WASHMATE MOTORS CENTRE
(PRIVATE) LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 January 2013, 29 January 2013
and 6 February 2013

Urgent Chamber Application

T Chitapi, for the applicant
C Kwaramba, for the respondent

MATHONSI J: The applicant has been leasing stand 729 of the remainder of Greencroft in the district of Salisbury, otherwise known as 729 Lomagundi Road, Greencroft Harare, from the respondent by virtue of written lease agreement signed in October 2009. The said lease agreement terminated by expiration of time on 30 September 2012 but the applicant continued in occupation while paying rentals which were happily accepted by the respondent.

The applicant has now approached this court on a certificate of urgency seeking the following relief:

> "Terms of Final Order Sought
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That the Urban Council's (Model) (Use and Occupation of Land and Buildings) By Laws, 1979 RGN 109/79 be declared *ultra vires* s 18(1)(a) of the Constitution of Zimbabwe to the extent that they deprive an individual from (sic) protection of the law.
>
> 2. That the Urban Council's (Mode) (Use and Occupation of Land and Buildings) By Laws 1979 RGN 109/79 be declared invalid on the grounds of inconsistence with the general law prohibiting resort to self-help without resort to due process of the law, for being grossly unreasonable and for being vague.

3. That the respondent's notice Annexure "C" be set aside as being invalid for being inconsistent with the provisions of the Administrative Justice Act [*Cap 10*:*28*].

4. That the respondent shall not summarily evict the applicant without a valid court order issued by a competent court.

5. The respondent shall pay costs of suit.

Interim Relief Granted

Pending the determination of this matter, the applicant is granted the following relief:

6. The respondent is interdicted from summarily evicting the applicant from stand 729 Lomagundi Road, Harare."

The respondent leased out the property to the applicant for the purpose of selling cars and any other purpose incidental to that purpose. Although the written lease agreement expired on 30 September 2012, the respondent allowed the applicant to remain in occupation and selling cars and continued to accept rentals including the rental for the month of January 2013. The respondent also generated a list of approved car sales in Harare as at 1 December 2012 showing that the applicant was also such approved car sales dealer appearing on that list.

To the applicant's chagrin, on 9 January 2013, the respondent served it with a notice which reads in relevant part as follows:

> **"Notice in terms of clause 18 (2) of the Urban Council (Model) (Use and Occupation of Land and Buildings) By Laws 1979 Statutory Instrument 109 of 1979: Vacate Municipal Land**
>
> TAKE NOTICE that you are using and/or occupying Council land illegally as you do not have either a lease with or the permission of the Council.
>
> FURTHER TAKE NOTICE, that within 48 hours from service of this notice upon you, you must do the following:
>
> (i) Depart from the land;
> (ii) Remove all your property from the land;
> (iii) Demolish any structures you may have erected on the land and remove all the rubble from the land.
>
> If you fail to comply with this notice steps will be taken by either Council or its appointed agent to summarily evict you and demolish any structures on the land and you will be liable to pay all the expenses incurred.

Yours faithfully

DIRECTOR OF URBAN PLANNING SERVICES"

It has been argued on behalf of the applicant that a "tacit relocation" was created when the respondent allowed the applicant to remain in occupation of the premises after the expiration of the lease on 30 September 2012, especially as the respondent continues to accept rent payment. For that reason the applicant has a case for seeking an interdict *pendent lite* or an interim interdict against the respondent barring the latter from acting in terms of the notice given on 9 January 2013 which prompted the applicant to bring this urgent application.

The respondent has opposed the application and in his opposing affidavit, Dr Tendayi Mahachi, the Town Clerk, states that when the lease agreement expired on 30 September 2012 it was not renewed. Although not aware that rent payments were received, he assumed that the applicant paid these in bad faith in order to legitimise its stay at the premises. While acknowledging that the applicant was listed as one of the approved car dealers, Dr Mahachi asserts that it enjoyed such status because the respondent had given it until 31 December 2012 to wind up its operations.

Dr Mahachi produced a copy of a letter dated 1 October 2012 written to the applicant by the respondent's city treasurer which reads thus:

"The Manager
Washmate Motor Centre
Stand No 729 STL
Lomagundi Road
Harare

Dear Sir/Madam

Re: NOTICE OF TERMINATION OF LEASE AGREEMENT – STAND 729 GREENCROFT LOMAGUNDI ROAD

Please be advised that at its meeting on the 2nd August 2012, Council under item 59 of the Environmental Management Committee minutes dated 10th July 2012 expressed concern at the proliferation of car sales along road verges which had created unsightly developments in addition to inconveniencing abutting property owners. As a result, Council resolved to evict, do away with all legal and illegal car sales.

> Accordingly, you are hereby formally served with a three (3) months' notice that the Agreement of Lease subsisting with the City shall be terminated on the 31st December 2012. You are therefore being accorded this opportunity to wind up tour (sic) businesses and ensure that you vacate the stand by the closer (sic) of business on Monday 31st December 2012 (sic), failing which you shall be evicted without further notice and at your own cost.
>
> Also ensure that all your outstanding rentals are paid up as at the date of termination.
>
> Yours faithfully
>
> CITY TREASURER"

The letter in question bears what appears to be two different signatures dated 1 October 2012. It does not show the name of the signatories which presumably signified receipt of the letter. Neither does it show where it was served except that it bears the address of the premises leased to the applicant.

Dr Mahachi states that the applicant occupied the premises until 30 September 2012 by virtue of the written lease agreement. Its stay subsequent to that was validated by the City Treasurer's letter of 1 October 2012 which allowed the applicant to remain in occupation until 31 December 2012. Therefore, as the applicant remained in occupation after 31 December 2012 the respondent issued a notice in terms of s 18 (2) of Statutory Instrument 109/79 which notice it was entitled to issue because the applicant occupied the premises without the consent and/or authority of the respondent.

In order to succeed in an application for an interim interdict, the applicant must establish the following:

(1) A *prima facie* right to the relief claimed, even though open to some doubt;
(2) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing that right;
(3) A balance of convenience in favour of granting the interim relief; and
(4) The absence of any other satisfactory remedy.

The papers before me show that the last three of the above cited requirements for the grant of an interim interdict do exist. This is because the respondent has already given notice of its intention to summarily evict the applicant from the premises and demolish any

structures on the land such action being imminent, there is a well-grounded apprehension of irreparable harm.

The dispute between the parties over the premises certainly does not give rise to a train smash situation on the part of the respondent regard being had to the fact that the applicant has operated a car sales business at the same place since 2009 by virtue of a valid lease agreement. Even after the expiry of that lease the respondent still allowed the applicant to conduct that business, albeit in a state of what the respondent called "winding up" for another three months until 31 December 2012. In my view, the balance of convenience would seem to favour the applicant.

It would appear that there would be no other remedy available to the applicant short of the interim relief that is sought. Indeed Mr *Kwaramba,* for the respondent did not advance any argument against the satisfaction of the last three requirements for an interim interdict.

It is however the requirement for a *prima facie* right which is strongly contested. Mr *Chitapi,* for the applicant advanced a lot of arguments on that point but they all boil down to the applicant's assertion that it is entitled to remain in occupation of the premises because, although the lease agreement terminated by effluxion of time on 30 September 2012, it was relocated after that by the conduct of the parties. In that regard, Mr *Chitapi* submitted that the respondent continued to accept rent from the applicant and even published a notice in the newspaper in December 2012 which notice listed all car sale garages which were operating legally in Harare, which conduct he claimed, shows tacit relocation of the lease.

Mr *Chitapi* strongly argued that once the lease agreement had been relocated, all its provisions remained in force including the dispute resolution provision, clause 11, providing that the parties shall make every effort to resolve disputes amicably by negotiation and in the event that negotiation fails, the dispute must be referred to arbitration. He went on to say that it was incompetent for the respondent to revoke s 18 of the regulations (SI 109/79) on 9 January 2012 without reference to arbitration. In any event the applicant is now challenging the statutory instrument.

Regarding the notice of termination dated 1 October 2012, the applicant's case is that it was simply not served upon it and can therefore not be relied upon.

What I therefore have to decide is whether, the applicant has a right, even if open to doubt, which it can seek to protect. If it does, then interim relief must be granted but if the conclusion is that no such right exists then the application must fail.

It is common cause that the relationship between the parties was governed by the written lease agreement which expired by effluxion of time on 30 September 2012. 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.

According to the learned author RH Christe, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Ltd at p 273:

> "The requirement that a lease be for a specified time calls for slightly fuller treatment. Commonly the time is specified as a fixed number of months or years, or until a fixed date, but there is no reason why it should not be specified as continuing until the happening of a certain event. In all such cases the lease terminates at the end of the fixed period or on the happening of the event, without the necessity of notice by either party: *Tiopaizi* v *Bulawayo Municipality* 1923 AD 317 325, a case on a contract of employment decided according to principles equally applicable to contracts of lease. The same passage in De VILLIERS JA's judgment in *Tiopaizi*'s case points out that if, at the end of the fixed period, the landlord permits the tenant to remain in occupation the lease will continue (but not in respect of an option to renew: *Chibanda* v *Hewlett* 1991 (2) ZLR 211) by what is known as tacit relocation until terminated by reasonable notice; *H & J Investments* (*Pvt*) *Ltd* v *Space Age Products* (*Pvt*) *Ltd* 1987 (1) ZLR 242. A landlord who does not wish this to occur may protect himself by giving the tenant notice at any time before the end of the fixed period, the tenant not being entitled to demand reasonable notice because the only object of the notice is to reaffirm the duration of the lease and make it clear that the landlord does not consent to the tenant's continued occupation." (The underlining is mine)

The learned author, Cooper, *The South African Law of Landlord and Tenant*, (1973 ed) defines a tacit relocation at p 319, a passage quoted with approval by SANDURA JP (as he then was) in *Chibanda* v *Hewlett* 1991 (2) ZLR 211 (H) at 216 C, as follows:

> "A tacit relocation is an implied agreement to re-let 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 tacit or express relocation. This is because, while Mr *Kwaramba* for the respondent bases the respondent's case on a letter dated 1 October 2012 addressed to the applicant in which the lease is extended to 31 December 2012 which would mean an express relocation, Mr *Chitapi* for the applicant denies the existence of such letter or that it was served properly upon the applicant.

I have stated that the letter was addressed to the business premises of the applicant and not the *domicilium citandi et executandi* given in the expired lease agreement, which the

applicant contends was not proper service in terms of the agreement. The applicant further argues that the letter was not served at all. I have already said that a copy of the letter is appended with two signatures and a date of receipt which is 1 October 2012.

If the letter of 1 October 2012 was served on the applicant and the applicant did not contest its contents, then its silence would mean acquiescence and the terms of the letter would be applicable. The letter makes it clear that the lease agreement would not be renewed and that the applicant had until 31 December 2012 to wind up its operations.

The letter was signed for, presumably at the applicant's business, a clear indication that it was received, just a day after the lease agreement expired. The applicant did not do anything to challenge its contents. Instead it continued paying rent as required by that letter. To then say that the letter was not received, is in my view, self-serving under circumstances suggesting otherwise. I am satisfied that, on a balance of probabilities, the respondent has proved that the letter of 10 October 2012 was served on the applicant.

The issue of whether or not this was proper service in my view is not important bearing in mind that the lease agreement containing the address for service in Emerald Hill Harare, had expired. The point is made by RAMSBOTTOM J in *Doll House Refreshments* (*Pty*) *Ltd* v *O'Shea & Ors* 1957 (1) SA 345 (T) 348 F-H, which is quoted with approval in *Chibanda* (*supra*) at 216 F-H that:

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

I make a finding that the respondent expressly relocated the lease agreement by its letter of 1 October 2012 to 31 December 2012 which letter was drawn to the attention of the applicant by service upon an individual, or is it individuals, who signed for it on the same date. To say that the respondent intended to import into the "new contract" the provision in the expired lease relating to service of correspondence at 70 Broadland Road Emerald Hill, Harare would be stretching the imagination to elasticity limit.

The respondent was merely allowing the applicant to remain in occupation for purposes of winding up its business. It clearly would not have intended to be saddled with

difficult and harsh provisions relating to service of the notice at an address other than the premises re-let to the applicant. I am fortified in that view by the pronouncement of SANDURA JP (as he then was) in *Chibanda* (*supra*) at 218 A-B in relation to a tacit relocation that a lessor should not be taken to have agreed to the importation of a term that is too onerous unless he has done so in express terms. In *casu*, the respondent relocated the lease expressly and did not expressly import the *domicilum citandi et executandi* which was given in the expired lease into the relocation.

I therefore come to the inescapable conclusion that the respondent was not required to deliver the notice at an address other than the premises re-let. In that regard, the applicant was aware of the terms of the relocation and in particular of the fact that it had until 31 December 2012 to vacate.

The conduct of the applicant is also consistent with a party which was aware of the day of reckoning. Although the lease had expired on 30 September 2012, it did not do anything visible to try and renew the lease. Although the applicant was aware of the notice given to all car sales operators by the respondent, which notice was published in the newspaper in December 2012, it did nothing to challenge that notice until it was served with a notice in terms of the regulations which the respondent revoked. I say the applicant was aware of the published notice because it specifically says so in paragraph 6 of its founding affidavit which reads:

> "In or about October and November 2012 the respondent started demolitions of car sale garages which it deemed illegal. It is common knowledge that the respondent published a notice in the newspaper in December 2012 in which it publicized the names of car sale garages which were legally in operation …"

What the applicant omits is to mention that the notice in question, as published in the newspaper had the following preamble:

> "Pursuant to the on-going crackdown on illegal car sales, illegal billboards, vending and other illegal activities, below is a list of registered car sales/parking garages operating in the City.
>
> Their operations were approved by the City Council and validated via the issuance of leases. Operators are advised to cease operations when their leases expire. Operators not on this list must cease immediately.
>
> Failure to comply with this notice will result in UNRELANTING ENFORCEMENT ACTION being taken against defaulters."

Rocket science is not required to deduce that the applicant, which is one of those operators listed on the notice, was aware that the lease had not only terminated but that even the express relocation up to 31 December 2012 was not going to be considered for renewal at all. Accordingly the applicant was left with no right whatsoever to protect at law.

That brings me to the issue of the applicant's signal failure in this application to disclose material facts which it was aware of. I have already found that the letter of 1 October 2012 relocating the lease agreement for a fixed period up to the end of year 2012 was indeed served on the applicant. It was therefore imperative for the applicant to disclose the existence of that letter in its founding affidavit. It did not.

By his own admission the applicant did have sight of the newspaper publication that I have cited above which means that it was aware that the respondent had specifically directed that the applicant should cease operations on 31 December 2012. This was a very material fact which the applicant was obliged to disclose in its application. It again did not. Instead, the applicant elected to attach a document omitting the preamble damning in its effect on the applicant's case.

Indeed, true to its outlook, when the applicant was served with a notice in terms of the regulations on 9 January 2013, which notice advised of its imminent summary eviction, the applicant proceeded the following day on 10 January 2013 to pay the rent for January 2013. In doing so, the applicant was clearly not acting in good faith because it was aware of the position of the respondent. It cannot therefore be allowed to rely on the payment of the January 2013 rent to build a case which it does not have.

This court has repeatedly stated that the utmost good faith must be shown by litigants making applications of this nature in placing all material facts before the court so that the court can make an informed decision: *N & R Agencies* (*Pvt*) *Ltd & Anor* v *Ndlovu & Anor* HH 198/11, *Shungu Engineering* (*Pvt*) *Ltd* v *Songondimando & Ors* HH 99/12 and *Graspeak Investments* v *Delta Corporation* (*Pvt*) *Ltd* 2001 (2) ZLR 551 (H) 554 D.

I conclude that the applicant has not shown to my satisfaction that it has a *prima facie* right which it can protect through the medium of a temporary interdict. While the applicant is at liberty to contest the propriety of SI 109/79 that does not translate to a *prima facie* right which entitles the applicant to interim relief of an interdict.

Accordingly the application is dismissed with costs.

T H Chitapi & Associates, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners