TOTAL ZIMBABWE (PRIVATE) LIMITED
versus
APPRECIATIVE INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 25, 26 October and 10 November and 1 December 2010

Civil Trial

H Zhou, for the plaintiff
T Mpofu, for the defendant

KUDYA J: The plaintiff issued summons out of this court on 8 September 2009. It sought an order confirming the cancellation of the lease agreement it had with the defendant, the eviction of the defendant and all those claiming occupation through it, arrear rentals, holding over damages, interest and costs of suit. The summons was served on the defendant on 9 September 2009. The defendant entered appearance on 11 September and filed its plea on 30 October 2009.

The plaintiff called the evidence of its Territory Manager Lovemore Tichaona Kuwana ("Kuwana") and produced two documentary exhibits. The first exhibit was the site lay out plan of stand 892A Nelson Mandela Avenue, Harare, the leased premises, while the second exhibit was a 65 paged bundle of documents consisting of the lease agreement and correspondence entered into between the parties through their legal practitioners. The defendant called the evidence of its managing director Ronald Mhlanga ("Mhlanga") and produced exh 3, a 14 paged bundle of correspondence exchanged between the parties.

It was common cause that the defendant entered into a lease agreement with Mobil Oil Zimbabwe (Pvt) Ltd (Mobil) on 1 February 2002 for the lease of the workshop, office space, empty space and other appurtenances that were indicated by Kuwana in exh 1, the site lay out plan of the leased premises. The lease expired by the effluxion of time after six months and the parties did not execute a new written agreement. Instead, they would from time to time discuss and agree on the new amounts of monthly rentals payable. Mobil was acquired by the plaintiff

in 2006. The plaintiff thus assumed the rights and obligations of Mobil including those pertaining to the lease agreement with the defendant.

The relationship between the parties was tumultuous as demonstrated by the action brought by the plaintiff against the defendant in this court in case number HC 3214/07. The plaintiff withdrew that action on 9 January 2009. On 15 January 2009 the defendant's former legal practitioners Chikumbirike and Associates wrote to the plaintiff's erstwhile legal practitioners acknowledging receipt of the notice of withdrawal and sought the plaintiff's input and comment on four proposals it wished included in a written lease agreement. The defendant proposed a five year lease with an option to renew, the inclusion in the lease of the parking space allocated to the defendant, the inclusion in the lease of the informal *pro rata* sharing of utility charges and the exploration of the policy of the plaintiff of leasing the whole premises to a single lessee as opposed to two lessees as prevailed at the premises. The currency which underpinned the lease relationship between the parties was the local currency. The introduction of the multi-currency system of payments in Zimbabwe in February 2009 adversely affected the currency of account between the parties. The plaintiff desired payment of rentals in a functionary currency while the defendant attempted to use the new currency regime as a springboard for renegotiating the terms of lease. The meetings arranged between the parties failed to take place. The defendant did not pay any rentals from February 2009 until 28 July 2009 when the plaintiff cancelled the lease agreement. The cancellation stampeded the defendant into making frantic efforts to save the lease by offering to pay the outstanding rentals. It was common cause that the defendant has remained firmly *in situ* and has not paid any rentals to date.

The parties differed on whether or not the defendant was aware of the rentals that were due in foreign currency before the service of summons**.** The pith of Kuwana's evidence was that he personally handed the statements of rentals due to the defendant's managing director, Mhlanga on the due dates until the lease was cancelled on 28 July 2009. Mhlanga denied ever receiving the statements and indicated that he only became aware of the amount that the plaintiff unilaterally imposed when he was served with the summons. Each party relied on the correspondence exchanged between them to support its averment.

The onus on a balance of probabilities to show prior knowledge of the amount of rental due per month lay on the plaintiff. Kuwana testified that when the defendant failed to pay up he arranged a meeting with Mhlanga for payment of the outstanding rentals and for the

execution of a new lease agreement. He relied on the tone of the letter written by Mushangwe and Company legal practitioners engaged by the defendant on 15 May 2009 as indicative of the defendant's prior knowledge of the amount of rentals due. It reads in the relevant part: "He further advises us that it was agreed by the parties that should the above request be met, our client will start paying his rentals. To date no response had been given to our client and he is too anxious to meet his obligation of paying you rentals." The plaintiff responded to that letter on 28 July 2009 and disputed the existence of an agreement to forego rentals due until the issues of the formalization of parking space, its request for a longer lease and exclusive use of the premises were agreed. Mr *Zhou,* for the plaintiff, contended that the term "rentals" in that letter was used in its technical sense of being synonymous with the actual amount of money demanded by the plaintiff. He further argued that the defendant had prior knowledge of the amount claimed by the plaintiff; otherwise it would have asked in that letter what the monthly rental payable was. Mr *Mpofu*, for the defendant, contended that "rentals" was used in its wide and generic sense of an unquantified and unknown amount of money that the defendant would pay after agreement was reached between the parties. He further contended that the letters written by Chikumbirike and Associates for the defendant on 30 July and 29 September 2009 and the plea demonstrated that the defendant was ignorant of the actual amount of monthly rental demanded by the plaintiff.

The difficult task of assessing the credibility of Kuwana and Mhlanga and the probabilities in order to determine this issue was minimized by the admission made by Mhlanga under the heat of searching cross examination that he was aware of the amount of monthly rental that was unilaterally set by the plaintiff in foreign currency before 5 May 2009. Before he made this admission Mhlanga had maintained that he did not know the amount the plaintiff regarded as monthly rentals until the defendant was served with summons. He had stuck to the suggestion made in the letter his legal practitioners wrote to the plaintiff on 30 July and 29 September that the plaintiff had not advised the defendant of what it regarded as a fair and reasonable amount of monthly rental payable. He had suggested that the statements drawn and produced by the plaintiff for the rentals payable from February to July 2009 were fabricated documents because they all had a print date of 21 October 2010. He had criticised the plaintiff for failing to produce both the signed and unsigned copies of the statement of accounts that it allegedly left with him. The admission portrayed him as an untruthful witness. In the result I was satisfied that Kuwana was a credible witness. I discerned from his testimony

that he verbally conducted most of the business communication between the plaintiff and the defendant with Mhlanga. He represented the plaintiff in 28 different leases involving workshops and service stations. The probabilities show that the plaintiff, being in the business of making an income from the lease of workshops and service stations would naturally have demanded a specific sum of monthly rentals from the defendant in foreign currency. In my view the defendant scuttled the meetings of 5 and 15 May 2009 because it had prior knowledge of the amount of monthly rentals demanded by the plaintif. The letter from Mushangwe and Company demanded that the plaintiff stop all direct communications with the defendant and requested that all future meetings be arranged with Mushangwe and Company. It revealed that the plaintif had in the past arranged for similar meetings which had failed to take place. I was satisfied from the tone and timing of that letter that the defendant was unwilling to agree to the amount of rentals payable because it was already aware of the figure demanded by the plaintiff. I hold that the term rentals as used in the letter of 15 May 2009 demonstrated that the defendant was aware of the sum of money demanded by the plaintiff as monthly rental payable. It was unwilling to pay that amount until the issues it had raised of parking space, *pro rata* sharing of utility charges and sole tenancy were incorporated in a new written lease agreement.

At the pre-trial conference that was held on 5 July 2010 the following two issues were referred to trial:

1. Whether or not the defendant breached the lease agreement by not paying rent from February 2009 to date
2. If the breach is established, whether the plaintiff is entitled to an order for ejectment and the payment of arrear rentals and holding over damages.

Mr *Zhou* based his submissions that the defendant had breached the lease agreement on the case of *Parkside Holdings* (*Pvt*) *Ltd* v *Londoner Sports Bar* 2005 (2) ZLR 68 (H) and *Negowac Services* (*Pvt*) *Ltd* v *3D Holdings* (*Pvt*) *Ltd & Anor* HH 144-09 while Mr *Mpofu* relied on the sentiments expressed by MAKARAU JP, as she then was, in *Local Authorities Pension Fund* v *F & R Travel Tours & Car Sales* (*Pvt*) *Ltd* HH 90-2010 and the views expressed in Cooper's *Landlord and Tenant* 2nd ed.

Mr *Mpofu* submitted that the claim should be dismissed. He argued that the plaintiff grounded its claim on the wrong cause of action. He forcefully contended that the lease agreement relied upon as the cause of action expired by the effluxion of time on 31 July 2002.

He relied on the *Local Authorities Pension Fund* case, *supra*, where at pp 2-3 of the cyclostyled judgment the learned JUDGE PRESIDENT stated:

> "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 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 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."

While the case before the JUDGE PRESIDENT was an application and the present matter is an action, I find that the causes of action in both cases are similar. The views of MAKARAU JP would have applied with equal force in the present matter but for one issue that was not argued before her. It does not appear in Her Ladyship's judgment that the meaning and effect of statutory tenancy was fully explored. Had that been done, she may have come to a different conclusion. The meaning of statutory tenancy is provided in s 22 of the Commercial Premises (Rent) Regulations. Statutory tenancy is the legal relationship borne out of a lease that has "expired either by the effluxion of time or in consequence of notice duly given by the lessor (in which the lessee) however continues to pay the rent due, within seven days of due date; and performs the other conditions of the lease." This definition of statutory tenancy was adopted in such cases as *Chibanda v Musumhiri & Anor* 1999 (2) ZLR 50 (HC); *Irvine* v *HM The Queen In Right of Canada* 1998 (1) ZLR 328 (SC) at 328 B; *Mungadze* v *Murambiwa* 1997 (2) ZLR 44 (SC) at 45E.

The effect is further provided in s 23 of the same regulations which read:

> ***"23. Rights and duties of statutory tenant***
>
> A lessee who, by virtue of s 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of

> all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:
> Provided that, notwithstanding anything contained in the contract of lease a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee."

The effect of s 23 as read with s 22 (2) (b) of the Commercial Premises Rent Regulations is that the original lease is renewed to the extent that it is consistent with the regulations. This view was confirmed by GUBBAY CJ in *Jackson* v *Unity Insurance Co Ltd* 1999 (1) ZLR 381 (SC) at 381G-382A where he stated that:

> "On 29 November 1996, the appellant entered into a contract with the respondent in terms of which the latter leased Flat No. 24 (hereafter referred to as "the premises") for the period 1 December 1996 to 30 November 1997. Upon the expiration of the lease, the appellant retained possession of the premises. Under s 31 of the Rent Regulations 1982 (SI 626 of 1982) ("the Regulations") he became a statutory tenant with occupation of the premises governed by the terms and conditions of the original contract of lease in so far as such were consistent with the Regulations."

In *Chibanda* v *Hewlett* 1991 (2) ZLR 211 (H) at 216B-218D SANDURA JP, as he then was, dealt with the concept of tacit relocation of a lease. At 217B the learned JUDGE PRESIDENT affirmed the views of RAMSBOTTOM J in *Doll House Refreshments* (*Pty*) *Ltd* v *O'Shea & Ors* 1957 (1) SA 345 (T) at 348F-H that:

> "A relocation after a lease has expired is a new contract which may be express or tacit. If the reletting is express the question which of the terms of the expired lease form part of the new contract is a question of interpretation as explained in *Webb* v *Hipkin* 1944 AD 95. Where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are incident to the relationship of landlord and tenant are renewed. But provisions that are collateral, independent of and not incident to that relationship are not presumed to be incorporated in the new letting."

The learned author Cooper at p.350, *op cit*, defines a tacit relocation in these terms:

> "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 my view, there does not appear to be much of a difference between a statutory tenancy and a tacit relocation. Like in a tacit relocation, the terms and conditions of the

original lease that are incident to the relationship of landlord and tenant and consistent with the provisions of the Commercial Premises Rent Regulations as opposed to those that are collateral and independent are renewed. See *Chibanda* v *Hewlett, supra* at 220E. I find that the plaintiff pleaded the renewed agreement by making reference to the original agreement in the declaration.

It seems to me that the submission by Mr *Mpofu* that the plaintiff pleaded the wrong cause of action must fail. Even if I am wrong in finding that the plaintiff correctly pleaded the original lease agreement, I would have dismissed Mr *Mpofu*'s submission on this aspect on the basis that I have a wide discretion to determine the real issues between the parties especially in circumstances such as this where the parties have fully ventilated the issue in dispute during trial. See *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 at 719B-G and the cases cited therein.

Mr *Zhou* submitted that the defendant breached the agreement by failing to pay the rental communicated to it by the plaintiff. In the alternative he submitted that he breached the agreement by failing to pay an amount which the defendant itself would have considered reasonable. He relied on the sentiments of MTSHIYA J in *Negowac Services* case, *supra,* at p 11 of the cyclostyled judgment that:

> "My view is that as long as the defendants wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was a reasonable rent. … The defendants were therefore in clear breach of the lease agreement for non-payment of rent."

In the *Local Pension Authority Fund* case, *supra,* at p.5 MAKARAU JP found the reasoning in *Negowac* very attractive. I agree. After all one of the essential elements of a lease is the payment of rent. The defendant did not pay any rent. It was aware of the amount of rental that the plaintif had unilaterally set. It did not dispute the amount but was willing to pay it once the plaintiff agreed to the three conditions that it had raised.

I find that the defendant breached the lease agreement by failing to pay the rental that was unilaterally imposed by the plaintiff. The plaintiff was entitled to cancel the lease for such breach.

I answer the second issue referred to trial in the plaintiff's favour. In argument Mr *Zhou* prayed for judgment in the sum of US$350-00 per month for both arrear rentals and holding over damages. He abandoned the purported increase of US$402-50 that had been claimed by the plaintiff from 1 May 2009. The evidence of Mhlanga demonstrated that the rental of

US$350.00 per month demanded by the plaintiff was fair and reasonable for the premises that are situated in the Central Business District of Harare. In any event, in his testimony Mhlanga expressed a willingness to pay the rentals demanded by the plaintiff, provided the cancelled lease was restored. He did not challenge the reasonableness of the rentals claimed. The plaintiff rejected the offer and persisted with its claim.

The plaintiff is entitled to the order it seeks together with costs of suit. I would order that interest at the prescribed rate starts to run from the date of the service of summons for both the arrear rentals and holding over damages.

Accordingly it is ordered that:

1. The cancellation of the agreement of lease entered into between the parties for Stand 892A Nelson Mandela Avenue, Harare be and is hereby confirmed.
2. The defendant and all its subtenants, assignees, invitees and all those claiming occupation through it be and is hereby evicted from Stand 892A Nelson Mandela Avenue, Harare.

3. The defendant shall pay arrear rentals to the defendant in the sum of US$2 100-00 together with interest at the rate of 5% per annum from 9 September 2009 to the date of payment in full

4. The defendant shall pay holding over damages at the rate of US$350-00 per month from 1 August 2009 to the date of ejectment together with interest at the rate of 5% per annum from 9 September 2009 to the date of payment in full.

5. The defendant shall pay the plaintiff's costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Manase & Manase, defendant's legal practitioners