OTTO DRIVES CONSTRUCTION (PVT) LIMITED
versus
SHANES AUTOELECTRICS
and
MARTIN DONALD SILK
and
SHANELY DAWN SILK

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 13 October 2022

APPLICATION FOR SUMMARY JUDGMENT

O. Mushuma, for the plaintiff
T.L Mapuranga, for the defendants

CHIRAWU-MUGOMBA J:

(1) This application was placed before me as one for summary judgment in terms of R30 of the High Court Rules, 2021. On the 13th of October 2022 after hearing the parties, I gave judgment *ex tempore.* I have been requested for reasons and these are they. Although there is reference to applicant and respondents, in my view, the correct reference is plaintiff and defendant given that it is an application for summary judgment. The parties will be referred to as plaintiff and defendants accordingly.

(2) The plaintiff under case number HC 221/20 issued summons against the defendants seeking an order for eviction and other ancillary relief. After summons were served on the 14th of January 2020, the defendants entered appearance to defend the suit. The plaintiff's contention is that the defendants have no genuine defence to the claim and have entered appearance solely to delay the matter.

(3) The plaintiff takes issue with the defences proffered by the defendants in their plea namely quasi-mutual assent, statutory tenancy and improvement lien.

(4) Further, the claim for summary judgment excludes that of holding over damages which is not a liquid claim. It is pertinent to note that the draft order also excludes the prayer for holding over damages.

(5) In opposing the application, the defendants made the following averments. That they filed their plea in May 2020 and the matter is ready for a PTC hearing. They have raised in the main matter proper defences of quasi-mutual assent and statutory tenancy and the fact that the plaintiff does not require the premises for its own use. A new rental was agreed to by the parties with effect from the 1st of October 2019. The defence of an improvement lien is also plausible. On the relief sought, the plaintiff cannot pick and chose which part of the relief in the summons it wants the court to grant.

(6) In my view, the issues before the court are (1) whether or not the application for summary judgment is properly before the court (2) whether or not the defendants have a bona fide defence in the form of (a) quasi-mutual assent (b) statutory tenancy (c) tacit relocation (d) improvement lien and (e) reliance on the provisions of the Contractual Penalties Act (Chapter *8:04).* The conclusions I reach will determine whether or not the plaintiff is entitled to the remedy of summary judgment

(7) **Whether or not the application for summary judgment is properly before the court**

Rule 30(1) makes it very clear that an application for summary judgment can only be held at any time **BEFORE** a pretrial conference is held. In his submissions, Mr *Mushuma* contended that a PTC had not been held as expressed in the notice of opposition. On all two occasions of the set down, the conferences were abortive. The first one scheduled for the 17th of May 2021 was not held because the parties indicated that they wanted to amend the pleadings. On the 2nd occasion, i.e., on the 25th of May 2022, the defendants filed an exception, amended plea and counterclaim. They also indicated that the matter was not ripe for a PTC. Mr *Mapuranga* submitted that the plaintiff's legal practitioner had conceded that a PTC had been set down, parties appeared before a judge and by virtue of these facts, the application fell short of the requirements of R30(1). It must therefore be dismissed. In my view, the issue turns on the meaning of 'held'. Is it the process or the outcome? In my view, this issue would need proper ventilation and I am therefore hesitant to dismiss the application for summary judgment based on the evidence relating to whether or not PTCs were 'held'.

(8) **Quasi mutual assent**

The doctrine has been part of our law for a long time. The *locus classicus* is per GOLDIN J in *Musgrove & Watson (Rhod) (pvt) Ltd v Rotta* 1978 (2) SA 918 (R) at 922 E-G where he had the following to say:

> "There are cases in which a contract is treated as having come into existence notwithstanding that one party's conduct conflicts with his real intention. (*I Pieters & Co v Salomon* 1911 AD 121 at 137; *Levy v Banket Holdings (Pvt) Ltd* 1956 (3) SA 558 (FC) at 561 - 3; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A).) This type of contract is sometimes called "quasi-mutual assent" (Wille and Millin Mercantile Law of South Africa 16th ed at 17; Lee Introduction to Roman-Dutch Law at 220; *Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 at 422.) It has also been described as "the objective theory of contract" (Williston on Contracts revised ed vol 1 para 98, and *Peri-Urban Areas Health Board v Breet NO and Another* 1958 (3) SA 783 (T) at 789 - 90)."

In their heads of argument and oral submissions, the defendants contended that the plaintiff's conduct of producing a new lease agreement for their signature and letting them remain in occupation created an agreement by quasi -mutual assent. Mr *Mushuma*, submitted that the document that the defendants seek to rely on regarding negotiations and payments was on a strictly without prejudice basis. Such negotiations did not result in any settlement hence the issuance of summons. In my view, the doctrine is related to the issue of tacit relocation which will be discussed latter.

(9) **STATUTORY TENANCY**

In rejecting the defendants' averment that they were protected by the provisions of ss 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 on statutory tenancy, Mr *Mashuma* submitted that these sections were no longer part of the law of Zimbabwe. His reason for so stating was that the High Court in case number HC 333/21 had declared them ultra vires the main act. HC 333/21 reads as follows: -

It is ordered that: -

1. Sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 are *ultra vires* the Commercial Premises (Lease Control) Act [*Chapter 144*] and are hereby set aside.

2. Respondents to pay the applicant's costs.

Mr Mapuranga on the other hand submitted as follows. All laws are subject to the constitution and they derive their validity and continuity from it. Section 134 of the Constitution reads as follows:

134. Subsidiary legislation

Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—

(a) Parliament's primary law-making power must not be delegated; 44

(b) statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;

(c) statutory instruments must be consistent with the Act of Parliament under which they are made;

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.

(10) **TACIT RELOCATION**

"Cooper, *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.*'

It is apparent from the replication that the plaintiff is receiving rentals. Negotiations also took place on the rentals. The defendants remain on the premises even after the expiry of their lease agreement. Once those admissions are made, in my view, that falls within the realm of statutory tenancy and tacit relocation. It is a triable issue. In *Total Zimbabwe (pvt) Ltd and Appreciative Investments (Pvt) Ltd,* HH-268-10, KUDYA J (as he then was) had this to say,

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.

In my view, the plaintiff cannot hide behind, "the no prejudice" engagements as it will be up to the trial court to determine the effect. I am fortified in my view by the words of MATHONSI J (As he then was) in *Kazingizi and anor vs Equity Properties (Pvt) Ltd,* HH-797-15 that,

ln our law, documents do not necessarily have to be marked "without prejudice" for them to be protected: *Gcabashe* v *Nene* 1975 (3) SA 912 at 941 E. Inversely, merely labelling a document "without prejudice" does not necessarily confer any privilege on the contents. What is important is whether the communication is considered privileged from an objective point of view: *Crowford* v *Roset and Cornale* (1992) 69 B.C.L.R (2d) 349; *Podovinikoff* v *Montgomery* (1984), 59 B.C.L.R 204……

In the final analysis, it is always in the discretion of the court to determine whether to admit or not to admit without prejudice communications. In exercising its discretion, the court may remove the privilege attaching to such communication if it deems that the admissibility of such communication is essential in proving certain things, such as the credibility of a witness, or if it considers that the upholding of the privilege would be contrary to public policy, for instance where the communication contains a threat or an act of insolvency.

(11) **ONUS AND THRESHOLD OF DEFENCE IN AN APPLICATION FOR SUMMARY JUDGMENT**

It is trite that the onus is on a defendant to show that they have a plausible defence to the plaintiff's claim. The Supreme Court in *Bastin vs Madzima N.O,* SC 37-20 restated the legal position as follows.

> It is also trite that in order to defeat an application for summary judgment, a respondent must set out a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit discloses facts which, if proved at the trial, would entitle the respondent to succeed. See *Kingston Ltd v L D Inesons (Pvt) Ltd* 2006 (1) ZLR 45 (S) at 458F-

In *Hughes v Donenek Investments (Pvt) Ltd* 1998(2) ZLR (H) it was said: -

> "All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that **"there is a mere possibility of success"**, he has a plausible case, there is a real possibility that an injustice may be done if summary judgment is granted".

In my view, the defences of tacit relocation and statutory tenancy are plausible.

(12) **IMPROVEMENT LIEN AND CONTRACTUAL PENALTIES ACT**

Having established that the respondents have plausible defences to the application for summary judgment, the issue of an improvement lien is one for interpretation by the trial court. The same applies to the contention of breach of some provisions of the Contractual Penalties Act.

(13) **UNLIQUIDATED CLAIM**

Mr *Mapuranga,* submitted that the claim for holding over damages was unliquidated and that it is trite that an application for summary judgment cannot be made in such circumstances. In the summons and declaration, the plaintiff sought an order in relation to eviction and holding over damages. In the application for summary judgment, the order in relation to holding over damages was abandoned. The immediate question that arises is whether or not it is competent to do so. Rule 30(2) states as follows: -

> '*A court application shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein,* ***verifying the cause of action and the amount claimed if any'***

In my view**,** what should be claimed in an application for summary judgment is the same relief as claimed in the summons. The plaintiff instead picked and chose what relief they should seek. I am fortified in my view from the perspective that the court is allowed to grant part of the application for summary judgment and grant leave to the defendant to defend the balance of the claim. This is through the provisions of R30(9) (b)(ii) that reads as follows:

> *'If at the hearing of an application made in terms of this rule it appears – that the defendant is entitled to defend as to part of the claim, the court shall: - grant leave to defend to the defendant as to a part of the claim and enter judgment against the defendant as to the balance of the claim, unless such balance has been paid to the plaintiff.*

(14) **COSTS**

In my view, the application is ill-conceived and accordingly the plaintiff must pay the defendants' costs.

DISPOSITION

It is trite that summary judgment is a drastic procedure. It is meant to balance the interests of a plaintiff who must not be made to wait for judgment for a long period of time. It must also not be used to silence a defendant who may have a defence. The threshold for the defendant is low, akin to that of a *prima facie* case. The defendants having raised plausible defences of statutory tenancy and tacit relocation, the application has no merit.

Accordingly:

1. The application for summary judgment be and is hereby dismissed.

2. The plaintiff shall pay costs on the ordinary scale.

Mushuma Law Chambers, Plaintiff's Legal Practitioners

Dhaka, Lightfoot and Stone Attorneys, Defendants' Legal Practitioners