GRASSRANGE SERVICES (PRIVATE) LIMITED
t/a THE PINK BUTTERFLY
versus
NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 3 November 2010

T K Hove, for the applicant
T Pasirayi, for the respondent

GOWORA J: The applicant seeks an order for the rescission of a default judgment entered against it on 1 April 2009.

The background to the dispute is as follows: The respondent is the registered owner of an immovable property, namely – Shop 1 Murandy Square West, Newlands, Harare. On 1 February 2001 the parties herein entered into a written agreement of lease, wherein the respondent leased to the applicant the premises referred to above for a period of three years commencing on 1 February 2001 and terminating on 31 January 2004.

On 18 November 2008 the respondent, through its legal practitioners of record sent a letter to the applicant which stated that the applicant had not paid rental and operating costs for the month of November 2008 resulting in it, the applicant incurring arrears for the same in the sum of $881 566 345 216,25. The applicant was informed in the said letter that the lease had been cancelled. The letter concludes by demanding the applicant pay the arrears, vacate the premises and hand the keys over to the respondent by no later than 20 November 2008. The applicant did not vacate the premises and as a result the respondent caused summons to be issued out on 17 February 2009 under case number HC 429/09 wherein the respondent claimed payment of the alleged arrears for rentals and operational costs holding over damages, interest on the two sums being claimed and costs of suit. It is common cause that the applicant did not enter appearance to defend resulting in the default judgment which is the subject matter of this application.

I will deal first with the issue of wilful default. The applicant states that it was not in wilful default as regards the failure to enter appearance. This is what the applicant states in para 10 of the founding affidavit.

On 21 February 2009, the same day that the applicant was served with the letter dated 18 November 2008, the applicant was served with summons in case number HC 429/09. A copy of the summons and declaration is hereto attached as annexure "F". At that particular date the applicant's account balance with the respondent clearly indicated that the applicant did owe the respondent anything. This was self evident from annexure "E". The deponent to the founding affidavit states that he had sought clarity from Mr Chidemo of Richard Ellis who confirmed that nothing was owing to the respondent and who advised the applicant to ignore the summons as they would be withdrawn. The applicant contends that as a result of this assurance, it did not enter an appearance to defend.

The opposing affidavit has been deposed to by Kumbirai Chidemo, a portfolio manager with CB Richard Ellis who, in the main, denies that he had spoken to Hassan the applicant's representative about having the summons withdrawn. He states that the alleged statement by the applicant is an attempt to found a basis upon which to justify its failure to take any action when served with summons.

It has not been denied by the applicant that it received the summons and decided not to enter appearance to defend the action. The applicant has itself, in its heads of argument, correctly defined wilful – within the context of default judgment -that wilful default has been held to connote deliberateness in the sense of knowledge of the action and of its legal consequences and a conscious and freely taken decision to refrain from entering notice of intention to defend the claim.

The explanation given by the applicant for its failure to enter appearance to defend and is not acceptable. Summons was served upon a manager who would have, or ought to have been alive to the consequences of not defending the summons. Even if one were to accept the contention that the summons and the letter cancelling the lease were received on the same day, it should have leapt to the mind that the respondent was seeking the eviction of the applicant from the lease of premises and prudence and good business sense would have required that continued occupation of the premises had to be ensured and therefore that there was need to respond to the summons. The letter may have emanated from Chidemo, the summons had not and therefore any effort to obtain indulgence would have required that the applicant speak, not

just to Chidemo but to the legal practitioners who had issued summons for eviction. No effort was made to deal with the summons. I find that there was a wilful default on the part of the applicant in failing to enter appearance.

I turn next to the issue of whether or not the applicant has a good and *bona fide* defence on the merits. The applicant does not dispute that rentals and operational costs for November 2008 were not paid in time. It appears that even the rentals for December 2008 were not paid in time. According to the applicant, it made a payment of fifty quadrillion Zimbabwe dollars into the account of C B Richard Ellis on 24 December 2008. The applicant explains its failure to pay the rent for November 2008 in time on an alleged failure by the respondent to issue an invoice for rent. Even assuming that this was the respondent's practice the applicant should just have paid rent according to the previous month's figure until advised otherwise. It is obvious that the amount paid on 24 December 2008 was not paid following the issuance of an invoice. The applicant has however not taken the court into its confidence to explain how it could have paid in December 2008 in the absence of an invoice and yet in November the lack of an invoice had caused it to default in paying rentals. It is the obligation of a tenant to pay its rental when due and unless the rental has been altered the tenant is duty bound to tender such rental as appears reasonable. To my mind, that would be the last amount agreed upon by the parties as constituting fair rental. The applicant clearly breached the lease agreement by failing to pay rental for November 2008.

The applicant has contended that it was a statutory tenant and that based on the provisions of the Commercial Premises (Rent) Regulations, 1983 the respondent did not have good cause to eject the applicant from the premises. The protection afforded to a tenant by the rent regulations protect a tenant from eviction of amongst other things, the tenant continues to pay the rent due within seven days of due date.

From the applicant's own papers, the rent for November 2008 was not paid within seven days of due date nor was the rent for December 2008. The rent for November was paid a month and three weeks later and that for December 2008 after three weeks.

In my view however the applicant never became a statutory tenant. Clause 2 of the lease agreement provides:

"2.1 The lessor lets to the lessee who hires the premises for the lease period.

2.2. at least three calendar months prior to last day of the lease period the lessee shall advise the lessor in writing whether –

2.2.1 the lessee intends to vacate on the termination date, in which event the leassee undertakes to vacate on such date or

2.2.2 the lessee wishes to renew the lease in which event a written agreement of renewal shall be entered by the lessor and leassee on such terms as may be agreed

.2.3 If the lessee fails to give notice as provided in clause 2.2 hereof, the lease will continue from the termination date of the lease or option period on the same terms and conditions, other than the rent payable, but subject to two months written notice of termination on either side being given".

The lease did not terminate by the effluxion of time but was extended in terms of clause 2.3 on the same terms and conditions except for the amount of rent to be paid and secondly that either party could terminate the lease at any time or two months written notice. This is what is referred to as a tacit relocation of the premises. Thus a periodic lease came into being after the initial date of termination and the applicant never became a statutory tenant. I am fortified in this view of the matter by the description given to a tacit relocation by GREENLAND J in H & J Investments (Pvt) Ltd v Space Age Products (Pvt) Ltd 1987 (1) ZLR (H) 242 at 252 A-B in the following terms:

"Cooper op cit at p 319 defines tacit relocation as 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 *casu*, it was not just the landlord allowing the lessee to remain in occupation, the written lease specifically provided for the continuation of the lease after its date of termination. The landlord continued negotiating rentals with the tenant but the other terms and conditions of the lease remained valid and of force and effect between the parties. The lessee however did not abide by the terms and conditions of the lease in that it failed to abide by its obligations in terms of the same.

I am unable to find that the applicant has established good and sufficient cause for the setting aside of the default judgment granted against it on 1 April 2009 and in the premises the application is dismissed with costs.

Mutamangira & Associates, applicant's legal practitioners
Gill, Godlonton Gerrans, respondent's legal practitioners