ORTID HARDWARE SUPPLIERS (PVT) LTD
t/a C & G ACCOUNTING SERVICES
versus
ADAM KATSVERE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 31 July 2019 & 5 February 2020

**Opposed application**

*R Zimudzi*, for the applicant
*T L Mapuranga*, for the respondent

TAGU J: This is an application for a declaratory order in terms of s 14 of the High Court Act [*Chapter 7.06*] seeking a declaration by this Honourable Court that the Notice to vacate dated 20 July 2018 by the respondent is unlawful. This is on the basis that the notice to vacate is fatally defective in that no good cause has been shown for giving such notice and in any event the Notice to Vacate does not meet the requirements of the law. It is alleged by the applicant that the adverse effect being that continuance with such will not only constitute a gross violation of the rights of the applicant but also cause irreparable harm to the applicant.

The facts as stated by the applicant and as deposed to by the deponent Givemore Manjengwa are that sometime in 2015 the applicant approached the respondent on potentially building a Mall in Karoi. The applicant planned the structure of the complex and went on to raise funds for the project through advance payments from most of the tenants during the construction of the complex. The applicant further supplied the respondent with goods worth $25 600.00 during the construction of the complex. Upon completion of the Mall the applicant said it started to manage the Mall and to collect rentals on behalf of the respondent, keeping proper books of account and providing counseling services. Givemore Manjengwa said he bought the receipt books on his own expense and was not receiving any salary or payment for the abovementioned responsibilities. It was his further averment that on 1 June 2015 the applicant and respondent entered into a Lease Agreement for 10years which is due to expire on the 1st of June 2015 for Shop No. B6 and E5. At all material times since 2015 he has been religiously paying rentals to

respondent without failure in terms of the Lease Agreement. Further he has been collecting rentals from other tenants on behalf of the respondent and keeping proper books and records of the same, a responsibility he assumed even before the commencement of the building of the Mall as he collected rentals in advance to fund the project.

Trouble started on 30 April 2018 when he communicated his intention to terminate consultancy services including the collection of rentals and cited justifiable reasons for the same through a letter but unbeknown to him the respondent took offence and in response unilaterally elected to give him 3 months' notice to vacate the premises for no apparent reason save for what he termed victimization. The notice was initially challenged by his legal practitioners and the respondent withdrew the notice. A second Notice to Vacate dated 20th July 2018 was then issued. He said it dawned on him that the respondent was revenging his revocation pertaining to the collection of rentals, managing the Mall and keeping books of account of the respondent. His legal practitioners once more challenged it through a letter dated 26th July 2018 but the respondent did not cancel the notice. It is against this background that the present dispute arose.

The applicant now seeks that this court declares that-

a. The Notice to Vacate Shop Number B6 and E5 Chanetsa Complex situated at Stand number 39 Harris Street, Karoi dated 20 July 2018 given by the respondent to the applicant be and is hereby declared null and void.
b. The applicant and the respondent shall be governed by the Lease Agreement signed on 1 June 2015.
c. The respondent to pay costs of suit on an Attorney and Client Scale.

The respondent opposed the application and raised a point *in limine* which he felt should dispose of this matter without dealing with the merits. The point *in limine* is that there are material disputes of fact more so in that this matter cannot be heard and determined in an application by reason of the fact that the application contains material disputes of fact which cannot be resolved on the papers. The respondent said the dispute of facts arise from the facts that-

1. The respondent never entered into any contract of any nature with the applicant. He said he only entered into contracts with the deponent to the applicant's founding affidavit Mr. Givemore Manjengwa.

2. He did not enter into any written contract with the applicant or Mr Manjengwa. The contract document which is attached to the applicant's founding affidavit as annexure "B" was not signed by the respondent. The purported signature of respondent on the document is a forgery.
3. The respondent never engaged the applicant or Mr Manjengwa to design any of his buildings or complexes, including the one which Mr Manjengwa is currently renting.

The respondent further stated categorically that a demand was sent to him and he responded through his erstwhile legal practitioners advising that:

i) He did not have any written Lease Agreement with Mr Manjengwa or any of his other tenants for that matter, let alone the applicant which was unknown to him.

ii) He had never engaged Mr Manjengwa or the applicant to assist him with any design work for his building complex and

iii) He was not in any partnership with Mr Manjengwa or the applicant hence put the applicant on notice that many of the factual averments in the demand were being denied but the applicant persisted with this application when an action would have been called for.

My reading of the papers filed of record show that in the present matter the applicant and the respondent are not in agreement on every material fact for the purposes of this application. They seem to be miles apart. In particular the parties disagree that there was a contractual privity between the applicant and the respondent. They disagree that the contractual document presented by the applicant is a genuine document particularly in that the respondent disputes the signature on it. While the applicant says the signature on the document is that of the respondent and the respondent need to produce a handwriting expert report to confirm that the signature is not his, equally I find that the applicant too need to produce proof that the signature is that of the respondent. It is an issue this court cannot decide on papers. Evidence has to be led. Secondly, the nature of the alleged Lease Agreement entered into by the respondent whether with the applicant or with Mr Manjengwa is disputed. The respondent stated that it was tenancy at will or periodic lease whereas the applicant alleges that it was an agreement for a fixed period of ten years as per disputed lease agreement. It is not clear whether it was the applicant, a company or legal persona that provided the materials for the construction of the complex in question or it was Mr Manjengwa

personally which brings doubt as to whether the contract was between the Applicant and respondent or between Mr Manjengwa and the respondent. This is even confirmed by the fact that even in the founding affidavit Mr Manjengwa seems to have been personally involved and not the Applicant as a company. In view of the totality of the disputed facts it makes it difficult for the court to believe one side without relevant evident. For these reasons I agree with the respondent that there are material disputes of facts which cannot be resolved on papers. I therefore uphold the point *in limine*. This matter should have been brought as an action and not application.

IT IS ORDERED THAT

1. The point in lime is upheld.
2. The application for a declaratur is dismissed.
3. The applicant to pay costs.

*Zimudzi & Associates*, applicant's legal practitioners
*Chihambakwe, Mutizwa & Partners*, respondent's legal practitioners