

NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND

versus

EKUTULENE INVESTMENTS t/a
WALKERS PUB AND RESTAURANT
and
WAYNE ALLAN JONES

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15, 16 AND 24 MARCH 2016

Civil Trial

L. Nkomo with C Bhebhe for the plaintiff
Ms H. Moyo with P Madziva for the defendants

MATHONSI J: This court has in the past bemoaned the development of a culture that makes a mockery of the biblical aphorism that “whatever a man sows, that he shall reap”. See *Southmark Trading (Pvt) Ltd & Others v Karoi Properties (Pvt) Ltd & Others* HH 52/13; *Mukuvisi Tashinga Housing Co-operative v Musukuma & Others* HH 478/15. That biblical aphorism has been corrupted by some of our people into one which says you have to reap where you did not sow at all, or, as is the case in this matter, you sow as little as possible but reap aplenty.

Otherwise how else can one explain the circumstances of this case where an employee of a company for just ten years wakes up one day owning the business of that company worth \$600 000-00 without making any outlay. He then takes over and runs the business for five years without paying rent or at best paying only what he wants to pay while reaping benefits throughout. For almost a year, he having last paid rent of his choice in the sum of \$700-00 on 15 April 2015 against the fixed fair monthly rent of \$4858-00, he has continued to occupy and conduct a lucrative business at upmarket business premises at Bulawayo Centre without paying a dime towards rentals and other charges. Despite that, proceedings for eviction are contested all the way to the wire on what are demonstrably tenuous grounds.

This matter involves eviction and related claims where a business man who was frustrated out of business by the debilitating costs of running the business is guilty of making all the wrong business decisions including handing over his business to an employee *gratis*, as Shakespeare would say, and failing to surrender the rented premises for five years thereby accumulating a huge bill in unpaid rent and related expenses. It is wrong business decisions compounded by unbelievably wrong legal advice which has led to this unfortunate state of affairs. But then this is a court of law charged with the responsibility of enforcing the agreements of parties where they have entered into them freely and voluntarily and with their eyes open. That is the whole concept of sanctity of contract. It is not a court of equity neither does it render advice to litigants, be it business or legal.

The plaintiff is the owner of a business complex in the central business district known as Bulawayo Centre where is located premises measuring in total 844,9 square metres which it let out to the first defendant by a written lease agreement signed on 7 and 8 March 1999 but the lease was to subsist from 1 September 1999 for an initial period of five years in terms of clause 1.1. It was to be renewed for another period of five years at the expiration of the initial period in terms of clause 1.2. as read with clauses 3 and 4 of the lease agreement.

In terms of clause 3 (c), the tenant had the right to renew the lease at the expiration of the initial five year period for a renewal period of another five years provided that the tenant was not in breach of any of the terms of the lease at the time the tenant sought to exercise the right of renewal. Whichever way, clause 3 (f) of the lease agreement gave the lease an indefinite lifespan terminable on its terms. It reads:

“If the tenant fails to give notice as provided in subclause (e) above this lease will continue from the termination date of the lease period (or the renewal period) on the same terms and conditions but subject to three calendar months’ written notice of termination by either party and the rent shall be determined in terms of clauses 5 and 31 hereof. However, the landlord may, during the last three months of the lease period (or the renewal period) give the tenant no less than two calendar months’ notice to terminate this lease on the termination date of the lease period (or the renewal period).”

The second defendant who is a director of the first defendant, signed a deed of suretyship on 7 March 1999 in terms of which he bound himself a surety and co-principal

debtor *singuli et in solidum* for the due and faithful compliance and performance by the first defendant of its obligations in terms of the lease agreement.

Following a lengthy but turbulent relationship spurning over a decade, the plaintiff instituted summons action against the defendants on 21 July 2014 for the confirmation of the cancellation of the lease agreement entered into between the parties, the eviction of the first defendant and “all persons claiming title or occupation through it”, outstanding rent and operating costs as well as holding over damages.

The defendants entered appearance to defend following service of summons upon them on 28 July 2014 and in their joint plea they denied liability to the plaintiff in any amount including value added tax. While not challenging the arbitral award fixing fair rent or being involved in the arbitration process giving rise to it, the defendants averred in paragraphs 10 and 11 of the plea as follows:

“10. Ad Para 5

- 10.1 The 1st defendant denies that it is indebted to the plaintiff in the sum of US\$506 395-84 or in any other sum and puts plaintiff to the proof thereof.
- 10.2 1st defendant avers that the plaintiff has failed to articulate how it arrives at the said figure of US\$506395-84 in clear and simple terms.
- 10.3 The plaintiff has failed to state the amount apportioned to rent and the period for which such rent is claimed.
- 10.4 Plaintiff has also failed to state the amount apportioned to operating costs and what such operating costs are and the period for which they are claimed.
- 10.5 1st defendant, further avers that plaintiff’s claims prior to 21 July 2014 are in any event prescribed or that the plaintiff is not entitled to back date the rentals to any date prior to the arbitrators determination.
- 10.6 1st defendant further avers that the parties agreed to a rental of \$600-00 per month for the period commencing the date of dollarization and that the arbitrator’s determination only applies for the period where there was no such agreement.

11. Ad Para 7

1st and 2nd defendants aver that they ceded their rights and obligations in the lease agreement to one Gersham Gara and Multishade (Private) Limited with the knowledge of the plaintiff and therefore denies (*sic*) any liability to the plaintiff.

WHEREFORE defendants pray that plaintiff’s claim be dismissed with costs.”

The issues for trial were agreed by the parties at a pre-trial conference held before a judge. They are;

1. Whether the lease agreement between the parties should be cancelled.
2. Whether the 1st defendant and those claiming occupation through the first defendant should be evicted from the premises.
3. Whether the defendants owe arrear rent and operating costs and the amounts thereof.
4. Whether the plaintiff is entitled to interest on any outstanding amount and the rate thereof.
5. Whether the plaintiff is entitled to levy value added tax on amount due.
6. Whether the plaintiff is entitled to holdover damages and operating costs from 1 August 2014 to date of eviction.
7. Whether the defendant is liable to pay costs of suit on an attorney and client scale.

At the commencement of the trial Mr *Nkomo* for the plaintiff applied to amend the summons and particulars of claim by substituting the figure of \$333 209-47 as arrear rent thereby removing operating costs which are now claimed together with hold over damages.

Only Simon Moyo, a partner in charge of Commercial Management at Knight Frank, the estate agent of the plaintiff gave evidence on behalf of the plaintiff. The import of his evidence is that the first defendant took occupation of the premises by virtue of a lease agreement aforesaid. He drew attention to clause 3(c) of the lease agreement providing for the tenant's right to renew the lease on the same terms and conditions contained in the written lease and to clause 3 (f) which I have already made reference to above. He then made the point that the lease did not terminate owing to that provision even though the tenant did not exercise the option to renew it upon expiration. The relationship of the parties remained governed by the written covenant. Moyo stated that a dispute over fair rent arose between the parties after the tenant refused to accept the rental stipulated by the landlord. The dispute had to be resolved by referral to arbitration after referral to the rent board and the Administrative Court failed to settle the impasse. It was referred to an arbitrator as provided for in clause 5 (a) of the agreement which reads:

“In the event of the parties being unable to agree the rent and/or the annual escalation rate for each succeeding year in terms of clause 4, the rent shall be determined by an arbitrator appointed in terms of clause 31 hereto, who shall thereupon fix as the

applicable rent the open market rent for the leased premises, on the basis provided for in this clause.”

He stated that the decision of the arbitrator is final and binding upon the parties as set out in clause 31(j) which also entitled either party to make an application to this court for enforcement of the arbitral award.

The appointed arbitrator was Angelbert G. M Nyandoro of Iwe-Neni Real Estate who was appointed by the chairman of the Royal Institute of Chartered Surveyors (Zimbabwe Group) to arbitrate the dispute between the parties regarding the rentals payable for shops 31-34 at Bulawayo Centre measuring 844,9 square metres in extent. Those who participated at the arbitration, according to the arbitral award dated 28 March 2014, were representatives of both the landlord and the tenant, the latter being represented by *P Madzivire* a legal practitioner at *Joel Pincus Konson & Wolhuter* and Gersham Gara. Moyo referred to the arbitral award, pages 27 to 37 of exhibit 1, which fixed the fair rent at \$1,47 per square metre per month from July 2009 to December 2009 (\$1,242-00 per month); \$4,16 per square metre per month from January to December 2010 (\$3515-00 per month); \$4, 72 per square metre per month from January to December 2011 (\$3988-00 per month); \$5,38 per square metre per month from January to December 2012 (\$4546-00 per month); \$5,62 per square metre per month from January to December 2013 (\$4783-00 per month) and \$5,75 per square metre per month from January to June 2014 (\$4858-00 per month). He stated that the arrear rentals being claimed by the plaintiff have been computed using those fixed rates for all the time that the fair rent remained outstanding as the bickering between the parties raged on. He referred to the schedule of outstanding rent; page 52 of the bundle of pleadings, showing the sum of \$333 209-47 being claimed for the duration of that period.

The arbitral award dated 28 March 2014 was received immediately thereafter and although the defendants received their own copy, the plaintiff took the trouble to advise them about the new development in June 2014 and to demand payment of the arrears which were then due within 14 days in terms of clause 6(b) of the agreement. It provides:

“6(a) The rent shall be payable by the tenant monthly in advance, without need for demand and without any deductions whatsoever, on the first day of each month at the offices of Knight Frank in Bulawayo, or such other place in Bulawayo as shall from time to time be notified to the tenant in writing by the landlord. The

payment of rent to any unauthorized person in any unauthorized manner shall be at the entire responsibility of the tenant and shall not relieve the tenant from his obligation to pay rent in accordance with the provisions of this agreement.

- (b) In the event of the rent for any review or renewal period not being determined before specific date the tenant shall continue paying rent at the monthly rate paid immediately prior to such review or renewal period. Upon agreement or determination of the rent for such period the tenant shall, within fourteen (14) days of such agreement or determination, pay to the landlord in the specified manner any arrears resulting from such increased rents not having been paid since the commencement of such period.”

The witness testified that in line with the foregoing provisions, the tenant was notified of the arrears that had accumulated as a result of the dispute in respect of both rent and operating costs and was asked to pay within the requisite fourteen (14) days. The arbitrator had determined the fair rent backdated to July 2009 when the dispute arose but the tenant refused to sign the addendum incorporating the new rental and did not bother to pay the rent arrears of \$333209-47 as required.

He went on to say that the landlord computed the operating costs and interest as appears on pages 37-38 of exhibit 1. Operating costs are claimed from July 2014 to date in the sum of \$266 665-68 to date which figure incorporates holding over damages which are also due in terms of clause 32 (a) and (b). Interest is determined in terms of clause 30 (f) which states that the interest rate on arrear rent or any other amount due shall be at the monthly compounded rate of 2% per annum above the current lending rate charged by the landlord’s bank. It is that rate which was used to calculate the interest being claimed.

The defendants breached clauses 6(a) and (b) by failing to pay the fixed fair rent thereby entitling the plaintiff to approach this court in terms of clause 30 (a) (i) and (ii) which provides:

“In the event of:

- (i) the rent being in arrears after the seventh (7th) day of the month for which it is due, whether the same has been legally demanded or not; or
- (ii) any payment in terms of clauses 7, 8, 9, or 21 (d) thereof being in arrears

the landlord shall be entitled to cancel this lease forthwith, without prejudice to any right of action or remedy by the landlord for the recovery of rent, damages or other relief arising out of the provisions of this agreement ---.”

The other clauses referred to in that clause relate to payment of rates and taxes, good tenancy deposit, payment of electricity, water, refuse, sanitation and other charges as well as insurance. Default in payment of those, which the witness said encompass what has been referred to in this action as operating costs, entitles the landlord to cancel the lease in terms of clause 30 (a). Where the landlord litigates in that regard, clause 30 (b) entitles it to recover costs on the scale of legal practitioner and client as well as collection commission. The witness said it was on the strength of clause 30 that the plaintiff instituted the summons action aforesaid. Clause 32 allows for the recovery of holding over damages. It reads:

- “32(a) Should the landlord cancel this lease and should the tenant dispute the landlord’s right to do so and remain in occupation of the leased premises pending the determination of such dispute, the tenant shall never the less continue to pay all rents and other amounts due to the landlord in terms of this agreement on the due dates thereof and the landlord shall be entitled to accept and recover such payment without prejudice to the landlord’s claims for cancellation then in dispute, and the tenant shall otherwise continue to observe all obligations imposed upon him by the agreement.
- (b) Should such dispute between the landlord and the tenant be determined in favour of the landlord, such payments shall be deemed to be amounts paid by the tenant on account of damages suffered by the landlord by reason of the unlawful holding over by the tenant.”

Regarding the claim for value added tax, he said that although at the time the lease agreement was drafted there was no legislation imposing the payment of such tax, it has since come into effect. The landlord is required to pay value added tax on amounts due for rent at the end of each month even where receipts have not been made from the tenant. As a statutory requirement, the landlord is therefore enjoined to levy that tax on the tenant who cannot lawfully refuse to pay it.

Commenting on the defendant’s assertion that they ceded their rights and obligations under the lease to one Gersham Gara and Multishade (Pvt) Ltd, Moyo said that the defendants were not allowed to unilaterally cede the lease. They did approach the landlord with that request but it was rejected out of hand. Instead of handing back the premises if the defendants were no longer interested, they pretended as if they were in occupation when, as it now turns out, it was Gara masquerading as the first defendant. The arrangement between the defendants and Gara

has nothing to do with the plaintiff which continues to regard the first defendant as the tenant which should be evicted together with those claiming through it.

Simon Moyo presented his evidence very well and with dignity. He was aided by documentary evidence including the lease agreement governing the relationship between the parties and the schedules showing how the amounts claimed are computed as well as the arbitral award forming the basis of the arrears. I embrace his evidence.

The presentation of that evidence and its credibility did not stop Ms *Moyo* for the defendants, making an application for absolution from the instance at the close of the plaintiff's case. She did a critique of the plaintiff's case starting from what may have appeared as confusion arising from the amendment of the plaintiff's claim at commencement of trial, through the contents of the summons and particulars of claim right up to the provisions of the lease agreement which the defendants argued could no longer be relied upon by the plaintiff because it has expired. I agreed with Mr *Nkomo* for the plaintiff that this was now a new case for the defendants as it traversed what they had pleaded.

Ms *Moyo* submitted that because of the criticism made against the plaintiff's case nothing was left of it upon which a reasonable court applying its mind reasonably could find for the plaintiff. She submitted that both the claims for rent and for operating costs have not been proved and that the claim for interest was abandoned. The claim for confirmation of cancellation of the lease agreement is meaningless while that for eviction is misplaced because, to the knowledge of the plaintiff, there is a new occupant at the premises who is not the first defendant.

She submitted that the plaintiff has therefore failed to prove a *prima facie* case and as such absolution from the instance should be granted. While the arguments advanced on behalf of the defendants warrant a closer examination in deciding the matter, they however were made pre-maturely. The attack on the contents of the summons and particulars of claim should have, in all fairness, been raised as an exception to the summons or as a preliminary point and not at the close of the case for the plaintiff.

The test for absolution has been stated in a number of case. In *United Air Charterers v Jarman* 1994 (2) ZLR 341 (S) 343 B – C, it was said that:

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court directing its mind reasonably to such evidence could or might (not should or ought to) find for him.”

The same principle was stated in another way in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1(A) 5D. The court stated:

“The test therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all.”

See also *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94; *Nestoros v Innscor Africa Ltd* 2007 (2) ZLR 267 (H) 268 E-H; *Manyange v Mpofu & Others* 2011 (2) ZLR 87 (H) 93G – H; -94A where Patel J (as he then was) made the point that:

“In principle, a reticent defendant should not be allowed to shelter behind the procedure of absolution from the instance. And in practice, the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. See *Theron v Behr* 1918 CPD 443 at 451; *Erasmus v Boss* 1939 CPD 204 at 207; *Supreme Service Station (Pvt) Ltd (1969) v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5-6. Moreover, at this stage of the trial, it is not pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard. See *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (TK) at 185.”

And *Efrolon (Pvt) Ltd v Muringani* (2) 2013 (1) ZLR 309 (H) 316 D-E.

In the present case the evidence led on behalf of the plaintiff is that the relationship of the parties is governed by the written lease agreement which, although it ran its course, has remained valid by virtue of clause 3 (f). That lease did not terminate when the tenant did not exercise the option to renew it but continued on the same terms. For that reason unless terminated by the parties on notice, it continues to bind the parties. The failure by the defendants to plead expiration in their joint plea resonates with that formulation.

The evidence led by the plaintiff is that when a dispute over rent arose between the parties, the dispute was eventually referred to arbitration in terms of the lease agreement and an

arbitral award was issued on 28 March 2014 in terms of which rent was fixed. Although the award was communicated to the defendants they have not paid the fair rent fixed by the arbitrator in breach of clause 6(b) of the agreement. It is for that reason that the plaintiff decided to litigate for relief aforesaid. Although the plaintiff's witness was subjected to extensive cross examination it focused on discrediting the amounts being claimed. A lot of time was devoted to demanding proof of the various debits that were entered against the defendants' account.

In my view the production of invoices on the minute details of the claim is not the only way by which a claim may be proved especially where the tenant is bound by clause 6 (a) to pay rent "as shall from time to time be notified to the tenant in writing by the landlord" and such monthly notification has been given. The *viva voce* evidence of the plaintiff's witness, if credible and supported by a rent account which was kept, should suffice.

In that regard, what we therefore have is evidence pointing to the existence of a landlord and tenant relationship between the parties. With all due respect, the timid defence that the rights and obligations of the tenant were ceded to a third party cannot be taken seriously. This is because the plea of the defendants does not suggest that there was authority granted by the plaintiff for the cession but only "knowledge."

The defendants would want to foist a new tenant on the plaintiff. They may well be entitled to do that depending on the presentation of their own case. What appeared very clear at the close of the plaintiff's case was that there was no privity of contract between the plaintiff and the new occupant. It was therefore for the defendants to tell the court why and how they were released from liability. The plaintiff has covered itself by seeking eviction of those claiming through the first defendant.

There was already evidence at that stage of the trial suggesting that the agreement was breached by a failure to pay the stipulated rent and the other related charges. There was nothing pointing to the falsity of that evidence.

My view was that there was evidence upon which a court directing its mind reasonably to such evidence could find for the plaintiff regarding what it has sued for. In arriving at that conclusion I was mindful of the remarks made by BEADLE CJ, which are binding on me, in *Supreme Service Station, supra* at 5H-I that:

“--- rules of procedure are made to ensure that justice is done between the parties, and so far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind procedure of absolution from the instance.”

See also *Munhuwa v Mhukahuru Bus Services* 1994 (2) ZLR 382 (H) 387 B-C.

It is for the forgoing reasons that I dismissed the application for absolution and placed the defendants to their defence.

The defendants led evidence from Wayne Allan Jones, a director of a family business known as Ekutulene Investments which he said is a registered company which operated Walkers Pub and Restaurant at the leased premises until sometime in 2011 when, tired and frustrated by Knight Frank’s demand for unreasonable rent and operating costs, he handed over the business to his employee Gersham Gara free of charge. Jones did not attempt to contest liability as a surety.

Prior to that, he had offered to pay rent of \$600-00 per month when the parties could not agree on a fair rent, which amount he started paying in 2009 although he did not sign any addendum to that effect. In fact the last addendum that he signed was in Zimbabwean dollars. His frustrating stemmed from the landlord’s demand for unreasonably high rent and operating costs which no business could sustain and Zimra was also busy penalizing the defendant in assessing taxes because it refused to accept the rent statements from Knight Frank.

The first defendant later proposed a rental of \$900-00 which the plaintiff rejected. As a result the dispute was then referred to the rent board, then to the Administrative Court and finally to an arbitrator. Before the arbitration, he decided to sell the business whose wherewithal was worth \$600 000-00. After failing to secure a buyer mainly because noone was willing to buy a business with a rent dispute, he then gave it to his employer in terms of an agreement signed on 15 August 2011, pp. 7 to 10 of exhibit 2. When he did that he wrote to the landlord’s agent in May 2011 advising the landlord that Gersham Gara had taken over the business but a few days later he received a response rejecting Gara as a tenant and pointing out that the defendants had no right to handover the premises to a third party. This surprised him because Gara is a very capable person who has been in the industry for a long time. When that happened the witness

said he did not do anything but left everything in the capable hands of Gara who assured him that he would pursue his own lease in terms of the indigenization laws of this country.

Therein lies the defendants' problem. They knew they were bound by a lease agreement clause 19 of which prohibited cession, assignment or transfer of the rights contained in that lease. That clause reads:

- “19(a). The tenant shall not sublet or give up occupation or possession of the whole or any part of the leased premises.
- (b) The tenant shall not cede, assign or transfer any of his rights, obligations or duties in terms of this lease.
- (c) The tenant shall not pledge or assign any of his furniture and equipment brought into the leased premises and the same shall be subject to the landlord's lien at common law.”

They had approached the landlord with a request to handover the lease to someone else but the landlord refused and demanded that they vacate the premises and surrender the keys. Instead of doing that, they decided to do as they pleased and brought in a third party to the leased premises in clear violation of the lease agreement and disregarding the wise counsel given by the landlord's agent.

If one had any doubt about the wrongfulness of that course of action, such doubt dissipates immediately upon reference to the agreement the first defendant signed with Multishade Investments (Pvt) Ltd represented by Gara. Clause 4 dealing with liabilities states:

“The company (Multishade) shall become responsible for all debts and liabilities in respect of the business, subsisting on the effective date and in particular the claims of employees for salaries, wages, leave pay, gratuities and any other obligations whatsoever, current rental disputes with the landlord and their agent, suppliers accounts and utility bills, and the company shall indemnify Ekutuleni and its directors from all actions, claims or demands in respect thereof.” (The underlining is mine).

The defendants were aware of their obligations towards the landlord. They sought to be indemnified by a third party against such liabilities to the landlord. The act of ceding rights was clearly in breach of clause 19 of the lease as I have already said. The landlord was not a party to the agreement with the third party and such indemnity has nothing to do with it. It cannot be used as a weapon of defence against the legitimate claims of the landlord arising out of a binding lease agreement.

A party that elects to ignore the terms of a contract that it entered into freely, to unilaterally substitute a third party for itself in that contract and to then seek to rely on such conduct to escape liability in terms of the contract is engaging in an exercise in futility. This is particularly so where the agreement of the parties contains a non-variation clause as clause 35(b) which reads:

“This lease constitutes the whole of the agreement between the parties and no variation or collateral agreement shall be of any force or effect unless and until recorded in writing in a document or series of letters signed by the parties.”

Where the parties have elected to restrict their own power to vary or discharge their contract by subsequent conduct by a non-variation clause providing that no variation of any of the terms of the contract shall be valid unless it is in writing, the terms of the contract shall bind the parties unless varied in writing by them. See R. H. Christie, *Business Law in Zimbabwe*, 2nd edition, Juta & Co Ltd, page 107; *SA Centrale Ko-op Graanmaats Chappy Bpk v Shifren* 1964 (4) SA 760 (A) (a judgment in Afrikaans whose ratio on non-variation clauses was adopted by this court in *Fillanion v Esat & Another* HB 106/03).

In addition, in our jurisdiction the doctrine of sanctity of contract is sacrosanct. It was expressed succinctly by JESSEL M. R. in *Printing Registering Co v Sampson* 19 Eq 462 at 465 in the following words:

“If there is one thing that more than any other, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider- that you are not lightly to interfere with this freedom of contract.”

Allied to that is the doctrine of privity of contract which is, in essence, the cornerstone of our law of contract. It postulates that a person who is not a party to a contract cannot be held liable or claim on it because he is not privy to the contract. See *PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe Ltd* 1993 (1) ZLR 55. I must state for completeness that Roman –Dutch law, unlike English law, recognizes an extension of the doctrine of privity of contract by accepting the validity of a

stipulatio alteri or ius quaesitum tertio, roughly, a contract for the benefit of a third party. See generally R. H Christie, *op cit* page 75.

I conclude therefore that the agreement entered into between the first defendant and Multishade has nothing to do with the plaintiff which was not privy to it. It does not release the first defendant from liability in terms of the lease agreement which lease agreement the first defendant breached by failing to pay the stipulated rent and other charges as determined in terms of the agreement by a lawfully appointed arbitrator. The breach entitles the plaintiff to cancel the lease and to eviction. That agreement entitles the first defendant to sue Multishade separately for indemnity and nothing more. Gersham Gara who also testified on behalf of the defendants actually substantiated the plaintiff's claim.

This court has to uphold the sanctity of the contract that the parties entered into which bind the first defendant as already stated. Mr Jones' entire testimony was concerned with questioning the accounts, not on any other ground, but that the defendants required to be shown all the bills emanating from the service providers. He decried the escalation of the charges and felt that because the first defendant did not agree to pay VAT, that tax should not be levied against is.

Unfortunately VAT is a statutory levy which should be paid by operation of the law. The tenant does not have to agree to pay it in order for it to be levied. I conclude that the defendants are indeed liable to pay VAT. The same applies to interest which is provided for in the agreement. It is not enough for the defendants to object to the production of the letter from the bank attesting to what the bank interest rate used was. Simon Moyo gave evidence on the computation of interest and submitted schedules showing the interest due. As I have already said, he was an impressive witness whose evidence I have no reason to disbelieve. The claim for interest has been established.

Ms Moyo for the defendants has of course submitted that the lease agreement between the parties expired on 1 September 2004 and what occurred thereafter was a tacit relocation of the lease because there was an implied renewal of the lease but in terms of a series of addendums the last one of which was signed on 26 February 2007. It was in Zimbabwean currency. Ms Moyo has not stated what then happened after that currency became moribund, but asserts that the first

defendant became a statutory tenant. Their relationship devolved according to the Commercial Premises (Rent) Regulations, 1983. I do not agree.

In *Washmate Motors Centre (Pvt) Ltd v City of Harare* 2013 (1) ZLR 97 (H) I had occasion to deal with tacit and express relocation and made the point that an agreement for a fixed period of time terminates by effluxion of time at the end of the fixed period and no notice is necessary. In the event of a lease, if nothing is said by the parties and the tenant continues to pay rent then a tacit relocation may be presumed. At 103 E –F I stated:

“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.’

In the present case I must decide whether there was a tacit or express relocation.”

See also R H. Christie, *I bid* at page 273. Clearly therefore a tacit relocation is implied because the parties have said nothing about renewal but the landlord has continued to accept rent. What we have in this matter is an express relocation expressly stated in clause 3 (f). The lease was expressly relocated on the same terms set out in the written agreement and the addendums that have been referred to only relate to the rent which was agreed at the time. They did not alter the broader picture.

The issue of prescription which was pleaded by the defendants and also mentioned repeatedly during cross examination was not made an issue for trial. In her closing address Ms Moyo however did not deal with the issue of prescription and the defendants’ witnesses said nothing about it. Being an issue of law, I have to touch on it. Section 14 (1) as read with section 15 (d) of the Prescription Act [Chapter 8:11] fixes the prescriptive period for a debt at three years from the date the cause of action arose. The question which arises though is: When did the cause of action arise?

An assessment of the lease agreement shows that where there is a dispute over fair rent, such rent has to be determined by an arbitrator. In terms of clause 5(f) the arbitrator is enjoined to determine the annual escalation of rent for each successive year of the period of the dispute.

This was done and the arbitral award was only made on 28 March 2014. There can be no doubt that the cause of action in respect of arrear rent only arose then. The summons was served on 28 July 2014. Clearly therefore the claim had not prescribed. The same applies to the claim for operating costs which are claimed as part of the holding over damages from July 2014.

It is however the quantum of the operating costs which has remained unresolved. Simon Moyo stated that they amount to \$266 665-68 when he gave evidence, a figure which Mr *Nkomo* for the plaintiff did not take up his closing address. He submitted that the claim for operating costs is “capable of ascertainment as at the time of granting judgment or eviction.” Mr *Nkomo* ended there. In his concluding remarks where he urges of me the grant of the order prayed for Mr *Nkomo* did not include a prayer for operating costs standing alone. Significantly he had submitted that they are being claimed as part of holding over damages, but only urges of me the grant of those in the sum of \$4858-00 from July 2014 together with operating costs.

Considering that the plaintiff amended its claim at the commencement of trial to remove the claim for operating costs as part of the figure prayed for and that no evidence was then led to explain what they amount to at the time of judgment, there is a *lacunae* in the plaintiff’s case in that regard. Even the figure of \$266 665-68 which Moyo related to does not appear on the schedule of operating costs set out at pp. 39 to 40 of exhibit 1 which records \$257 380-44.

I must state however that it has been established that the plaintiff is entitled to holding over damages from August 2014. The exact amount has not been established and as such it has to be left open. The plaintiff bears the onus to prove its claim and on this score the onus has not been discharged on a preponderance of probabilities at this stage.

In the result, it is ordered that:

1. The cancellation of the lease agreement between the parties is hereby confirmed.
2. The first defendant and all persons claiming title or occupation through it shall be evicted from shop numbers 31 to 34 Bulawayo Centre, JMN Nkomo Street and 9th Avenue Bulawayo.
3. The first and second defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved the sum of \$333 209-47 being arrear rent for the leased

premises, together with interest thereon at the rate of 15% per annum from the date of summons to date of payment.

4. The first and second defendants shall pay to the plaintiff, jointly and severally, the one paying the other to be absolved, holding over damages in the sum of \$4858-00 per month from 1 August 2014 together with value added tax thereon and operating costs incurred from 1 August 2014 to date of eviction.
5. Costs of suit on a legal practitioner and client scale.

Messrs Coghlan & Welsh, plaintiff's legal practitioners

Messrs Joel Pincus, Konson & Wolhuter, 1st & 2nd defendants' legal practitioners