. They chose not to.

As stated by Smith J in *PTA Bank v Elanne (Pvt) Ltd and Others* 2000(1) ZLR 156(H) at 158 C-D:

> "To wait for more than 3 months after having a matter set down and then to file an affidavit a day before the hearing, without the courtesy of advising the other side of the intention to file the affidavit and without application for leave, is not acceptable. For one thing, the other side

> has no opportunity to respond to anything raised in the affidavit. In addition, the court is not furnished with any basis for granting leave to file the supplementary affidavit. It is clear that the defendants are not entitled, in terms of the High Court Rules, to file supplementary affidavits whenever they feel so inclined – see r235 of the High Court Rules 1971. Accordingly, I ruled that the supplementary affidavit was not properly before the court. It was the reafter ignored." (Emphasis added)

I find myself in total agreement with the learned judge on that point. I am fortified in my position by the fact that the supplementary affidavit sought to be introduced in this matter is deposed to by the first Respondent who was served with the application and did not file opposition. She is therefore barred which bar has not been lifted. To admit her affidavit would be to introduce her opposition via the back door. That affidavit is accordingly expunged from the record.

Mr Dube-Banda for the second Respondent took some points in limine namely that;

(a) This is a review application disguised as an application for a declaratory order, it does not comply with the rules relating to review applications and was filed out of time.

(b) The issues raised in the application are pending before the magistrates court in respect of first, second and fourth Applicants and in the High Court in respect of third Applicant whose appeal is still to be determined.

The Rent Board is a statutory body with quasi judicial authority. It is empowered to make rent orders and to issue eviction certificates. The applicants seek to contest the recurrent expenses claimed by the second Respondent and the eviction certificates. The Applicants' claim that the order for recurrent expenses should be declared invalid and set aside is not sustainable at all for the simple reason that it has not been shown that the Rent Board ever made such an order.

It is the first Applicant who stated categorically and under oath at paragraph 6 of her founding affidavit as follows;

> "Some time in August 2009 having unsuccessfully tried to get the tenants of Bertha Court to pay rates and so-called recurrent expenses, the second respondent made an Application to the Western Region Rent Board as chaired by the First Respondent for a Recurrent Expenses Order. I annex hereto marked 'B' a copy of a letter sent to us from the first Respondent's offices contents of which are self-explanatory. Other than confirming the monthly rental of $70-00 per month, the rent board did not make an Order with respect to the recurrent expenses and suggested that the parties should discuss the matter between themselves." (Emphasis added)

At paragraph 11 of the same affidavit she speculates as follows:

> "I also wish to point out that in terms of the Rent Regulations the Rent Board has no power to make a separate order for payment of the current (sic) expenses. The First Respondent is only

empowered to make a Rent Order or to vary the same. In the circumstances if the First Respondent did make an order for payment of the current (sic) expenses, such order is, I submit, null and void as it would have been made contrary to the provisions of the rent regulations." (Emphasis added.)

This, coupled with the fact that no order for recurrent expenses has been produced clearly does not lay a foundation for nullification. Applicants want the nullification of something which does not exist. I am also mindful of the fact that in the eviction proceedings instituted in the magistrates' court, the second Respondent relied on an alleged agreement for recurrent expenses entered into between the parties and not on an order for these made by the rent board.

That then leaves the challenge being made against the certificates of eviction. The Rent Board is statutorily empowered to issue such certificates. Having issued such certificates, aggrieved parties have a remedy in terms of section 35 of the Rent Regulations to lodge an appeal to the Administrative Court. In the event that there are grounds for review, the aggrieved parties could proceed by way of a review application to this court in terms of section 26 of the High Court Act.

They chose neither of those two options and waited until eviction proceedings had commenced in the magistrates' court, only to make this application for a declaratory order presumably upon a realisation that the time to seek a review had lapsed. There is merit in the point raised in limine that his is a review application disguised as an application for a declaratory especially considering that the basis of attacking the proceedings betrays grounds for review.

I have already made a pronouncement on submissions made by *Mr Mazibuko* that the eviction order made by the magistrates' court was a nullity. See *Ndlovu v PDS Investments (Pvt) Ltd and another* HB 2/11at page 5 (as yet unreported).

More importantly the inquiry into the validity or otherwise of the certificates of eviction in respect of first, second and fourth Applicants is pending in the magistrates' court. In respect of the third Applicant, the same inquiry is pending on appeal to this court. It is wholly inappropriate for the applicants to then bring this application before exhausting what has already been commenced.

It smacks of forum- shopping which is extremely unacceptable, if not an abuse of process. I therefore find no merit whatsoever in this application which should not have been made in the first place. The second Respondent has been put out of pocket unnecessary in having to defend this

application and is therefore entitled to costs on an attorney and client scale.

In the result the application is dismissed with costs on an attorney and client scale.

Calderwood, Bryce Hendrie and partners, applicant's legal practitioners
Dube-Banda, Nzarayapenga and Partners, 2nd respondent's legal practitioners