XARA (PVT) LIMITED

Versus

LYNCHGATE INVESTMENT (PVT) LTD

And

MARJORIE NYANHEMWA

And

MICHAEL GONDWE

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 19, 20, 22, 23, 28 June, 3, 4, 6 & 12 July 2023.

TRIAL CAUSE

A. Mufari with *E. Madzongwe* for the plaintiff

J. Dondo, for the defendants

CHIRAWU-MUGOMBA J.

After numerous change of legal practitioners, numerous Pre-Trial Conferences, many false starts, poorly drafted pleadings and behaviour akin to a game of chess, the trial in this matter finally took place eight years down the line, leaving me wondering why such a simple matter took so much time to resolve.

At the centre of the dispute lies a lease agreement over a property called Number 67 Churchill Avenue, Alexandra Park, Harare, "the property". Such lease has expired and the plaintiff continue in occupation and last paid rent in July 2014. There are allegations and counter-allegations of breach, a claim in reconvention on arrear rentals and holding over damages.

The plaintiff in the initial summons pleaded that it entered into a lease agreement with the 1st defendant in June 2011 in terms of which the 1st defendant leased the property to the plaintiff. Although the property was registered in the 2nd defendant's name, it had been sold to the 3rd defendant. Accordingly, the agreement was at all material times to the benefit of the 3rd defendant.

The terms and conditions of the lease were as follows;- that plaintiff would effect improvements to the premises, that the plaintiff would recover the money spent on the improvements in the sum of US$16800 by paying reduced rentals of US$1800 instead of US$2500 for a period of 24 months and that the 1st defendant would secure a permit for change of use to enable the plaintiff to thereafter obtain a license to trade commercially.

The 1st defendant breached the terms and conditions of the lease and failed to obtain the permit. As a result, the plaintiff was unable to trade commercially and therefore suffered damages in the sum of US$2 971 414.00.

As a consequence of failing to trade profitably, the plaintiff lost US$ 45 968.00 that it could not recover for the renovations. 3rd defendant's liability rests on the fact that he is the beneficial owner of the property and is unjustly enriched at the expense of the plaintiff. The 2nd defendant is liable as the current registered owner of the property.

In a plea filed on the 18th of March 2015, the defendants averred that the renovations had an upper limit of US$16800. They denied breaching the lease. They stated that they had secured a change of use permit and as a result, plaintiff had been conducting business from the premises. They pleaded that the plaintiff did not suffer damages in the amount specified and even if it did, plaintiff had a duty to mitigate its loss.

In their claim-in-reconvention, the defendants averred that in terms of the lease agreement, the rentals were pegged at US$2500 per month. That plaintiff would carry out renovations to the tune of US$16800. That the plaintiff would recover this amount by paying reduced rent for a period of 24 months in the sum of US$1800. That the lease would expire on the 30th of June 2013. That defendants would secure a change of permit from the City of Harare to enable the plaintiff to conduct its business. The defendants performed their part of the bargain but the plaintiff has failed, refused or neglected to pay rentals. That the plaintiff should pay holding over damages at the rate of US$2500 per month in addition to arrear rentals and should also vacate the premises.

In its response to the claim-in-reconvention, the plaintiff denied that the improvements were not to exceed US$16800. That the excess amount was approved by the defendants, that the lease would expire on the 30th of June 2016, that the lease was never cancelled, that it did not breach the lease, that the non-payment of rent was as a direct consequence of the defendants' breach of terms and conditions, that no valid notice was given and that the claim for it to vacate had no merit.

The plaintiff amended its summons and declaration on the 23rd of June 2016 with the salient additions as follows. The plaintiff and the 1st defendant entered into a lease agreement with the 2nd defendant representing the 1st defendant. Although the property was registered in the name of the 2nd defendant, it had been sold to the 3rd defendant and only awaited transfer. The lease was to commence from the 1st of July 2011 to the 30th of June 2016. It was agreed that a change of permit use would be secured within three months. In breach the 1st defendant had failed to obtain the permit and as a result, plaintiff had lost business thus suffering damages in the sum of US$ 2 832 832.00

At a pre-trial case management meeting held on the 18th of May 2023, I directed the parties especially given the effluxion of time to streamline the issues for trial. The following issues were therefore identified for trial.

a. Whether or not the defendants breached the lease agreement by failure to secure the agreed permit, and if so, whether the plaintiff suffered the sum of US$ 2 832 832 in contractual damages?

b. Whether the plaintiff was entitled to exceed the sum of US$16 800 on renovations, and if so, whether such were consented to by the 1st and 2nd defendants?

c. Whether the plaintiff is liable to pay arrear rentals and holding over damages in the amount claimed?

d. Whether plaintiff is entitled to remain in occupation of the premises?

Both parties despite indicating that they would call more witnesses ended up leading evidence from one witness each. Mr *Dondo* also indicated that the 2nd and 3rd

defendants agreed to be bound and stand or fall on the evidence of the 1st defendant. I will summarise their evidence as below. Patricia Shumba gave evidence on behalf of the plaintiff in her capacity as a director. The plaintiff entered into a lease agreement with the 2nd defendant in July 2011. The defendants were looking to lease the premises on a commercial basis hence the lease agreement and further a tenant who was able to renovate the property. They were supposed to acquire a change of use permit. The agreed rentals were US$2500 per month. The specific use of the premises was commercial. The plaintiff's obligation after signing the lease was to renovate and refurbish the property. The US$16800 cost of renovations was the difference between US$2500 minus US$700 times 24 months. The defendants failed to convert the premises from residential to commercial as per the agreement. The parties had given an allowance of six months each to fulfil their obligations. The commercial use was supposed to be in the form of a home gallery and display. The 1st defendant made an application to City of Harare for change of use but it was declined. The 1st defendant was advised of the option to appeal against the rejection within a period of 30 days but they did not do so.

She went further to testify that the 1st defendant then made another effort to re-apply for a permit in 2014 which was granted but it was not suitable for the specific use that the plaintiff had requested. It was for Human Resources and a training centre and if they used it, it would expose the plaintiff to penalties. As a result, they were unable to trade. On renovations, a sum of US$ 60 450 was expended but they were only claiming US$45 968. The difference in the figures is by agreement of the 1st defendant on what was supposed to be claimed. At some point, the defendants queried the claim of US$45 968 and requested to view the property. The 2nd defendant was very much aware of all the work done. On damages, in order to trade profitably, they had requested for a long lease of five years. After not being able to trade profitably, internal projections were done and presented to the 1st and 2nd defendants. External auditors by the name of Mwaturura and Company were engaged to verify the figures. The plaintiff also had stock which they were unable to sell at a profit. They were still in occupation after realising that the defendants had failed to obtain a commercial lease. When the application for the 1st permit was denied, they requested a full refund from the 1st defendant so that they could leave. They were persuaded to stay on the

promise that the relevant trading permit would be applied for. Rentals in the sum of US$1800 per month were paid from July 2011 until 2014 where at the sit- down meeting, plaintiff requested and was granted a rent holiday. In further engagements, the plaintiff requested for some security such as assurance that the property would not be sold to a third party except to the third defendant. Letters to that effect were sent to the defendant's legal practitioners but to no avail.

In relation to the claim-in-reconvention, plaintiff was still on the property because, despite undertakings by the 1st and 2nd defendants, no refund was effected. The claims were nearing prescription and that is why the plaintiff issued summons.

Under cross examination, the plaintiff testified as follows. Despite the lease agreement stating an upper limit of US$16800, for renovations, and that all variations were to be in writing, in reality, that was not the understanding. The 2nd defendant was always in touch and she agreed to renovations exceeding the stated amount. The 2nd defendant was looking for a commercial tenant and despite a possibility that the permit for change of use would be declined, there was hope and a possibility that it would be granted. The plaintiff did not vacate the premises when the City of Harare declined the first change of use permit application and mitigate its loss because the permit application process was in progress. When the 2nd permit which did not suit the plaintiff's business was obtained, the plaintiff still did not vacate because it had grown weary of the defendants' promises and opted to engage legal practitioners. In relation to the US$60 000 expenditure on renovations, although no receipts and invoices had been brought to court, they were available. On exhibit 6, the document prepared by a chartered accountant to prove plaintiff's loss, the witness admitted that she was not an expert. The document was also prepared at a time when the plaintiff was not trading.

Evidence on behalf of the 1st -3rd defendants was through one Ignatius Munengwa in his capacity as a director of the 1st defendant. He testified as follows. That the 1st defendant had a lease agreement with the plaintiff. There were limitations to the improvements and these were not to exceed US$16800. If there were any improvements in excess of that amount, the plaintiff was expected to notify the 1st

defendant in writing for approval. The plaintiff did not do so. He disputed the plaintiff's version that the 2nd defendant had approved the excess amount because this was never reduced to writing. He could not comment on the cost of renovations as claimed by the plaintiff because he has been denied access to the property.

He confirmed the version of the plaintiff that the rentals were $2500 per month but were reduced to $1800 for two years to cover the cost of US$16800. He did not agree that the plaintiff had suffered damages in the sum of US$ 2 832 832 as claimed in the amended summons and declaration. When the lease was entered into, the plaintiff had ample time to re-assess its position. When the change of use permit was denied first time, plaintiff also had an opportunity to re-assess its position. The figures claimed were hard to fathom given that the plaintiff was not trading.

Although conversations could have taken place, such needed to be reduced to writing. For a period of two and a half years after denial of the first permit, the plaintiff was paying rentals. The plaintiff fell behind in rentals in March 2014 and prior to that, it had been struggling to pay rent. Therefore from that date to present, the total claim for holding over damages is US$210 000. There was never any agreement on what plaintiff termed a rent holiday as claimed. The plaintiff is liable for both holding over damages and arrear rentals. It became a statutory tenant but an illegal one for failure to pay rent. The 1st defendant had to clear rates payments after threats of being handed over to debt collectors by the City of Harare. The plaintiff has no defence to the defendants' claim in reconvention.

Under cross examination the following emerged. That the lease agreement was negotiated by the defendants' agent. The 1st defendant converted the premises to commercial use in 2014 though the lease agreement was signed in 2011. The lease was a negotiated document and the plaintiff was aware that at the time of signing the lease, there was no change of use permit. When the first application was declined, efforts were made to secure another permit whilst the plaintiff was still paying. This second permit was an alternative one. The defendants could not challenge the denial of the first permit because the reasons given were valid.

The duty of the plaintiff to mitigate its loss arose when the first permit was declined. There was no assurance given to the plaintiff to keep occupying the premises. When the lease expired, there was no renewal.

What is common cause from this evidence is the following. The plaintiff entered into a lease agreement with the 1st defendant in respect of the property on the 14th of June 2011 to commence on the 1st of July 2011 and terminate on the 30th of June 2016. The lease was followed by an addendum that appears as annexure one to exhibit number one. In that document, it is recorded that the lessor shall obtain the relevant commercial permit for such premises and that some renovations were to be done. The estimate of the renovations was put at $16 800, and the plaintiff would pay a reduced rental of US$1800 per month for 24 months as compensation for the renovations. The assessment of the renovations was to be conducted after 24 months and rent would be reviewed thereafter. An application for change of use permit (exhibit 2) was made to the City of Harare in terms of the Regional, Town and Country Planning Act [Chapter *29:12*] for what is termed an interior décor gallery. By letter dated the 15th of August 2012, the City of Harare notified the 2nd defendant that the application had been refused and reasons were cited. There was no appeal against the refusal. The plaintiff continued occupying the property. By letter dated the 10th of January 2014, the 2nd defendant was notified by the City of Harare that a permit for human resources personnel training centre had been approved. Despite the plaintiff alleging that it was the wrong permit, it continued occupying the premises to date and has been denying the defendants access. Although the parties had differences in accepting the date of last rent payment, the defendants; grudgingly agreed to give plaintiff the benefit of the doubt and accept the July 2014 date. That makes a period of almost nine years to date when rentals have not been paid.

In my view, the issues that arise are as follows:-

a. What permit was supposed to be secured by the 1st defendant?

b. Did the 1st defendant secure the correct permit?

c. If not, did the 1st defendant breach the lease agreement by failing to secure the correct permit?

d. If so, what were the remedies of the plaintiff?

e. Is the plaintiff entitled to US$ 45 968.00 for what it claims were renovations to the property?

f. Is the plaintiff's defence of tacit relocation in refusing to the vacate the property valid?

g. Is the 1st defendant entitled to an order for arrear rentals, holding over damages and eviction of the plaintiff?

Christie, in *Business Law in Zimbabwe,* -1998(ed) describes a lease as, *" a temporary sale, the lessor corresponding to the seller, the lessee to the buyer and the rent to the price, the subject matter- of the contract being transferred not permanently but for an agreed period."* It follows and is trite therefore that a lease is a contract between a lessor and a lessee. As has been held in a plethora of cases, courts do not make contracts for parties, under the broad framework of freedom of contract. In *casu,* the property was given to the plaintiff for a specified amount of rent. Where parties differ however is on whether or not the 1st defendant was supposed to obtain a commercial change of use permit to enable the plaintiff to run an interior décor showroom. The addendum to the lease agreement merely mentions that the lessor shall obtain a relevant commercial permit. The defendants constantly averred that the obtaining of the relevant permit was beyond their control. However the language used in Annexure one clause 1 is that the 1st defendant 'shall' obtain the relevant permit. In my view, the caption to exhibit no. 3 captures the essence of the permit as agreed to between the parties. The response from the City of Harare, clearly states that the application that was turned down is with respect to a proposed interior décor gallery on the property. This supports the assertion by the plaintiff that the commercial permit envisaged was for an interior decor business. I also accept that although the obtaining of the change of use permit was depended on a third party, i.e. the City of Harare, from the manner in which the parties interacted, it must have been contemplated that the application would be successful. From the evidence of the plaintiff, it seems that it is relying on the doctrine of fictional fulfilment- See *Guthrie Corporation PLC vs*

MATRAC (pvt) Ltd, 1989(2) ZLR 323 (H). The distinguishing factor however is that in *casu,* the 2nd defendant did apply for a change of use permit and it was declined initially and then granted under different usage.

The defendants had an option to appeal against the refusal of the change of use in the first instance. However, they opted not to appeal and went on to apply for a wrong permit altogether. This is where I find that they breached the lease agreement because all parties were aware of exactly what permit was required. All parties appreciated the fact that the decision was in the hands of a third party. Had the defendants, appealed, it is not the outcome that was important but the fact that they had put effort in acquiring the correct permit. The appeal would have put the matter to rest and also enabled both parties to re-assess their positions. The lease in clause 20 provides for variation in writing which parties could have resorted to. Having breached the condition to obtain the relevant commercial permit, the next issue to consider is what were the remedies of the plaintiff at that stage?

The evidence, supports the fact that the plaintiff insisted on specific performance with respect to the relevant commercial permit. This is supported by the fact that the 2nd defendant proceeded to apply and obtain a permit but it was not for the décor business as agreed.

There is no evidence then that the plaintiff insisted on specific performance when the incorrect permit was obtained as it did in the first one. This brings me to the aspect of remedies for breach. Section 18 of the lease agreement only relates to breach by the lessee with respect to failure to pay rent or fulfil other conditions. However, that does not dis-entitle the plaintiff to remedies for breach under the common law. In my view, the breach by the 1st defendant went to the root of the lease agreement. At that stage when the second application for a permit was granted, the plaintiff ought to have terminated the lease agreement by giving the 1st defendant three months as stipulated in clause 1.6.

The letter from the City of Harare granting the 2nd application for change of use is dated 10th of January 2014. The plaintiff stated that it was notified of this letter but still continued to pay rent. As indicated above, the defendants grudgingly accepted that rent was last paid in July 2014.

In ***Rowland Electro Engineering (Pvt) Ltd v Zimbank*** **2007 (1) ZLR 1 (H)**, GOWORA J (as she then was) at page 13F stated as follows: -

> "The rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not
>
> occurred by the payment of money and without causing undue hardship to the defaulting party."

It follows therefore that once its is established that a breach has occurred, the aggrieved party is entitled to damages.

In, ***Monyetla Property Holdings v Imm Graduate School of Marketing (Pty) Ltd and Others (10083/2012) [2013] ZAGPJHC 210*** aptly underscores that point. It provides the following, at paragraph 26 of the judgment:

> "In a claim for damages arising out of the breach of contract, the plaintiff may claim damages for all the damage flowing from the cause of action. He or she must claim, in a single action, compensation for all the damage he or she has already suffered and the prospective loss which he reasonably expects to suffer in the future. In *Coetzee v SA Railways & Harbours 1933 CPD 565*, Gardner JP (with whom Watermeyer J concurred) examined the English cases and said:
>
> 'The cases, as far as I have ascertained, go only to this extent, that is a person who sues for accrued damages, must also claim prospective damages, or forfeit them" (my underlining)

The plaintiff's witness explained the damages sought as being based on its knowledge in the industry and a comparative with businesses of a similar nature. It claimed that it had purchased some items for the business. However, what is glaringly missing from the plaintiff's evidence is the proof. Plaintiff did not place evidence of proof of purchase of the alleged items and the prices that were likely to be placed on them for purposes of sale. There was no evidence of any comparative businesses operating in the areas. In the absence of any proof placed before the court, the figure claimed remained hanging in the air.

Having said that, should the plaintiff walk away empty handed despite the finding of breach of the lease in respect to a change of use permit? The Supreme Court in an illustrative judgment in *Wynina (pvt) Ltd v MBCA Bank Ltd,* 2014 (1)

ZLR 415 (s) had occasion to deal with this issue. In particular, the court stated as follows:-

> "It is an accepted principle of our law that some types of damage are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. The principle is not a novel one and decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. See *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964".

In *casu,* the plaintiff has claimed damages in the sum of US$ 2 832 832.00 for the breach. In the amended summons and declaration, the basis of the breach is that plaintiff has been constrained from running a commercially viable business at the premises. What has been placed before the court is a report by Mwaturura and Company titled Xara (pvt) Ltd legal claims as exhibit number 6.

The report is the nature and form of what can be termed, an 'expert's' report. In that regard, the Civil Evidence Act [Chapter *8:01*] deals with that in section 22 as follows:-

> PART V
> OPINION EVIDENCE
> **22 Expert and lay opinion evidence**
> (1) The opinion of a person who is an expert on any subject, that is to say, of a person who possesses special knowledge or skill in the subject, shall be admissible in civil proceedings to prove any fact relating to that subject which is relevant to an issue in the proceedings.
> (2) The opinion of a person who is not an expert as provided in subsection (1) shall be admissible to prove any fact relevant to an issue in civil proceedings if—
> (a) his opinion is based on what he saw, heard or otherwise perceived; and
> (*b*) his opinion is helpful to a clear understanding of his evidence or to the determination of that issue.
> (3) A court shall not be bound by the opinion of any person referred to in subsection (1) or (2), but may have regard to the person's opinion in reaching its decision

The expert who prepared the report did not give evidence. The witness of the plaintiff who gave evidence falls under section 22 (2). Based on the authority of the *Wynina* matter, the plaintiff placed before the court what can be termed as the best evidence that was in its possession at the time. On page six of the report, a breakdown or a summary of the claims is indicated.

In the *Wynina* matter, the court gave an indication on how the damages can be calculated as follows:-

> It is accepted that in assessing damages the court must as one of the aspects, have regard to the events that have occurred from the damage causing event to the date of the action in order to reach a more realistic assessment of the damage.[1] This principle is based on the existence of uncertainty about the arising and impact of a factor which in its nature is relevant to the assessment of loss. A court therefore has no better method than to place a value on that factor according to the Court's prognosis. As certainty arises, the need to speculate about probabilities and to evaluate expectations dwindles, and the actual facts form the basis for calculations.[2]
>
> In addition, the court is obliged to take into account any relevant conditions that would necessarily affect the assessment of damages.

See also *Mbundire vs Butress,* SC-13-11 on assessment of damages.

I accept that the plaintiff paid commercial rentals on the notion that the defendants would obtain a change of use permit. This is part of the plaintiff's claim under net operating expenses. This is particularly so for the period July 2011 to July 2014. I have accepted the plaintiff's evidence that when the first application for a permit was declined, there were discussions regarding obtaining the correct permit by submitting another application. This was done in January 2014 albeit a wrong permit being obtained. Therefore for the period July 2011 to January 2014, that is 31 months, the plaintiff was paying US$1800 thus a total of US$55 800. To this figure, I will add the sum of US$1800 being the good tenancy deposit. As for utilities, the plaintiff did not give a breakdown per month hence it becomes difficult to assess the damages. As from February 2014, when the second permit was obtained, it must have been apparent to the plaintiff that there was not going to be the obtaining of the correct permit since another one had already been obtained. It must have been clear that the plaintiff would not be able to trade in its chosen line of business.

The defendants from their plea and evidence-in-chief constantly averred that the plaintiff was under a duty to mitigate its loss. It is trite that a plaintiff must not sit back and let damages multiply – See *Reid vs Hepker and sons (pvt) Ltd,* 1971(1) RLR 284 (H). In my view, having realised that the defendants were not going to obtain the correct permit, the plaintiff ought to have terminated the contract within a period of

---

[1] See General Accident Ins Co Sa Ltd v Summers etc 1987 (3) SA 577 (A) at 615;

[2] Glass v Santam Ins Ltd 1992 (1) SA 901, 902

three months as stipulated in the contract. The plaintiff instead elected to continue paying rentals until July 2014. In assessing damages, in addition to the US$55 800, I will award them US$1800 multiplied by three months, a total of US$5400. From May to July 2014 when the plaintiff averred they last paid rentals, I will not award it any damages in relation to the rentals since it was under a duty to mitigate its loss by simply vacating.

In relation to the claim for money used for renovations, the lease agreement in clause 3.6 states as follows:-

> **Please note the agreed rent of US$1 800.00 for two years has been agreed on, on condition that the tenant is going to renovate the house according to the schedule in Annexure A attached to the lease agreement. The alterations or improvements authorized shall become the sole property of the lessor and shall not be removed from the premises at the termination of the lessee's tenancy.**

Clauses 4 and 6 of Annexure 1 read as follows:-

> **4. It has been agreed by both parties that the lessee will spend an estimated total cost of sixteen thousand eight hundred (US$16 800.00) dollars on renovations stated above. Therefore the lessee will pay a rent of US$1800.00 per month for twenty-four months from the period of commencement of the lease agreement, thereafter rent shall be reviewed according to the provisions of the lease agreement.**
>
> **6. Save for the above, all terms and conditions of the original lease agreement remain the same.**

From the pleadings and the evidence led, it is not seriously disputed that the parties agreed that the improvements would not exceed US$16 800. The defendants did not dispute that the plaintiff spend that amount on renovations. What they disputed is the fact that any excess spend was to have been reduced into writing. I did not hear the plaintiff to plead and testify that renovations over the stipulated amount was reduced to writing. All the plaintiff stated is that the 2nd defendant was aware of the renovations. The plaintiff's attention was drawn to paragraph 8:3 of the lease to the effect that all improvements shall become the sole property of the lessor. The plaintiff was adamant that it had agreed to the improvements because it envisaged a long -term lease. It is trite that a party cannot rely on its own wrong-doing – See *Delta Beverages (pvt) Ltd vs Blakey Investments (pvt) Ltd,* SC-59-22 where the court held as follows,

> "Another aspect that militates against the appellant is that of public policy. It is not open to a party to seek to rely on its own default or illegality to avoid its
>
> obligations. These courts are loath to lend support to such a party. See *Standard Chartered Bank Limited v Matsika* 1997(2) ZLR 389 (SC)".

In my view, the plaintiff should be awarded US$16800 on the basis that this was the agreed to upper limit and has not been seriously questioned by the defendants. For the rest of the claim however, I find that there has been no proof that it was agreed to in writing. In addition, no proof of the excess was placed before the court. The plaintiff has denied the defendants access to the premises such they they cannot even confirm whether or not renovations as claimed have been effected.

The defendants in their claim-in-reconvention seek arrear rentals, holding over damages and eviction of the plaintiff. I am indebted to ZISENGWE J for eloquently making a distinction between arrear rentals and holding over damages in *Balvant Patel t/a Reliable Hardware vs. C.A Angelos (pvt) Ltd*, HMA-44-20 as follows,

> "Arrear rentals simply refer to those outstanding amounts for rentals that accrued during the currency of the lease but were not paid.
>
> A claim for holding over damages on the other hand is based on a breach of the contractual obligation to give vacant possession of the property on termination as required by the relevant clause in the lease agreement or as in incidence of the commercial law. A.J. Kerr in the *Law of Sale and Lease (3rd ed. 2004)* at p 421; states that under contract, the breach is the failure to restore possession on termination and the remedy of ordinary damages for holding over (i.e. market related rental) arises by reason of the landlord being deprived of the use and enjoyment of the property because the erstwhile tenant has remained in occupation".

I have made a finding that the plaintiff ought to have vacated the premises by the end of May 2014 but did not. It is still in occupation despite the fact also that the lease agreement has since expired. In its evidence, the plaintiff appears somewhat confused on whether its stay is based on the fact that it will only vacate when 'paid' what it considers its dues, or that there was an agreement that it should stay on until all issues were sorted out. I find that however, its defence is that of tacit relocation.

"Cooper, in *South African Law of Landlord and Tenant* (1973 edition) defines a tacit relocation at page 319, a passage quoted with approval by SANDURA JP (as he then was) in *Chibanda* v *Hewlett* 1991 (2) ZLR 211 (H) 216C, as follows:

> *'A tacit relocation is an implied agreement to relet and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property.*'

As I postulated in *OTTO DRIVES CONSTRUCTION (PVT) LIMITED vs SHANES AUTOELECTRICS* and ors, HH-780-22, there is no real distinction between tacit relocation and statutory tenancy. See also *Total Zimbabwe (pvt) Ltd vs Appreciative Investments (pvt) Ltd,* 2010 (2) ZLR 598 (H).

In my view, the rentals that the plaintiff ought to have been paying from June 2014 to June 2016 is the sum of US$1800 per month multiplied by twenty-four months which is a total of US$ 43 200. In my view, in accordance with the lease agreement clause 5 of annexure one make it clear that after overall assessment of the renovations, rent shall be reviewed. During the period of the lease, this was not possible because plaintiff denied access to the defendants.. It is not in dispute that the lease agreement has expired. To benefit from tacit relocation, the plaintiff must have been paying rentals. By its own admission, rentals were last paid in July 2014, well before the expiry of the lease agreement. In my view, the plaintiff cannot by any stretch of imagination succeed on a defence of tacit relocation. Even if the court were to accept that the plaintiff is entitled to compensation, it is trite that after a lease expires, there is no right of retention as a lien against a claim for such. See *Cochrane vs Mackie,* 2011 (2) ZLR 510 (H).

Once it is accepted that the lease expired and that the defence of tacit relocation holds no water, as from the 1st of July 2016 to date there exists no lease agreement between the plaintiff and the defendants. The plaintiff clearly has no right to remain in occupation and worse still to deny the defendants access. It is an illegal occupier.

As I have already stated, the rentals remained at US$1800 until a new figure was negotiated. I am fortified in my view by the decision in *Negowac Services (pvt) Ltd vs 3D Holdings (pvt) Ltd and anor,* 2009 (2) ZLR 446(H) wherein it was held that in the event of a dispute on rent, the tenant is obliged to continue paying the last agreed rent. I did not hear the plaintiff to suggest any other figure as the rentals. It is astounding that the plaintiff has continued to occupy the property rent free for years. I

therefore find that the plaintiff is liable for holding over damages from July 2016 to 30th of June 2023, a period of seven full years, a figure of US$151 200 and thereafter an

additional sum of US$1800 per month calculated from July 2023 to date of payment and/or eviction.

On costs, it is apparent that this case has dragged on for a period longer than necessary. This has partly been caused by a change of legal practitioners. There has also been throughout the prosecution of the matter, a lack of appreciation of the applicable legal issues and principles. I have also taken note of the fact that the parties have been partially successful each. I will therefore make an order that each party bears their own costs.

The total award to the plaintiff is therefore the sum of US$55 800 plus US$ 1800, plus US$16800 plus US$5400, a total of US$ 79 800.

The total figure awarded to the defendants is US$43 200 plus US$151 200, a total of US$194 400 but does not take into account the sum of US$1800 per month calculated from the 1st of July 2023 to date of payment/ and or eviction.

I will therefore set off the sums of US$194 400 and US$79800 leaving a balance of US$ 114 600 due to the defendants.

DISPOSITION OF MAIN CLAIM AND CLAIM-IN-RECONVENTION

1. The defendants shall pay plaintiff the sum of US$ 79 800 as damages for breach of the lease agreement.
2. The plaintiff shall pay defendants the sum of US$ 194 400 as arrear rentals and holding over damages.
3. The plaintiff shall pay the defendants the sum of US$1800 per month calculated from the 1st of July 2023 to date of payment and/or eviction.
4. The amounts in paragraphs (1) and (2) above shall be set off against each other leaving a balance of US$114 600 due to the defendants by the plaintiff in addition to the figure in paragraph (3) above.

5. The plaintiff and all those claiming title through it shall vacate the property known as 67 Churchill Road, Alexandra Park, Harare within a period of seven (7) days from the date of service of this order.
6. Should the plaintiff refuse, fail or neglect to vacate the above -mentioned property as aforesaid, the Sheriff of the High Court be and is hereby authorized to evict the plaintiff and all those claiming title through it without further notice.
7. Each party shall bear its own costs.

Mufari and Paradzayi, plaintiff's legal practitioners
Dondo and Partners, defendants' legal practitioners