LOCAL AUTHORITIES PENSION FUND
versus
F & R TRAVEL TOURS AND CAR SALES (PRIVATE) LIMITED
and
FREEJOY CHIGWIDA
and
RAPHAEL MAKWARA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 11 May and 9 June 2010.

OPPOSED APPLICATION

Mr T Nleya for applicant
Mr P Makuvaza for the respondents.

MAKARAU JP: The applicant and the first respondent are landlord and tenant respectively. Their relationship commenced when they concluded a written agreement in respect of certain commercial premises situate at Throgmorton House, Samora Machel Avenue, in Harare. The agreement was for a period of one year, commencing on 1 July 2006 and terminating on 30 June 2007. The second and third defendants as directors of the first respondent bound themselves as co –principal debtors under the lease agreement.

In July 2009, the applicant filed this application seeking an order evicting the respondents from the rented premises. In its founding affidavit it averred that the respondents had breached the written lease agreement by failing to pay rentals and operating costs for the premises since January 2009. The amount of arrear rentals and outstanding operating costs was also prayed for in the order.

It is pertinent in my view that at this stage, before I detail the opposition that was filed by the respondents, I comment on the manner in which the applicant proceeded to frame its cause of action against the respondents.

The applicant has alleged that the respondents are in breach of the written lease agreement of 2006.

It is common cause that the written lease agreement between the parties terminated by the effluxion of time in June 2007. As at the time of the filing of the application, it was no longer binding upon the parties and could thus not found a cause of action for the applicant. Its terms and conditions may have continued to afford the respondents protection against eviction under the operation of the provisions of the Commercial Rent regulations S. I. 276/83("the Regulations"), under what is commonly referred to as statutory tenancy. This is however not part of the averments made by the applicant in its founding affidavit.

In my view, statutory tenancy is not an issue that the court should take judicial notice of *mero motu*. It must be specifically pleaded as it brings into play different considerations regarding the respective rights of the parties. It is a separate cause of action, apart from the terminated lease agreement.

I shall avert to the provisions of the regulations in detail below.

At this stage, the point I am making is that the applicant could not validly seek to rely on an agreement that had terminated without first laying a legal basis for its revival so to say. As I shall show later, this may have fatally compromised the applicant's quest to recover its property from the tenant.

In opposing the application, the respondents argued that the written agreement between the parties provided for payment of rent in local currency and when that currency lost favour with traders and generally, the applicant sought to impose a rental in United States currency with the parties failing to reach agreement on the amount payable.

Again I pause to make the point that the respondents were clearly relying on the protection against eviction afforded them by the Commercial Rent Regulations but did not specifically raise that defence in their papers.

In moving for the granting of the order sought in the draft, the applicant urged me to find that the parties had a written lease agreement, that in terms of that lease agreement, the first respondent was obliged to pay rentals and operating costs monthly and in advance and that in breach of that agreement, the first respondent failed to pay any rent or operating costs from January 2009 to the date of the filing of the application.

As indicated above, the applicant's argument is flawed in one or two respects and does not flow from the facts that are common cause. Firstly, the written lease agreement terminated in July 2007. As from that date, the first respondent became a statutory tenant and the expired lease agreement can no longer found a cause of action between the parties. The first

respondent in my view, can now only be competently evicted in terms of the provisions of the rent regulations. It is common cause that the applicant is not proceeding in terms of the rent regulations but is proceeding *ex contractu*, alleging breach of the written agreement.

Secondly, and assuming that the written lease agreement between the parties is still subsisting, then, in that event, the first respondent's obligation is to pay rentals monthly in advance in local currency. The obligation to pay rentals monthly in advance must have been imposed by some other agreement, which has not been pleaded.

The applicant has urged me to find that the agreement to levy rentals in foreign currency and in the sum of US$700-00 per month was reached between the parties at a meeting that was held on 12 May 2009.

I cannot agree.

It is common cause that on 8 May 2009, the applicant addressed a letter of demand to the first respondent, claiming payment of the sum of US$4 497.75 as arrear rentals and the sum of US$1772,81 as unpaid operating costs. The parties met on 12 May 2009 to discuss the demand. On the same day of the meeting, the first respondent responded to the letter of demand in writing, acknowledging the letter of demand and advising that at the meeting held with the applicant's representatives, it had been agreed that the first respondent would pay one thousand dollars towards the arrear rentals and the balance over two or three weeks.

It is worth noting that the meeting of 12 May 2009 was in response to the applicant's letter of demand. By then, the amount of the arrear rentals had already been calculated. In other words, the breach had already occurred.

It appears to me that by January 2009 the parties had not yet agreed on the rental payable for the premises. As detailed above, the applicant seeks to rely on the alleged agreement concluded on 12 May 2009, some five months after the alleged breach. If the parties had greed to the rentals in January 2009, why would they need to meet over the same issue in May? Similarly, if the parties had not reached agreement on the rentals in January 2009, on what basis can they be held to have breached the contract before the parties had reached agreement on it? These are questions that will go begging for an answer as in my view, the applicant has placed its cart before the horse. It has proved the breach before proving the agreement breached!

Assuming that I have erred in concluding that the applicant has placed its card before horse and that by application of some other legal principle, not argued before me, the applicant

could prove that the agreement reached on 12 May 2009 could apply retrospectively, then the denial of the agreement by the respondent would raise a material dispute incapable of resolution on the basis of the papers filed of record.

I have considered whether I can convert the proceedings before me into an action by referring the matter to trial. In view of the reservations that I have regarding the cause of action that the applicant has pleaded in this matter, I am of the view that such exercise of discretion will not have the effect of saving to expedite the resolution of this matter or of saving costs.

Before I dispose of this matter, it is important in my view that I remark on the submissions made on behalf of the respondents. They have argued that the first respondent is a statutory tenant and is protected against eviction. In this regard, they have relied on the provisions of section 22(2) of the Regulations which provide as follows:

"(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—

(*a*) continues to pay the rent due, within seven days of due date; and

(*b*) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that—

(i) the lessee has declined to agree to an increase in rent; or

(ii) the lessor wishes to lease the premises to some other person."

While the section specifically limits the right of landlords to recover their properties where leases have terminated by expiration for the reason given in the regulations, it simultaneously creates the right in favour of the tenant to remain in occupation of the leased premises provided the tenant pays the rent that is due in terms of the lease within seven days of the due date and performs all the other conditions of the lease. The provisions of the section seek to protect the genuine tenant who is not in breach of any of the terms of the lease agreement from being at the mercy of a landlord who may wish to let out the premises to another tenant.

The issue that exercises my mind in this application is whether the statutory tenancy remains viable where the rentals payable were fixed in local currency, in view of the lack of value now attaching to that currency.

It is trite that for a statutory tenancy to be created and thus earn protection, the tenant has to continue to pay the rent due within seven days of due date and perform the other

conditions of the lease. The practical difficulty that arises is that where the tenant's obligation is to pay in local currency, how does such a tenant remain protected when the rentals are neither payable nor constitute a valuable exchange for the right to use the landlord's tenant.

While it is not necessary for me to make a specific finding on this issue, I would venture to suggest that in circumstances similar to the facts before me, where the obligation in terms of the written agreement of sale was in local currency, the protection afforded by the statutory instrument becomes doubtful or of limited value as payments for rentals in local currency are ludicrous and may in some instances be impossible to effect.

Finally, I wish to refer to the case of *Negowac Services (Private) Limited v 3D Holdings (Private) Limited and Others* HH144/09 in which MTSHIYA J was faced with facts similar to the ones before me. In that case, in upholding the landlord's right to evict the tenant, the learned judge was of the view that the obligation of the tenant to continue paying rent on due date imposed by the Regulations in turn imposes an obligation on statutory tenants to pay "reasonable rentals" in respect of the property leased where the parties fail to reach agreement on the amount of rentals payable.

Mr Nleya for the applicant urged me to follow the decision in that case.

Again it is not necessary in my view that I distinguish this case from the application before me. It is my finding above that the applicant has not pleaded statutory tenancy as its cause of action. It has instead alleged breach of a specific written agreement and I have disposed of the matter on that basis. Had the applicant approached the court on an action in *rem*, seeking to recover its property from the tenant on the basis that the parties had failed to reach agreement on a material term of the lease, I would have found the reasoning by MTSHIYA J very attractive in the general sense that the *sine qua non* for enjoying the use of the property of another is the payment of rent and one cannot hope to have that enjoyment for nothing.

In the absence of proof of payment of anything, a tenant would have no defence in my view, to resist the enforcement of the right of an owner to recover their property. As PATEL J observes, a tenant is not entitled to withhold rentals except in a few and very limited instances. (See *Parkside Holdings (Private) Limited v Londoner Sports Bar* HH66/05).

As I indicated above, the applicant has approached court alleging breach of a specific term of the lease agreement. It is my finding that the averred lease agreement is no longer

binding on the parties and even if it were, it cast an obligation upon the first respondent in a currency that is now redundant.

On the basis of the foregoing, it is my view that the applicant has pleaded a cause of action that is not competent and cannot therefore succeed.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant shall pay the respondents' costs.

Gill Godlonton & Gerrans, applicant's legal practitioners.
Sinyoro& Partners, respondents' legal practitioners.