

MINING INDUSTRY PENSION FUND

versus

FARTINGALE DESIGN (PVT) LTD

and

LETINA UNDENGE

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE 7, 13-14 FEBRUARY, 13 MARCH AND 3- 4 APRIL 2012

Civil Trial

K E Kadzere, for the plaintiff

T E Mudambanuki, for the defendants

KUDYA J: On 20 October 2010, the plaintiff issued summons out of this court against the two defendants. The plaintiff and the first defendant concluded a lease agreement on 23 March 2009. The second defendant stood as surety and co-principal debtor to plaintiff for the due performance by first defendant of all its obligations arising from the lease agreement.

The first claim was against the first defendant for an order confirming the cancellation of the lease agreement between the plaintiff and the first defendant and its ejection from the ground and Mezzanine floors of MIPF House, 5 Central Avenue Harare. The second claim was against both defendants jointly and severally the one paying the other to be absolved for the payment of arrear rentals and arrear operating costs together with interest thereon at the rate of 5% per annum from 2 October 2010 to the date of payment in full. In addition it

claimed for the payment of holding over damages in lieu of rent and operating costs, and interest at the prescribed rate from 2 November 2010 to the date of ejectment and costs on the scale of legal practitioner and client. The defendants contested the claims.

At the commencement of trial, the amendment to the plaintiff's claim to the figures sought as arrear rentals and arrear operating costs was granted. The amounts were reduced from US\$ 31 317.19 and US\$ 9 102.24 to US\$28 489.00 and US\$7 417.07 respectively.

The plaintiff called the evidence of a single witness Shepherd Razunguzwa, the credit controller of its managing agent Southgate and Bancroft, and produced three documentary exhibits. These were the four page detailed transaction schedule exhibit 1, the 228 page bundle of documents exhibit 2 and the one paged Fartingale transaction reconciliation account, exhibit 3. The defendant called the evidence of two witnesses, its managing director the second defendant and its former administration manager Simbarashe Munetsi and produced exhibit 4, the lease agreement and exhibit 5, the 17 page bundle of documents. The defendants' witnesses dealt with Mr Gomba the general manager of Southgate and Bancroft. Mr Gomba did not testify. The allegations made against him stood unchallenged. I considered this unchallenged evidence given for the defendants as common cause.

It was common cause that the lease was for three years commencing on 1 April 2009 and terminating on 31 March 2012. In terms of clause 28 the agreement constituted the whole agreement between the landlord and tenant and no warranties or representations whether express or implied not stated therein were binding on the parties unless such variations and conditions were in writing and signed by the landlord and tenant. Again, in terms of clause 24 acceptance by the landlord or its agents of any rent or other payment, unless stated otherwise in writing by the landlord would not prejudice or waive, rescind or operate as an abandonment of any right of cancellation acquired before such acceptance.

The agreed rental was US\$3 200.00 per month. The operating costs were agreed at an estimate of US\$990.00 per month. Rent was due in advance on the first of each month. It was common cause that the defendant made actual payments for rentals on the dates that are indicated in exhibit 1. The amount due for rental from 1 April 2009 to 31 March 2010 was US\$ 38 400.00. During that period the first defended paid a total amount of US\$29 700.00. The following table, an extract from exhibit 1, indicates the dates and amounts of rent due and the dates and rental amounts paid.

Date and amount of rent due		amount paid and date of payment	
01-04-09	3 200	3 200	20-03-09
01-05-09	3 200	1 000	07-05-09
		2 500	14-05-09
01-06-09	3 200	2 000	08-06-09
01-07-09	3 200	4 100	07-07-09
01-08-09	3 200	3 200	13-08-09
01-09-09	3 200	1 600	28-09-09
01-10-09	3 200	2 000	09-10-09
01-11-09	3 200	3 200	11-11-09
01-12-09	3 200	1 200	15-12-09
01-01-10	3 200		
01-02-09	3 200	1 200	15-02-10
		2 000	16-02-10
01-03-10	3 200	3 400	17 -03-10
Total	38 400	30 600	

The table shows that the first defendant did not make timeous payment of rent in May, June, July, September, October and December 2009 and that it did not make any payment in January 2010 and all the subsequent months from April 2010. It was common cause that the first defendant last paid rent on 17 March 2010. Even though it remains in occupation on the date of this judgment, it has not paid any other amount as rent for the last 25 months that it has been in occupation.

It was common cause that the plaintiff did not render an account for operating costs to the first defendant from April 2009 to September 2009. When it eventually did so the first

defendant disputed the amounts levied and of its own accord paid US\$300.00 on 9 October and US\$ 1 275.00 on 19 October 2009 and a further US\$ 300.00 on 4 May 2010, thus making a total of US\$ 1 575.00 directly to the landlord. Exhibit 2 especially the reconciliation at page 218 shows the total operating costs for the whole building during the period in issue from which the share due to the first defendant was calculated. The bulk of the documents in exhibit 2 consist of actual invoices issued for various sub-heads by service and utility providers. These are indexed on pages 226 to 228 for the period April 2009 to July 2010. These were conveniently reduced in exhibit 3 to show the share of the first defendant under eight sub-heads of staff costs, repair and maintenance, cleaning, rates, water, electricity, security and repair and maintenance of lifts. Razunguzwa used this information to calculate the first defendant's share of operating costs. He used the wrong percentage of 8 % for the lettable area to arrive at US\$8 992.07 and deducted US\$1 575.00 to arrive at the amount claimed of US\$ 7 417.07. When he used the correct percentage of 7, 59% he calculated the first defendant's share at US\$6 956.23 after deducting the payment of US\$1 575.00.

It was common cause that the first defendant expended US\$23 200.00 from April to September 2009 putting the leased property in good order on behalf of the plaintiff who through the general manager of the landlord's managing agent pleaded lack of funds for the job. I was satisfied from the letters written by the second defendant on behalf of the first defendant as early as 25 March 2009, that it renovated and made the repairs it did at the cost it incurred for and on behalf of the plaintiff who did not have the funds to put the rented property in good order. I was satisfied from the second defendant's testimony, which was confirmed by Munetsi and accepted by Razunguzwa, that the plaintiff did not give the leased premises to the first defendant in good order and repair at the commencement of the lease as required by clause 9.1 of the lease agreement. That the leased premises were not in good order and repair is clear from the extensive repairs done by the first defendant over the first six months of the lease agreement. I, however, find that the cost was US\$23 200.00 recorded in the cash amounts paid to Weavendale Construction on 14 June and 18 August 2009 for the extensive work noted on pages 2 to 5 of exhibit 5. The repairs were to the floors, walls and carpets including replacement of damaged wall plugs, switches and lighting in both the storeroom in the Mezzanine floor and the ground floor. The first defendant failed to lay the basis for seeking the administration manager's salary for those six months as part of the costs of placing the leased property in good order.

It was common cause that on 27 January 2010 the second defendant wrote to Mr Gomba. She made five proposals. These were that interest charged on the first defendant's rental account be reversed, operating costs charged up to September 2009 be reversed as the first defendant was not yet using the building and that the payment of US\$1 575.00 be allocated to operating costs for September, October and December 2009, the security costs be scrapped from operating costs as the first defendant had engaged its own security guard and that rental increases be frozen to give it time to clear outstanding arrears caused by the plaintiff's maladministration. Gomba did not respond to the suggestions and appears to have demanded payment of all outstanding amounts.

It was common cause that the plaintiff cancelled the lease on 13 July 2010 and demanded payment of arrear rentals calculated at US\$21 693.62 and operating costs of US\$5 917.36 for the period from June 2009 to July 2010 and vacant possession within 48 hours of receipt of the letter. The second defendant responded to the letter on 14 and 16 July 2010. In the letter of 14 July she indicated that there had been a serious dispute on the figures for arrear rentals and in the other letter she indicated paying US\$30 000.00 in rentals directly to the plaintiff.

The evidence of the sole witness for the plaintiff was attacked on two grounds. The first was the use of the wrong lettable area percentage and the second was for claims on areas that the defendants alleged were not common to the first defendant and other tenants. He maintained that repairs to the fourth floor toilets of US\$220.00 of 21 May 2009 and purchase of in door flowers of US\$108.00 on 13 July 2009 was properly apportioned to the first defendant under clause 4.3.8 that defined common areas. There were obvious errors in exhibit 1 that were corrected by the plaintiff such as interest payments of US\$480.00 and US\$15 975.00. While he failed to explain the total water bill for May 2009 of US\$1 210.37 under cross examination, he was able to do so in re-examination. He conceded that the July 2009 bill of US\$701.50 was an error. He was not aware that the first defendant was exempted by the plaintiff from paying operating costs for 12 months in lieu of the renovations. While the rationale for paying security and staff costs by the tenant was questioned he maintained that the basis was found in the terms of the written lease. He was not privy to discussions between the second defendant and Gomba. He was simply called to establish the alleged arrear rentals and operating costs and holding over damages after the lease was cancelled.

The defendants raised two defences to the claim. The first was based on illegality. On rentals they averred that the lease agreement was concluded in fraud of legislation. They stated that the leasing of the building for clothes and electrical goods was in violation of council by-laws. They produced an application dated 17 January 2011 for sale of clothing and accessories and electrical goods that was declined on the basis that the stand in question fell within special zone 164 of the City of Harare City Centre Development Plan which prohibited the operations of the proposed shop. The building was a special offices' zone and not a commercial zone. The other defence was one of set off against the plaintiff's claims of the sum expended on renovations and amounts arising from loss of business. These amounts are set out on page 8 of exhibit 5. These consisted of US\$ 31 000.00 for the renovations, US\$80 000.00 for interferences and harassment by council officials claiming licences, meetings with the managing agent, failure to sell electrical goods due non-disclosure by the landlord and the 24 hour eviction notice and US\$6 000.00 for electricity cuts in February 2012. The second defendant and Munetsi averred that the first defendant sustained losses by failing to trade in its main and profitable line of electrical appliances but realised between US\$60.00 to US\$100.00 a day from the sale of clothes. The defendants did not make a counterclaim for loss of business and harassment. The witnesses for the defendants failed to prove the loss of business suffered by the first defendant, with which they sought to counteract and reduce the plaintiff's claims. The second defendant also averred that the figures in exhibits 1, 2 and 3 were exaggerated and that the court action was premature.

The following issues were referred to trial at the pre-trial conference held on 21 March 2011:

1. Whether or not the first defendant breached the terms and conditions of the lease agreement between the parties
2. If it did, what is the quantum of arrear rentals and operating costs and holding over damages that plaintiff is entitled to recover
3. Whether or not the breach of the lease agreement is attributable to the plaintiff's conduct, discretion or consent
4. Whether or not the premises had been condemned by the City Council
5. If so, whether or not the first defendant is excused from paying rent and operating costs for the period when the building was condemned.

I have grappled with the issue of whether I should determine the case on the basis of defences raised in evidence but which were not pleaded. Mr *Kadzere* for the plaintiff submitted that I could not do so without prejudicing the plaintiff. Mr *Mudambanuki*, for the defendants submitted that I could do so in order to achieve justice between the parties.

The parties are bound by their pleadings. In *Robinson v Randfontein Estates G.M. Co. Ltd* 1925 AD at 198 it was stated:

“The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within these limits the Court has wide discretion.”

In *Vos v Cronje and Duminy* 1947 (4) SA 873 (C) at 879 NEWTON-THOMPSON J stated that:

“That the court is not bound by the strict pleadings when the parties themselves have enlarged the issues is beyond argument.”

Further in *Middleton v Carr* 1949 (2) SA 374 (A) SCHREINER JA at 385-6 stated:

“Where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the Court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court. Generally speaking, the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought.”

Lastly, in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H), where all the above cases are cited, GARWE J, as he then was, at 719A-B stated:

“Although there is no specific claim in the plaintiff’s declaration for payment of the sum representing her contribution during the subsistence of the union, this was identified during the pre-trial conference as one of the issues for determination at the trial. The extent to which the plaintiff, and the defendant for that matter, contributed was fully canvassed during the trial. In these circumstances, it is permissible for a court to determine such an issue.”

In the present matter the defendants did not specifically plead set off of the debt as at the date of cancellation. In paragraph 9 of the declaration the plaintiff averred that:

“In breach of its obligation referred to in paragraph six (6) above[to pay rentals of US\$3 230.00 per month the first defendant has failed and /or neglected to pay rent in

full for the period between April 2009 and September 2010 thereby incurring arrears amounting to US\$ 28 489.00.”

The defendants pleaded in paragraph 5 that:

“Ad para 9

This is denied. It is clear that as at December 2009, the alleged amount owing was \$2 000.00, which was attributed to operating costs which plaintiff had not rendered an account to the first defendant. The defendants deny being indebted to the plaintiff in the sum of US\$ 28 489.00 since first defendant made payments for the rent account.

Alternatively, the plaintiff did not disclose to defendants at the time the agreement was entered into that the building had been condemned by the city council, a fact which the defendants only discovered several months later after the commencement of the lease. As such the building was prohibited from occupation and in the premise; the alleged lease agreement was void for illegality. Plaintiff is estopped from making the claim more so when it misled the defendants into entering the agreement of lease without disclosing the material information.”

Mr *Mudambanuki* argued that the set off was implied by the response. I disagree. The response was a bare denial of indebtedness on the rent account. The only time the amount defrayed in renovations is pleaded is in paragraph 10 of the plea in answer to paragraph 14 (a) of the declaration, where the plaintiff claimed holding over damages for rent in the sum of US\$3 230.00 per month. The defendants pleaded:

“Ad paragraph 14 (a)

This is denied as plaintiff is being presumptuous. First defendant is willing to continue paying rentals as agreed as it solely forked out money to have the premises back in habitable order.”

The defendants did not impliedly plead set off of the money paid out in renovations. They were willing to pay rentals as agreed to derive mileage from the amount expended in renovations. The only document in which set off was implied was in the letter of 16 October 2010 written to Gomba by the second defendant in response to the letter of 13 July 2010 that cancelled the lease. She wrote:

“I am a woman who has been paying rentals after sweating hard in these harsh economic conditions. I have already suffered about \$30 000.00 in rental payments to MIPF before operating. After putting the premises in good order to conduct business, I am facing threats of eviction.”

In their respective testimonies, both the second defendant and Munetsi stated that Gomba agreed on behalf of the plaintiff to either reimburse the first defendant for the

renovations or credit the cost to the rent account. It was there uncontroverted evidence that they held discussions with both Gomba and Chief Executive Officer of the plaintiff Kanjanda on the reimbursement. Kanjanda simply referred them to Gomba, while Gomba was receptive to the idea until July 2010 when he attempted to persuade them to relinquish the lease to Royal Bank at which time he became hostile. The issue was fully ventilated in evidence by the defendants. The attitude of the plaintiff portrayed by Mr *Kadzere* was that the renovations were catered for by clause 9.3 of the lease agreement.

Clause 9.3 is better understood in the context of the preceding clauses that deal with repairs and maintenance. Clause 9.1, 9.2 and 9.3 read:

- 9.1 The leased premises shall be deemed to be in good order and repair at the commencement of the lease, unless the tenant has given written notification of any defects to the landlord within 14 (fourteen) days of the commencement of this lease.
- 9.2 The tenant shall keep the leased premises, entrance, fascias and signs in the same good order and repair as they are at the commencement of the lease period and shall redecorate all previously painted internal surfaces at intervals of not more than (5) five years and on termination of this lease or any renewal, extension or assignation thereof.
- 9.3 **The tenant shall clean, maintain and pay all costs and charges relating to the maintenance, repair and renovation of the interior of the leased premises including doors, windows, plate and other glass, lights, including fluorescent tubes, starters, ballast and incandescent bulbs and electrical fittings, equipment and cables.**

The plaintiff's attitude during trial was that the renovations were at the cost of the first defendant.

It seems to me that clause 9.3 flows from clause 9.1. Clause 9.1 restates the common law duty of a landlord to handover leased property in good order and repair. It is only after the landlord has discharged this duty that clause 9.3 takes root. Mr *Kadzere* conceded that the plaintiff did not handover the leased property in good order. He further conceded that it was the duty of the landlord to place the property in good order and repair at its cost before

handing it over to the first defendant. The concession confirmed the truthfulness of the evidence of the second defendant that Gomba authorised the first defendant to renovate the property in lieu of either reimbursement or set off with future rent obligations. The proximity of the letter of 25 March 2009 to the date on which the lease agreement was concluded satisfied me that the plaintiff consented to the arrangement.

I am satisfied that even though the issue of set off was not specifically pleaded, it was fully ventilated at the trial. I am at liberty to employ it in the resolution of the issues referred to trial.

Mr *Mudambanuki* submitted in the main that the plaintiff was estopped from obtaining the relief it sought by the illegality of the lease agreement. He contended that the lease agreement was in fraud of legislation. He relied on the admission by Razunguzwa that at the time the contract was executed the plaintiff did not have a certificate of fitness for the whole building that housed the leased premises. He also relied on the application dated 17 January 2011 on which the Director of Urban Planning Services wrote on 21 January 2011 that:

“Stand 1031 STL falls within special offices zone 164 of the operative City of Harare City Centre Land Development Plan No 22 wherein the proposed shop (for sale of clothing and accessories and electrical appliances) is prohibited.”

Mr *Kadzere* contended that the defendants failed to prove that when the lease was concluded the plaintiff knew that the premises did not have a certificate of fitness or authority to trade in the sale of clothes and electrical appliances. Razunguzwa admitted that it was aware of the absence of a certificate of fitness. The uncontroverted oral evidence of the witnesses for the defendants that Gomba prevailed upon them to use their personal and political influence to persuade the municipal authorities to grant them the certificate of fitness and turn a blind eye to the contravention of its zoning regulations also confirmed the accuracy of these averments. The core business of the plaintiff was to let out property. It is deemed to have had such specialist knowledge.

That the conclusion of a lease agreement for the use of premises contrary to municipal zoning regulations is illegal was set out in *Latimer Manley & Associates (Pvt) Ltd v Larverna Investments (Pvt) Ltd* 1990 (1) ZLR 200 (H) at 203 G where GIBSON J stated that:

“In this case (where a dwelling was used as commercial premises in contravention of both the Commercial Premises (Rent) Regulations SI 676/83 and the Rent Regulations SI 626/82) the illegality was not in my view, innately reprehensible, it was *mala prohibita*. Ordinarily then one would incline to relax the rule-*in pari delicto potior conditio defendentis*.”

The definition of and the jurisprudential justification for relaxing the *in pari delicto* maxim is set out in *Dube v Khumalo* 1986 (2) ZLR 103(S) at 109E-110E. In the *Latimer Manley* case, *supra*, at 203C-D GIBSON J stated that:

“It is not open to the parties to negotiate terms which are clearly illegal and then to turn around and invite the court to recognise or enforce their illegal activity. I would therefore hold that if the lease agreement had not been acted upon, this court would have refused to enforce it. But since it has been acted upon, the court will intervene if justice and equity deem it proper.”

In the present matter the illegal lease agreement was acted upon, therefore I am allowed to intervene if justice and equity deem it proper. The presence of unjust enrichment often drives the court to intervene. In the present matter the plaintiff contended that it was entitled to eviction and payment of arrear rentals and operating costs and holding over damages otherwise were it denied this relief, the defendant would be unjustly enriched at its expense. I find merit in the plaintiff’s contention.

Thus while I would answer the fourth issue referred to trial in defendants’ favour, I would dismiss Mr *Mudambanuki*’s main submission and answer the fifth issue referred to trial against the defendants.

The next issue for determination is whether the first defendant breached the terms and conditions of the lease agreement.

The plaintiff averred that the first defendant did not pay rent on due dates and where rent was paid; at times it did not pay the whole amount due. It also averred that the first defendant failed to pay operating costs. Mr *Mudambanuki* conceded that the first defendant did not pay the full amount due per month in January 2010 and the months from April 2010. I also find that it did not make timeous payments in May, June, July, September, October and December 2009. Exhibit 1 and the table of payments I extracted from exhibit 1 shows that the first defendant was not paying rent on time. The first defendant has not produced evidence to dispute these facts. The non- timeous payment of rent was a fundamental breach of the lease entitling the plaintiff cancellation of the lease agreement.

The first defendant did not pay the operating costs. The averment that it was exempted from doing so for 12 months because it had face lifted the leased premises was not pleaded. The failure to pay operating costs until October 2009 when Mr Lupahla notified them of the oversight in billing them can only excuse non-payment up to the period of such notification. In her letter of 23 October 2009 to Razunguzwa (in response to Razunguzwa's request to pay outstanding rentals for October of US\$3 180.16), the second defendant stated that Lupahla had submitted a bill for operating costs of US\$4 000.00 from April 2009. She further averred that they were prompted to balance payments and share rentals between the plaintiff and its managing agent. She suggested that the managing agent should have discussed a payment plan rather than threaten legal action. I note in passing that she did not suggest that both rentals and operating costs were to be offset by the cost of the renovations. The only valid defence the defendants could possibly raise for non-payment of operating costs to October 2009 was that the plaintiff did not furnish them with a statement for operating costs. Once the statement was supplied for that period and subsequent months to the date of cancellation, it seems to me that the defendants were obliged to pay.

In the letter of 27 January 2010, the second defendant raised a dispute on the amount of operating costs and challenged requests to pay certain classes of operating costs such as security. During the trial the defendants also challenged payment for indoor flowers. The second defendant averred that the defendants were not obliged to pay for operating costs during the first six months of the lease as they had not yet commenced operations. Mr *Mudambanuki* submitted that the plaintiff should have referred the dispute to an independent expert for determination in terms of clause 4.7 instead of launching this action prematurely. Clause 4.7 reads:

“If any dispute arises between the parties in regard to the operating costs, and without derogating from the generality of the foregoing, any dispute as to any amount payable by the tenant in respect of operating costs and the reasonableness of the expenditure, such dispute shall be referred to an independent person who has at least 10 (ten) years experience in the management, maintenance and upkeep of premises, buildings and properties similar to those forming the subject matter of this lease. Such independent person whose decision shall be final and binding on the parties, shall be agreed upon between the parties, and failing agreement within 30 (thirty) days after the date of a written declaration of such dispute as notified by either party to the other, shall be nominated by the President of the Advocates Chambers. Such independent person shall, in making his determination, act as an expert and not as an arbitrator, and shall have due regard to generally accepted standards and practices in the property industry. The expert shall determine which party shall bear the costs of such determination,

having regard to which party's submissions were substantially upheld in the determination of the dispute.”

I make three observations concerning clause 4.7. The phrase without derogating from the generality of the foregoing preserves the obligations set out in the preceding clauses 4.1 to 4.6 that define the nature, computation, content and payment of operating costs. The second is that the tenant must raise the dispute and initiate a written declaration of such dispute. Thereafter the parties agree on the expert and if they fail, one is appointed for them by the President of the Advocates Chambers.

In the present matter, the tenant raised a dispute. It did not initiate a written declaration of the dispute but pursued dialogue and negotiation. Even when dialogue failed to achieve the desired result, it neither provided a written declaration of the dispute nor identified a possible independent expert. The defendants' failure to initiate these preliminary procedures negated the application of clause 4.7 to the dispute and absolved the plaintiff from submitting the dispute to mediation. I do not agree that in bringing the present action the plaintiff acted prematurely or violated the provisions of clause 4.7. Mr *Mudambanuki's* submission in this regard fails.

Accordingly, I find that the first defendant breached the terms and conditions of payment of both rent and operating costs.

Before dealing with the amounts due to the plaintiff under the three heads sought, I must deal with the third issue referred to trial. It seems to me that clause 28 answers the issue. By signing the lease agreement as it stands, the first defendant agreed to all its terms and conditions. It was obliged to pay rent in advance on the first of each month. It was obliged on presentation of a statement for operating costs to pay such costs. It agreed to put the property in good order for the landlord without extracting from the landlord written agreement to waive timeous payment of either rent or operating costs. It agreed to pay these costs in addition to the costs of renovating the leased premises. I am not able to lay blame on the landlord for the first defendant's failure to pay rent. I am also not able to blame the landlord for first defendant's failure to pay operating costs after October 2009. I do not find that the illegality of the lease exempted the first defendant from paying rent and operating costs once it decided to remain in situ after discovering the illegality in December 2009. It was incumbent on first defendant to leave the premises once it discovered that its line of business

was prohibited in the leased premises and if advised sue the plaintiff for its present and future losses. It chose to remain in occupation and benefit from such occupation and use of associated services. I answer the third issue referred to trial against the defendants.

I now consider the amounts due to the plaintiff as arrear rentals, arrear operating costs and holding over damages.

Initially, the plaintiff claimed rent of US\$3 230.00 per month. The claim included US\$30.00 per month for parking fees. In his oral submissions Mr *Kadzere* correctly abandoned the claim for parking fees on the basis that they were not contained in the lease agreement. The claim for US\$28 489.00 included the parking fees and interest charged on over due rentals inclusive of parking fees. Interest on over due rent was charged in terms of clause 7.1 at 5% above the minimum lending rate of the landlord's bankers per month. The plaintiff failed to prove the rate it levied interest on over due rentals. To that extent, the claim for over due rentals inclusive of interest in the sum of US\$28 489.00 was not proved.

The lease agreement was cancelled on 13 July 2010 when the July 2010 rent of US\$3 200.00 was due on 1 July 2010. The first defendant had been in occupation for 16 months. The amount due for rent was US\$51 200.00. In that period the first defendant paid rent in the sum of US\$30 600.00. The amount owing was US\$20 600.00.

I would order payment in this amount.

On operating costs, Mr *Kadzere* conceded that deductions be made for the *pro rata* share of the first defendant for water charges in July (US\$ 701.50), October(US\$764.29), November (US\$942.08) and December(US\$942.08) 2009. The total amount for all the tenants at the building for these months was in the sum of US\$ 3 349.95. The share attributed to the first defendant (7, 59 % of this amount) was US\$254.26. After deducting this amount from the corrected amount due of US\$6 956.23, the amount due for operating costs is in the sum of US\$6 701.97.

Mr *Mudambanuki* argued that the formula used to compute the operating costs was unreasonable bearing in mind the actual usage of the services such as water and electricity by the first defendant. It is apparent that there was a bulk meter for such services for all the tenants. In the absence of an individual meter on each tenant, there does not appear to be any other rational method of sharing such costs between tenants. Mr *Mudambanuki* did not

suggest any. In any event, it is not the duty of the court to write a contract for parties. It is the duty of tenants to negotiate terms of payment with the landlord.

The second contention was that the first defendant was exempted from paying operating costs during the first six months that it was not operating. The contention, however, overlooks the agreement reached by the parties. The definition of operating costs is provided in clause 4.3 as the total amount reasonably and actually incurred by the landlord in relation to the building and the property. That definition does not limit operating costs to those actually incurred by the tenant. It limits them to the landlord's costs. The fact that the defendant was not operating is irrelevant as in terms of clause 4.1 the operating costs started to run from the date of commencement of the lease. Those costs include cleaning costs, security costs and maintaining indoor and outdoor garden for the whole building and the leased property. There is no legal basis for the first defendant to challenge security costs, the cost of purchasing indoor flowers or repairing public toilets in the fourth floor.

It seems to me that the plaintiff has proved claims for arrear rentals in the sum of US\$ 20 600.00 and arrear operating costs in the sum of US\$ 6 701.97.

On holding over damages, I am satisfied that the plaintiff has proved those that are in lieu of rentals at the rate of US\$3 200.00 per month for the period the first defendant remains ensconced on the premises until ejection. It did not prove holding over damages in lieu of operating costs of US\$ 800.00 per month. The average for the 15 months from April 2009 to 30 June 2010 amounts to US\$ 446.80. Operating costs are based on actual expenditure incurred by the plaintiff. By the time of trial the plaintiff would have been in possession of the actual expenditure incurred from July 2010. I will grant the defendants absolution from the instance on the claim of holding over damages for operating costs.

In their evidence, the defendants pleaded set off of the cost of renovations against claim for holding over damages in lieu of rent. The defendants proved expending US\$23 200.00 on the renovations. It is appropriate to set off this amount against the proved arrear rentals and arrear operating costs of US\$27 301.97. The amount due to the plaintiff after set off is US\$4 101.97.

Costs are always in the discretion of the court. The plaintiff sought costs on a higher scale. They are justified by the conduct of the defendants who while accepting the illegality

of their stay on the premises from December 2009 has remained ensconced therein. I find the conduct of the defendants reprehensible. The court expresses its displeasure by mulcting them with costs on the higher scale as prayed for by the plaintiff.

Accordingly, it is ordered that:

1. The cancellation of the lease agreement between the plaintiff and the first defendant is confirmed.
2. The first defendant and all its sub-tenants, assignees, invitees and all other persons claiming occupation through it shall be evicted forthwith from the plaintiff's premises being ground and mezzanine floor MIPF House, 5 Central Avenue Harare.
3. The first and second defendant, jointly and severally the one paying the other to be absolved shall pay to the plaintiff:
 - i) The sum of US\$ 4 101.97 with interest thereon at the rate of 5 % per annum from 2 October 2010 to the date of payment in full.
 - ii) Holding over damages for continued occupation by first defendant of plaintiff's premises at the rate of US\$ 3 200.00 per month from 2 November 2010 to the date of first defendant's ejection together with interest thereon at the rate of 5 % per annum as from due date to the date of payment in full.
4. The first and second defendant are absolved from the instance from paying holding over damages for operating costs incurred from 13 July 2010 to date of eviction.
5. The first and second defendants shall jointly and severally, the one paying the other to be absolved pay the plaintiff's costs of suit on the scale of legal practitioner and client.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Mudambanuki and Associates, first and second defendants' legal practitioners