

**PECHI INVESTMENTS (PVT) LTD**

**Versus**

**MAURICE CHARLES MUTATSI NYAMUDA  
t/a EBUNANDINI RESTAURANT**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 18, 25 & 26 OCTOBER 2010 & 13 JANUARY 2011

*Mrs H. Moyo* for applicant  
*H. Shenje* for respondent

Judgment

**CHEDA J:** This is an application whose relief is for the eviction of respondent under case number HC 2231/08 while respondent was the applicant in case number 2187/08. These two matters were subsequently consolidated under case number HC 167/09.

The facts of the matter are largely common cause in that the parties entered into a lease agreement of number 123 George Silundika Avenue, Bulawayo a property owned by applicant. The agreement of lease was to commence on 1 September 2004 and terminate on 31 July 2005. It was however renewed for a further one year thus terminating on the 31<sup>st</sup> July 2006. It was further allowed to run for another year. In January 2008 applicant resolved to terminate the agreement on the 30<sup>th</sup> April 2008 after giving respondent a 3 months' notice. Respondent made further representations, a meeting was held on the 2<sup>nd</sup> July 2008 which resulted in the parties agreeing that the lease terminate on the 30<sup>th</sup> September 2008. This is the allegation under case number HC 2231/08.

Notwithstanding the agreement, respondent refused to vacate the premises on the 30<sup>th</sup> September 2008 as has been previously agreed.

Under case number HC 2187/08, respondent who was then applicant filed a court application, the relief sought was that he be allowed to continue with his business at the said property, the verbal agreement of 15 years lease entered into by the parties be declared binding and that the purported agreement that he vacates the property on the 30<sup>th</sup> September 2008 be declared unlawful.

In support of this application, he asserted that in June 2005, applicant through its representative had advised him to purchase the entire shareholding of applicant. It was during

the said negotiations that a verbal agreement was agreed that he leases the property for 15 years. It is further his argument that applicant through its agent CB Richard Ellis advised him of a new lease agreement.

As the issue was the same, related to the same property and the same parties the parties agreed that the two matters be consolidated therefore avoiding a duplicity of applications.

Applicant's argument is that despite the indulgence given to respondent, as a result of numerous negotiations which resulted in the extension of the lease up to 30 September 2008, he still refused to vacate the property. He continues to occupy this property to this date without paying rent. They further argued that respondent was given adequate notice to vacate but has defied the said notice.

Respondent on the other hand has argued that despite the notice which was given to him, the parties went further and entered into a verbal agreement which allowed him to lease the property for a further 15 years with a view to purchase it. It was his further argument that the applicant should not evict him in the manner he is doing as he is a statutory tenant.

The main issues as I see them are:

- 1) whether or not respondent was given proper notice to vacate;
- 2) whether there was an agreement that he should lease the property for a further 15 years with a view to purchase it, and
- 3) whether or not he is a statutory tenant to an extent of being protected under the Commercial Rent Regulations Statutory Instrument 32/07.

The general rule is that a reasonable notice to terminate the lease must be given by either party, see *Tshabalala v Van der Merwe* 1926 NPD 75 at 78. The period of notice must be such that the lessor has a reasonable opportunity of letting his premises or the lessee of finding other premises. *In casu*, respondent was given notice to vacate the premises on the 30<sup>th</sup> September 2008 and he acknowledged this notice by signing the said letter. In the said letter he stated that he was not going to vacate the property as he had signed the lease under coercion. He, however, changed his stance on this point at a later stage. The question of duress therefore does not arise. By his action, it is clear that he was deliberately defying the notice to vacate.

In any event a notice to terminate or resign is an unilateral act, not requiring acceptance and once given it is final and cannot be withdrawn except by consent, see *Potgietersrust*

*Hospital Board v Simons* 1943 TPD 269 at 274. At that stage, respondent was properly notified to vacate the property – on the 30<sup>th</sup> September 2008.

The second issue is whether or not there was a verbal agreement that respondent should lease the property for a further 15 years. He, however, does not tell the court the terms and conditions of the lease, namely the duration of the lease and the rent among other conditions. This, therefore, does not qualify as a valid lease, see *Stewart v Vosloo* 1965 (1) SA at 104 (H) where it was stated that the parties must agree on;

- 1) the purpose of the contract, that the lessor is to give and the lessee to receive the use and enjoyment of the property;
- 2) the identity of the property; and
- 3) the rent.

Two of the essential elements are present. I find that respondent's argument is fraught with difficulties with regards to the third element as it is clear that rent to be paid was not agreed upon.

Respondent also argued that to show his sincerity about the supposed 15 year lease with a view to purchase the property, he obtained a second mortgage bond. The bond in question was in 2005 yet the supposed verbal lease was in 2008. This is inconsistent, as there would not have been the issue of purchase in 2005 when he was purely a tenant without more. There is nothing to show that there was a verbal agreement, other than his mere say-so. The common principle in our law is that respondent having asserted that there was a verbal agreement, the burden of proof shifted upon him which he has failed to do.

He has further argued that applicant should have complied with the conditions required of a statutory tenant. While it is true that statutory tenancy requires a different approach *vis-a-vis*, an ordinary tenant, a person who seeks to be covered by such an umbrella should also fulfill a certain obligation namely that he should be paying rent, see *Elher (Pty) Ltd v Silver* 1945 WLD 271 and *Marshall v Ivory* 1951 (2) SA 555. In this case respondent has admitted that he has been carrying out business in applicant's premises from October 2008 to date without paying rent. This, to say the least is absurd. Such a person cannot with all due respect, seriously seek the protection of the courts. If he was *bona fide*, he would have paid rent into court. For a tenant who occupies and uses a commercial property for over 2 years without paying rent is a serious indictment to all the ethos of business.

Respondent has failed on a balance of probabilities to show that there was a 15 year lease of the property and that the notice for him to vacate the property is valid.

I, therefore, find that applicant has made a good case for itself and is entitled to take the property for its own use as outlined in *Mobil Oil Zimb (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd* 1991 (2) 82 (5).

Accordingly the application succeeds and the following order is made:-

It is ordered that:

1. The respondent together with all those claiming through it who occupy the applicant's property be and are hereby directed forthwith to vacate the property being stand 464 Bulawayo Township of Bulawayo Township Lands situate in the District of Bulawayo, which is situated at 123 George Silundika Street, Bulawayo (hereinafter referred to as "the property" and to give possession of the same to the applicant.
2. In the event that the respondent and/or any others should fail to vacate the said property within 24 hours of the service of this order upon the respondent then, the Deputy Sheriff of this honourable court be and is hereby directed and authorized to evict and eject the respondent together with all those claiming through it from the property and to restore the property to the applicant.
3. The costs of this application shall be borne by the respondent on a legal practitioner and client scale.

*Joel Pincus Konson & Wolhuter*, applicant's legal practitioners  
*Shenje & Company Legal Practitioners*, respondent's legal practitioners