TOUCH THE SKY TOURS & DISTRIBUTORS (PVT) LTD
t/a MODERN MOTORS SERVICE STATION

Versus

MODERN MOTORS LIMITED

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 8 JULY 2019

Civil Trial

S. Chamunorwa, for the appellant
L. Nkomo with S. Huni, for the respondent

TAKUVA J: After hearing the parties on 8 July 2019, the court made the following pronouncement:

"The appeal be and is hereby dismissed with costs."

Subsequently, counsel for the appellant filed a request for full reasons for our decision.

Hereunder are the full reasons.

This is an appeal against the entire judgment of the Magistrates Court granted in favour of the respondent.

FACTUAL BACKGROUND

The respondent is the owner of an immovable property known as No. 120-128 Herbert Chitepo Street Bulawayo, held under Deed of Transfer No. 1140/1954. On the 30th of January 2015 the parties entered into a written lease agreement in terms of which the respondent leased the appellant the immovable property at issue for a period of three years expiring on the 31st of January 2018. The appellant carried on the business of a fuel garage thereon. On 30th November 2017, the respondent informed the appellant that the Lease Agreement would not be renewed upon expiry of the three year period ending on the 31st January 2018. By letter dated 26 January 2018 written by the appellant's legal practitioners to the respondent in response to the letter of 30th November 2017, the appellant put it on record that it was not accepting the notice of non-renewal of the Lease Agreement.

The appellant continued in occupation of the leased property as of 31st January 2018 and the lease agreement between the parties was deemed to be renewed on the same terms and conditions pursuant to clause (4) (a) thereof. Respondent issued summons against the appellant in the court *a quo* under case No. 2094/18 claiming confirmation of the termination of the Lease Agreement, ejectment of the appellant, holding over damages and costs of suit. The appellant entered appearance to defend and filed its plea contesting the validity of the non-renewal notice of 30th November 2017 on the basis that the notice period therein was insufficient and therefore not in compliance with the cancellation clause in the Lease Agreement. Alternatively, the appellant averred that it had become a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983. Thereafter the respondent filed a Notice of Withdrawal of the summonses in that case.

On 27th March 2018, the respondent's legal practitioners gave appellant a new 3 months' notice of termination of the Lease Agreement pursuant to clause 4 thereof. The appellant received the notice on the 29th March 2018. By a letter dated 24th May 2018 penned by the appellant's legal practitioners to the respondent's legal practitioners, the appellant's legal practitioners advised that the appellant was not accepting the new notice of termination of the lease and would not vacate the premises. Respondent issued fresh summons against the appellant on the 6th of July 2018 after appellant persisted with its refusal to vacate the leased premises and remained in occupation beyond the 1st of July 2018.

The respondent claimed the following:

"1. Confirmation of the termination of the Lease Agreement between the parties.

2. Ejectment of the appellant and all those claiming occupation through it from the leased premises.

3. Payment of $1150-00 per month being holding over damages per rates and charges incurred from 1st July 2018 to date of appellant's ejectment.

4. Costs of suit on an attorney and client scale."

Appellant entered appearance to defend the summons and subsequently filed its plea in which it contested the validity of the new written notice of termination of the lease dated 27th March 2018. Alternatively, appellant contended that it had become a statutory tenant and therefore was disputing the respondent's averment that the respondent needs to retake possession of the leased premises for its own use.

On 5th of September 2018, the parties filed a joint pre-trial conference memorandum in terms of which they agreed on the following issues for trial;

1. Whether or not the respondent gave requisite notice to the appellant to vacate the premises.

2. Whether or not the appellant has any right to refuse to vacate the premises.

3. Whether or not respondent is entitled to evict the appellant from the premises.

During the trial, respondent adduced evidence through Mr Michel Attala its Managing Director in support of its claim and the respondent closed its case. Appellant then made a written application for absolution from the instance which respondent opposed. The application was dismissed by the trial Magistrate and appellant then adduced evidence through two witnesses namely Mr Musa Mandaza and Mr Kudzayi Mwanyenyeka and thereafter closed its case. By judgment dated 1st October 2018, the court *a quo* granted the respondent's claim against the appellant. In granting judgment the court *a quo* made the following substantive findings;

1. That the notice of non-renewal of the Lease Agreement dated 30th November 2017 was null and void *ab inito* by reason of non-compliance with clause 4 of the Lease Agreement.

2. That on 31st January 2018 the Lease Agreement between the parties automatically renewed itself in terms of clause 4 thereof. Thereafter appellant did not become a statutory tenant as it continued to be governed by the terms of the automatically renewed lease agreement.

3. That the automatic renewal of the lease on the 31st January 2018, clause 4 of the lease required that a party seeking to terminate the lease must give the other party two calendar months written notice.

4. That the notice of termination of the Lease Agreement dated 27th March 2018 gave three months' notice expiring at the end of June 2018. The appellant was given more time (i.e 3 months) in the notice dated 27th March 2018 than was required by clause 4 (a) of the Lease Agreement (two months)

See pages 133-134 of the record.

5. That the notice of termination of the Lease Agreement dated 27th March 2018 given to the appellant was valid and the appellant should have vacated the leased premises on or before the stipulated date.

6. That the appellant's argument that the notice of termination dated 27th March 2018 was invalid because the Lease Agreement had been cancelled by the first notice dated 30th November 2017, is incorrect.

Aggrieved, appellant appealed to this court. The notice of appeal sets out one substantive ground of appeal and three alternative grounds of appeal as follows;

"1. The court *a quo* misdirected itself on a point of law in holding that the notice issued by the respondent on 27th March 2018 was valid in an instance where the respondent had previously issued and not withdrawn a notice dated 30th November 2017.

2. **ALTERNATIVELY**, the court *a quo* misdirected itself on a point of law in holding that upon the expiry of the parties' Lease Agreement on 31 January 2018, the appellant did not become a statutory tenant.

3. **ALTERNATIVELY**, the court *a quo* erred on a point of law in that having found that the appellant was a statutory tenant, it failed to determine if the respondent had disclosed good and sufficient grounds for requiring the premises as provided for in the Commercial Premises (Rent) Regulations, 1983.

4. **ALTERNATIVELY**, the court *a quo* erred on a point of law in finding that upon the expiry of the notice period the respondent by that fact alone, became entitled to the appellant's eviction."

The respondent opposed the appeal on the following grounds;

1. The appeal is devoid of merit as it is premised on untenable arguments.

2. The appeal was noted without the *bona fide* intention of testing the correctness of the judgment appealed against but simply as a ploy to buy time.

3. The notice dated 27th March 2018 was a valid notice to vacate the premises.

4. The appellant never became a statutory tenant because the Lease Agreement was automatically renewed on the 31st January 2018 in terms of clause 4 (a) thereof.

I now consider each of the grounds of appeal set out in the notice of appeal *seriatum*:

THE FIRST GROUND OF APPEAL

Here, the appellant attacks the court *a quo's* finding that the notice of termination of the Lease Agreement dated 27th March 2018 (p 173-174 of record) was valid. It is the appellant's contention that because the respondent had previously given the appellant a notice dated 30 November 2017 of non-renewal of the lease upon expiry on 31st January 2018, the respondent could not thereafter give the appellant a fresh notice of termination dated 27 March 2018 without having withdrawn the non-renewal notice.

I take the view that the appellant's contention in the first ground of appeal is untenable and defies logic and common sense. I so conclude for following reasons:

(a) The court *a quo's* specific finding that the notice dated 30 November 2017 concerning the non-renewal of the lease upon expiry on 31st January 2018 was invalid or null and void *ab initio* by reason of non-compliance with clause 4(a) of the lease agreement is unassailable. At page 132 of the record, the trial Magistrate found that;

> "It is not in dispute that the notice of the 30th November 2017 which was served on the defendant on the 12th of December 2017 was in violation of the Lease Agreement and as such it was null and void *ab initio* hence unenforceable."

Since the appellant did not appeal against this specific finding, it is therefore untenable for the appellant to contend that a notice concerning non-renewal of the lease upon expiry on the 31st January 2018, which was found to be null and void *ab initio* by the trial court ought to have been withdrawn in March 2018 when the notice of termination dated 27th March 2018 was handed over to the appellant.

(b) Further as regards this disputed notice, the appellant is on record stating via pleadings and correspondence that it never accepted as valid the notice of the 30th November 2017 – see appellant's outline of the background facts and paragraph 3 of its Heads of Argument filed of record. It thus defies logic as to how a notice whose validity the appellant refused to accept could invalidate the notice of termination dated 27th March 2018.

(c) Even if the notice dated 30 November 2017 was valid, common sense dictates that it could not have been extant beyond 31st January 2018 (the expiry date of the

lease agreement). Therefore, as of 27th March 2018 there was no other extant notice given by the respondent which should have been withdrawn.

For these reasons, I find the first ground of appeal to be devoid of merit. It is hereby dismissed.

THE SECOND GROUND OF APPEAL

The concern here is that the court *a quo* misdirected itself on a point of law by holding that upon expiry of the Lease Agreement on 31 January2018 the appellant did not become a statutory tenant. In my view, on a proper interpretation of clause 4(a) of the agreement, the court *a quo's* conclusion that the appellant did not become a statutory tenant after 31 January 2018 does not constitute a misdirection at all.

It is instructive to consider the provisions of clause 4(a) of the agreement. It states;

"4. TERMINATION OR RENEWAL

(a) Subject to any option to renew this Lease hereinafter contained, unless the Tenant gives to the OWNER notice as set out below that he will vacate the Premises upon the expiry date of this Lease, the Lease will be deemed to be renewed from the date of expiry on the same terms and conditions subject to two calendar months' notice of termination by either party to the other." (my emphasis)

Quite evidently, the lease was automatically renewed on the same terms and conditions as deemed in Clause 4(a) thereof which is quoted above. Upon the deemed renewal of the lease on the 31st January 2018, it became terminable by either party giving the other two calendar months' notice of termination. In the circumstances there was no room for the appellant to become a statutory tenant as contemplated under section 22 of the Commercial Premises (Rent) Regulations, 1983. Statutory tenancy is a legal concept that arises from the regulations. How it is created is settled – see *Total Zimbabwe (Pvt) Ltd* v *Appreciative Investments (Pvt) Ltd* 2010(2) ZLR 598 (H) at 599 B, *Paget – Pay Endowment Trust* v *High Life Investments (Pvt) Ltd* 2015 91) ZLR 833 (H) at 833 G.

Therefore, the finding of the court *a quo* that the appellant never became a statutory tenant is unassailable. This ground is dismissed for lack of merit.

THE THIRD GROUND OF APPEAL

This ground refers to the court *a quo* erring on a point of law by firstly making a finding that the appellant was a statutory tenant and secondly failing to determine if good and sufficient grounds were shown by the respondent for requiring the leased premises as it is enjoined to do by the provisions of the Commercial Premises (Rent) Regulations. Surprisingly, the court *a quo* never made a finding that the appellant became a statutory tenant. On the contrary it repeatedly stated that the appellant never became a statutory tenant. At page 132 of the record the court *a quo* stated;

> "Thus if the notice was a nullity in that it did not comply with Clause 4 of the Lease Agreement it therefore means come 31 January 2018, the lease automatically renewed itself in terms of the same clause 4. Therefore the defendant did not became (sick) a statutory tenant. He remained governed by the lease which automatically renewed itself on the 31st of January 2018 ..... I should point out herein that, because of the automatic renewal of the Lease Agreement, defendant did not become a statutory tenant." (my emphasis)

In light of this clearly stated finding, I agree with *Advocate L Nkomo's* submission that it is therefore utterly frivolous and vexatious for the appellant to contend in the third ground of appeal that the court *a quo* erred on a point of law in that "having found that the appellant was a statutory tenant, it failed to determine if the respondent disclosed good and sufficient grounds for requiring the premises as provided for in the Commercial Premises (Rent) Regulations, 1983"

This ground of appeal is deliberately contrived in that it is obviously not appealing against any finding of fact or ruling of law by the court *a quo* as required by the mandatory provisions of Order 31 rule 2(4)(b) of the Magistrates Court (Civil) Rules 1980, which rules were applicable when the appeal was filed. This ground is not only fatally defective and invalid but also betrays the appellant's lack of *bona fides* in launching the appeal because the court *a quo* never made a finding that appellant became a statutory tenant. For these reasons the third ground of appeal is dismissed.

THE FOURTH GROUND OF APPEAL

Appellant's contention here is that the court *a quo* erred on a point of law by making a finding that upon the expiry of the notice period, the respondent *ipso facto* became entitled to evict the appellant. The appellant did not pursue this ground of appeal in its heads of argument. One does not have to go far in order to discover that this ground lacks merit and is

testimony to the evident lack of *bona fides* on the part of the appellant in noting the appeal *in casu*. Clause 4(a) of the Lease Agreement provides that after the lease is deemed renewed, it is subject to termination by either party giving the other two calendar months' written notice. Therefore, since the respondent gave the appellant the requisite notice of termination of lease, upon the expiry of the notice period the respondent became at law entitled to evict the appellant since the appellant remained in occupation beyond expiry of the notice period.

CONCLUSION

The appeal is totally devoid of merit. It was noted without the *bona fide* intention of testing the correctness of the judgment of the court *a quo* but for the indirect purpose of buying time for the appellant and delaying the respondent's recovery of its premises. The court *a quo's* findings are unassailable in view of the evidence led and the terms of the Lease Agreement. On the other hand, the grounds of appeal are premised on totally untenable arguments which cannot withstand scrutiny.

DISPOSITION

In the result, it is ordered as follows;

The appeal is dismissed with costs.

Mabhikwa J …… I agree

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners
Coghlan and Welsh, respondent's legal practitioners

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