Judgment No. HB 125/2002
Case No. HC 1275/2002

ARTCRAFT FURNITURE MANUFACTURERS (PVT) LTD **Applicant**

Versus

TOKOZANI (PVT) LTD **Respondent**

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 26 JULY & 17 OCTOBER 2002

J K H Stirling for the applicant
N Ndlovu for the respondent

Court Application

CHIWESHE J: In this court application the applicant sought an order set out as follows:

> "1. That judgment with costs be and is hereby awarded against respondent in the sum of $260 000,00 plus interest thereon at the prescribed rate from the date of service of the application to date of payment, plus $81 250,00 per month from 1 June 2002 to date of ejectment, plus interest thereon at the prescribed rate from the date of ejectment to date of payment.
> 2. That the Deputy Sheriff of Bulawayo be and is hereby directed to eject respondent and all those claiming under respondent from applicant's premises at stand 11, Kelvin West, Kelvin, Bulawayo."

The background facts to this application are as follows. The applicant and the respondent entered into an agreement in terms of which the applicant leased its premises namely, stand 11, Kelvin West, Kelvin, Bulawayo to the respondent with effect from 1 June 2001 at a rental of $65 000,00 per month. According to the applicant the respondent failed to pay rentals for the months of February and March 2002. As a result the applicant by letter dated 6 March 2002 cancelled the lease agreement. The respondent notwithstanding this fact not only remained in occupation

but failed to pay further rentals for the months of April and May 2002. The total rental due as at May 2002 amounted to $260 000,00. The present application was lodged on 17 May 2002.

The lease agreement had provided for the lessee to renew the lease at a monthly rental of $81 250,00 with effect from 1 June 2002. According to the applicant the lessee did not so seek to renew the lease (which in any event had been cancelled) but continued to occupy the premises after that date. In respect of such occupation after 1 June 2002, the applicant claims rentals in the sum of $81 250,00 per month.

In his opposing affidavit, Sean Redding, on behalf of the respondent, denies that the respondent had breached the lease agreement as alleged by the applicant. Respondent avers instead that at the time the applicant was withholding the respondent's monies in the sum of $854 585,00 and that by withholding such monies the

applicant had in February 2002 paid itself rent in advance from that date till the amount shall have been exhausted. Apparently this amount was the subject matter of a dispute between the parties in a separate action under case number HC-739-02. The respondent also denies that the applicant had the right to cancel the lease and avers that the applicant had ignored letters written by the respondent and in particular one dated 19 April 2000 in which respondent sought to renew the lease for a further twenty four months. It should be noted that in its replying affidavit the applicant denies ever receiving that letter and goes on to suggest that the letter had been written after the event in order to bolster the respondent's case. In any event given the nature of the relationship of the parties at that time, it is unlikely that the applicant would

have entertained renewal of the lease. Applicant had in fact cancelled the lease.

The respondent further contends that in terms of the agreement between the parties the rent was payable from the gross sales of goods sold by the applicant on behalf of the respondent. Because the applicant has not released to the respondent the sum of $854 585,00 the respondent has been unable to conduct any business since February 2002. No sales have therefore arisen to generate the rentals. According to the respondent, it is the applicant therefore who has caused the impasse. The applicant cannot therefore rely on its own breach to evict the respondent. On perusal of the lease agreement it is quite clear that the arrangements alluded to by the respondent *vis a vis* payment of rentals are not part of the provisions of that agreement. If indeed the parties had contemplated payment in any manner other than as spelt out in the agreement, one would have expected them to include an appropriate provision to that effect.

The respondent further alleges that applicant fraudulently converted the sum of $1 003 252,00 through under-invoicing of goods and overcharging of commission payable to it as respondent's agent. This matter is also being dealt with in a separate action under case number HC-739-02. The respondent therefore claims the defence of set off against any future rentals that applicant may claim.

In its answering affidavit the applicant avers that the sum of $954 585,00 was withheld by it in order to set off a debt owed to it by respondent in connection with the sale of the applicant's property to the respondent. The set off was effected under case number HC-340-02. In its plea in that case the respondent did not deny liability but alleged a counter claim in damages. The same amount cannot be set off again in

respect of rentals. Neither can the respondent properly claim set off against a claim for damages which are denied and are yet to be proved and quantified.

In the circumstances I find the respondent's version of events to be improbable and inconsistent. The application must succeed. At the hearing the applicant advised the court that the respondents had since vacated the premises in question. This they did on 2 July 2002. As a result the applicant amended the draft order to reflect this change in circumstances. The second paragraph of that order relating to the eviction of the respondent was deleted. The first part of the draft order was amended to reflect a cut out date of 2 July 2002. An order is hereby made in terms of the amended draft order as follows:

Judgment with costs be and is hereby awarded against the respondent in the sum of $260 000,00 plus interest thereon at the prescribed rate from the date of service of the application to the date of payment plus $86 491,92 being the equivalent rentals for the period 1 June 2002 to 2 July 2002 plus interest thereon at the prescribed rate from the date of ejectment to the date of payment.

Coghlan & Welsh applicant's legal practitioners
Lazarus & Sarif respondent's legal practitioners