

PARIRENYATWA GROUP OF HOSPITALS
versus
DEFINE HORIZONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 January & 7 February 2018

Opposed application

T Tandi, for applicant
CW Gumiro, for respondent

TSANGA J: The applicant seeks eviction of the respondent to whom it was leasing a take away and a superette on its hospital premises, on the grounds that the lease has expired; that six months' notice had been given to the respondent; and, lastly that the continued occupation is illegal. The application has some important background facts to it that have led to the present application. The parties entered into the initial lease agreement in August 2010. The lease was in writing and was for a period of three years. All went well during this period or so it would seem. In 2013, the lease was renewed on the same conditions as the 2010 lease. However, midway through this period, the applicant sought to cancel the lease agreement between the parties. The respondent resisted this eviction resulting in the applicant dragging the respondent to court to confirm the cancellation and to get its ejectment. The matter was heard as HC 2374/15 sometime in October 2016 and the judgment passed in January 2017. Materially, at the time the court found the applicant's intentions in seeking to terminate the lease before its expiry to be less than noble, it having emerged that its intention was to put in a more favoured tenant. The long of the short is that by the time the matter was heard, the lease had expired by effluxion of time. This was at the end of June 2016. When the applicant attempted to raise this in the matter as an additional cause for eviction, the Judge was not persuaded because that was not the cause of action that had been pleaded. Furthermore, no effort had been made to amend the claim following the expiry of the second term of the lease in June 2016. The applicant had therefore lost its case for eviction at that stage for this additional reason.

However, the Judge having observed in his judgment that the renewal provision in the 2010 lease was carried over into the period of the lease that was the subject matter of the dispute, the applicant (as then plaintiff) had the onus to flight a new tender to enable the respondents (as then defendant) to regularise their position. Following on from this, the applicant had written to the respondent on the 7th of March 2017, indicating that in accordance with the judgment in HC 2374/15, they were notifying the respondent that the lease agreement would terminate on 8th of September 2017 in terms of the six months' notice period stated in the 2010 lease agreement. The applicant equally advised that it would be floating a tender and assured the respondent that they were welcome to participate in the tender. The tender was flighted with its closing date as June 23 2017. The respondent happily participated. They lost the tender to Berringham Trading who offered rentals of US\$4 500.00 a month for the shop compared to respondent's offer of US\$ 2600.00.

What has led to the present application is that following their loss the respondent then wrote to the applicant on the 22nd of August 2017 pointing out that its notice to vacate sent to them on 7 March 2017, more than five months earlier, was defective. The reason advanced was that in terms of the lease agreement, the tender should have been held prior to the termination of the lease – in other words before the end of June 2016. Their argument was therefore that the tender which was held a year later in June 2017 flouted the lease provision. The relevant clause relied upon in the lease agreement read as follows:

“At the end of the lease period, the lessee shall apply for the renewal of the lease through submission of bids in response to tender invitations, which shall be advertised 6 months before the expiry of the lease agreement. Notice to terminate operations shall be given in writing by either party on the first of the month at least 6 months before hand”.

In other words, drawing on the above provision, respondent's argument was that the lease could not have been terminated prior to consideration of the tender bids, which bids should have been advertised for in January 2016. As this had not been done at the material time in accordance with the above, the respondent argued that it remained validly on the premises and that the attempt to evict it through the letter dated March 2017 was of no effect. Moreover, the letter was said not to have addressed the reason for termination. The respondent also argued that there were in fact two lease agreement one signed in August 210 and another in June 2010 and the latter gave the respondent the right of first refusal. The respondent also said that it was seeking payment for damages suffered and that these could only be determined on trial.

The applicant's disputes that it acted improperly as the lease had expired anyway by effluxion of time. It is also argued that the giving of notice was technically now a formality to ensure vacant possession to whoever won the tender.

The applicant being a group of public hospitals is a public institution which has to follow valid tender procedures. There was no way that the respondent could remain on the premises without going through this process as mandated by the relevant Act being the Procurement Act [*Chapter 22:14*] and the applicable regulations being the **Procurement Regulations SI 171/2002**.

The expiry of the lease was a result of a fixed period. It had a very determinable beginning period and a very certain end period from the start in 2010 and when renewed on the same conditions in 2013. It is common cause that the parties were already before the courts at the time that the lease expired. The lease was not renewed and there was no consensus to renew the lease as the parties were already in court. The controversy turns on whether the failure to adhere to the time frames for advertising for bids which was well out of time, meant that any flighting of bids thereafter would be a nullity. I think not.

I say this because the hospital being a public institution the lease agreement was fundamentally underpinned by a public procurement process in terms of the Procurement Act [*Chapter 22:14*] and its regulations. In particular s32 of the Act sets out in detail the procedures that are to be followed for the procurement of services. The basis of a tender is to invite all qualified bidders and to ultimately choose on the basis of quality and price. The fact that the time period stipulated in the lease was not adhered to due to circumstances peculiar to the case is in my view not the point. The time frames are there for the convenience of renewal rather than as fundamentals that impact on the flighting of bids if not adhered to. It is a fact that there are tender procedures that are to be followed so as to ensure fair and transparent selection. That is ultimately the crux of the matter. The challenge to the holding of the tender outside the six months' time frame also had an explanation and cannot be said to have been in anyway wilful. It is impossible and undesirable to pretend that there was no dispute between the parties that had led to the delays. This court has to look at the entire context to appreciate why the notice of termination was being written when it was being written. Furthermore, the failure to advertise for bids as stipulated had also no bearing whatsoever on the expiry of the lease since as has already been stated, its time frame was fixed. Even though the letter was worded in such a way as to be terminating a lease agreement, the lease agreement itself had expired by efflux and had not been renewed since fundamental to its renewal was the tender public process.

There is no doubt that the defendant has held over after being given notice simply because it lost the bid. This conduct is unfortunate and should not be countenanced.

Indeed the remarks made by FOROMA J in HC 2374/15 *Parirenyatwa Group of Hospitals v Define Horizons HH 44-17* regarding those who refuse to abide by the results of a tender process are particularly apt with respect to the respondent this time round. As he stated:

“Quite why a party which has lost competition through the tender system should be allowed to come through the back of the door and be allowed to wrestle to the contract from a successful bidder is not easy to understand. It defies the very *sine qua non* of the procurement procedures provided for by the procurement legislation. This should not be allowed to happen”

There is no dispute of fact or issue of damages which needs to be referred to trial here. The letter written to the applicant was clear that respondent was being given notice and that the lease would go to tender. The respondent participated freely and voluntarily with the legal process that is mandated of public institutions and enterprises. The respondent simply lost. There is also no dispute as to which lease agreement bound the parties. The issue of whether there was another lease agreement which gave a right of first refusal can be easily disposed of by reference to the decision in HC 2375/15 by FOROMA J. The applicable lease was clearly and categorically stated to be that of 10 August 2010. In the circumstances there are no valid reasons for the respondent to refuse to vacate the premises.

Accordingly the order is granted in favour of the applicant as follows:

It is ordered that:

1. The Respondent and all those claiming occupation through it be and are hereby evicted from the precincts of Parirenyatwa Hospital, in particular a retail outlet and takeaway situated within the said Mazowe Street Harare.
2. Respondent to pay holding damages at the rate of US\$150.00 per a day reckoned from 9 September 2017 to the date of its vacation.
3. Respondent to pay all arrear utilities and water to the Applicant or alternatively to the relevant authority dues as of the date of its vacation.
4. Respondent to pay costs of suit on a legal practitioner scale.

Kantor and Immerman, applicant's legal practitioners
Ngarava Moyo & Chikono, respondent's legal practitioners