W & E SILKS (PRIVATE) LIMITED
versus
FYNATEX DISTRIBUTORS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 21 January 2022 and 15 May 2023

Opposed Chamber Application for Leave to Execute Pending Appeal

E Mubayiwa, for the applicant
T Mjungwa, for the respondent

CHITAPI J: The applicant is the owner of a property called Shop No. 1, 32 Julius Nyerere Way, Harare. It leased the property to the respondent by written lease agreement executed on 17 January 2018 due for termination on 31 March 2018. Upon the expiry of the lease agreement, the applicant sought the eviction of the respondent and an order to confirm the cancellation of the agreement. The applicant also pleaded that it required the leased premises for its own use.

Consequent on the judgment being delivered, the respondent noted an appeal to the Supreme Court on & October 2021. The appeal is pending determination in the Supreme Court under case No. SC 377/21. The appeal is based on three grounds of appeal as set out in the notice of appeal as follows:

> "GROUNDS OF APPEAL
> 1. The court *a quo* erred and misdirected at law in not considering whether or not the lease agreement between the parties had been novated, despite this issue having been duly placed before the court *a quo* by the appellant.
> 2. The court *a quo* erred in founding the eviction of the appellant on the basis of statutory tenancy and late payment of rentals by the appellant, despite the respondent not having sought such relief before the trial court and having only sought the eviction of the appellant on the basis of the termination of the lease agreement by the effluxion of time.
> 3. The court *a quo* erred and misdirected itself at law in find that the principle of substantial compliance does not apply to statutory tenancy, despite the principle being one that is applicable to all statutory enactments."

The approach of the court in determining an application for leave to execute pending appeal is set out in several judgments of the superior courts of this jurisdiction. In the case

Zimbabwe Mining Development Corporation & Anor v *African Consolidated Resources PLC & Ors* SC 1/10, it is stated:

> "The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave, and if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet 49.7.3; *Ruby's Case Store (Pty) Ltd* v *Estate Marks and Anor supra* at p 127). This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (*cf. Fismer* v *Thornton* 1929 AD at p 19). In exercising this discretion, the court should in my view, determine what is just and equitable in all circumstances, and, in doing so, would normally have regard *inter-alia* to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (the respondent in the application), if leave to execute were to be granted'
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (the applicant in the application) if leave to execute were to be refused.
> (3) The prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to harness the other party, and
> (4) Where there is the potentiality of irreparable hard or prejudice to both appellant and respondent, the balance of convenience as the case may be."

See *Netone Cellullar (Pvt) Ltd* v *Netone Employees & Anor* 2005(1) ZLR 275 at p 281, *Nzara* v *Tsanyau & Ors* HH 303/14.

In relation to the material facts of the case the trial court had to determine four issues as agreed by the parties at the pre-trial conference. The issues were firstly whether or not the respondent was a statutory tenant and whether the applicant's claim that it required the premises to renovate them or for own use was established as a good and sufficient reason to justify the eviction of the respondent. Issue three was whether or not the reasons given by the lessor complied with the Commercial Premises Rent Regulations (*sic*) and fourthly whether costs be awarded on the legal practitioner/client scale. In the trial, it became common cause that the respondent was not after the expiry of the lease agreement due to effluxion of time paying rentals within seven (7) days of due date in order to get protection afforded by the Commercial Premises (Rent Regulations 1983. The respondent excused the default on the basis that there had been a novation and that a new lease was created by the acceptance by the applicant of overdue rentals.

It was clear from the record of trial proceedings that the respondent did not confess and avoid in its plea. In other words, it did not confess to late payment of rentals and seek to avoid liability on the basis of estoppel. Novation was not listed as an issue for trial. In consequence, the appeal court agreed with the submission of the applicant's counsel that the trial court created the novation issue out of its own resolve. The determination of the issue was considered

by the appeal court to be determinant of the dispute because once the respondent failed to prove that it was a statutory tenant as envisaged in s 22(2) of the Commercial Premises (Rent) Regulations, it could not rely on statutory tenancy protection as a defence to the claim for eviction from the premises.

Dealing with the veracity of the grounds of appeal as listed, the respondent in the first ground averred that the appeal court misdirected itself at law by failing to consider whether or not the lease agreement between the parties had been novated despite the fact that the respondent had placed that issue before the court a quo. It is of course incorrect to aver that the issue of novation was raised by the parties in the trial court. The respondent could not on appeal and now even point to the portion of the record where the issue was raised. It was an issue raised for the first time in the judgment of the trial court.

The appeal court judgment clinically dealt with the irregularity by a court where the court determines an issue which the parties have not raised. The appeal court was directed by the *dicta* in the case of *Lifort Toro* v *Vodge Investments (Pvt) Ltd & Ors* SC 15/2017; *Nzara & Ors* v *Kashama N.O. & Ors* SC 18/18 and *Makgatho* v *Old Mutual Life Assurance (Zimbabwe) Ltd* SC 57/2015. The cases make it clear that the parties are bound by their pleadings and that the court must determine only the specific matters in dispute and should not pronounce upon a claim or defence not raised by the parties.

The respondent in the opposing affidavit averred that novation was a point of law which could be raised at any stage of the proceedings including an appeal. It averred that it had raised the point in the heads of argument on appeal. Firstly, novation is not just a point of law. It is a point of mixed fact and law. There has to be established facts from which novation is inferred. The respondent was in any event required to give notice of the point of law to be raised with the applicant being afforded an opportunity to respond to it. The respondent did not do so and cannot argue that it raised a point of law for determination when such alleged point of law was not properly raised for determination. On this score as well, the respondent's argument has no merit. There would clearly be no prospects of this ground of appeal succeeding.

In the second ground of appeal, the respondent seeks to impugn the appeal court judgment on the basis that the appeal court founded the order of eviction upon the basis of statutory tenancy and late payment of rentals yet the applicant had not sought such relief and "only sought eviction of the appellant on the basis of termination of the lease agreement by the effluxion time". This ground of appeal could not have been motivated by the desire on the part

of the respondent to genuinely have the Supreme Court test the correctness of the judgment appealed against. This ground is so devoid of merit that little needs be said about its merit lessness.

The first issue for determination by trial court was whether or not the respondent was a statutory tenant. The respondent had pleaded in its plea that it was such a tenant and relied on such pleaded status to avoid eviction. The trial court found that rentals were not being paid within seven (7) days of due date which late payments would violate a condition preceded to get of protection from eviction as a statutory tenant. The trial court then determined that the late acceptance of rentals amounted to a novation. It was not clear what novation was being referred to because the question is novation of what? The appeal court interpreted the position of the respondent arguing estoppel as that because the respondent was paying rentals late and paid late and the respondent accepted them, then the applicant was estopped from relying on late payment of rental as constituting a breach of the statutory tenancy. The position as set out in the appeal judgment was that, once statutory tenancy was not established, there was no necessity to consider the issue of whether the applicant required the premises for renovations because such exception to statutory tenancy protection is invoked where the occupation of the premises is governed by a Statutory tenancy as defined by s 22 of the Commercial Premises (Rent) Regulations, 1983.

A reading of s 22(2) of the said regulations is clear that the court is precluded from making an order for recovery of possession of the commercial premises or for eviction as long as conditions of payment of rent within seven (7) days of due date and full compliance with the rest of the terms of the expired lease are adhered to by the lessee. The applicant *in casu* had in the trial sought confirmation of expiry of the lease agreement and ejectment. The respondent's response was that it enjoyed the protection of a statutory tenant on the principle that he who avers must prove, the respondent ought to have then proved that it was compliant with the requirements which would entitle it to statutory tenancy protection. It failed to do so by its own admission and thus was not protected. Upon such failure, its defence fell through. There being no substantive alternative or further defence which would defeat eviction having been pleaded, eviction could not be avoided. The trial court ought to have granted the applicant's prayer and hence upon reversal of the order of the trial court, the appeal court granted the applicant's prayer as prayed for. The appeal court judgment dealt with this issue in great detail. There are clearly no prospects of success of this appeal ground succeeding.

The third ground advanced is what the respondent in para 10 of the opposing affidavit advanced and described as the "crux of the respondent's appeal". The ground of appeal is simply that the appeal court erred law in holding that the doctrine of substantial compliance did not apply to statutory tenancy. The respondent argues that the determination of whether there has been substantial compliance is to be considered on the basis of what the legislature intended to achieve. The respondent averred that the substantial compliance was to be found upon a consideration of the fact that the respondent "continued to pay rentals in the manner that it had always done during the existence of the lease agreement". The respondent argued that the court should have been guided by the "Supreme Court formulations and pronouncements on substantial compliance" and thus misdirected itself by not doing so.

Despite boldly averring that there is a plethora of case authority by the Supreme Court which should have guided the court on its formulation of the application of the doctrine of substantial compliance, the respondent only cited the case of *Kutama* v *Town Clerk of Kwekwe* 1993(2) ZLR 137(SC) at 144 and *Sterting Products* v *Zulu* 1998(2) ZLR 293(SC). The respondent's counsel quoted the obiter statement of the learned CHIEF JUSTICE GUBBAY as follows:

> "Now, whether procedural requirements are mandatory or merely directory are open to waiver, has been considered on several occasions in respect of different statutes dealing with a variety of subjects. In *Liverpool Borough Bank* v *Turner* 30LJ Ch 380 quoted with approval by FISHER J in *Chapman* v *Earl* (19678) (s*ic*) I WLR 1315 at 1319 Lord Campbell said:
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> "No universal rule can be laid down for the construction of statutes as to whether mandatory requirements shall be construed directory only or obligatory, with an implied nullification for disobedience. It is the duty of the courts of justice to try get at the real intention of the Legislature by carefully attending to the whole scope of the nature to be construed."
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> The categorization of an enactment as peremptory or directory with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice no longer finds favour. As was pertinently observed by Van See HEEVER J (as he then was) in *Lion Match Co. Ltd* v *Wessels* 1946OPD 376 at 380 the criterion is not the quality of the command but the intention of the legislator, which can only be denied from words of enactment its general plan and objects."

The respondent did not cite any Supreme Court authority to the effect that the statutory terms of a statutory tenancy as provided for in the Commercial Premises Rent Regulations could be breached by late payment of rental made after the seven (7) day limit given and that the protection remains on the basis of substantial compliance in that rent has nonetheless be paid. It would be illogical for the landlord not to accept rental paid late on the basis that it

would compromise a claim for eviction of the tenant because the rent would still be due. Payment of rental outside the seven (7) day period given in the regulations would be in violation of the statutory tenancy peremptory requirement. In order to get statutory protection from eviction as provided for in s (2) of the s 22 of the regulations; the statutory lessee should pay the rent within seven (7) days of due date and observe/perform the rest of the conditions of the expired lease. The protection is granted for "so long as the lessee continues" to pay rent within the seven (7) days of due date. Therefore, the law is clear that such statutory lessee has to "continue" to pay the rentals as provided for. The judgment appealed against dealt with the issue in depth.

The respondent seeks to fault the judgment appealed against by arguing that the court misdirected itself in reasoning that the principle of substantial compliance does not apply to a statutory tenant. The difficulty with the argument that the doctrine of substantial compliance is applicable is that the statutory tenant is created by a law which is clear in its terms. It is clear because it tells the statutory lessee as in this case that "your lease has expired and has not been renewed. You will not be removed or ejected from the leased premises for as long as you continue (own underlining) to pay due rental within seven (7) days of due date and perform other conditions in the expired lease." The statutory lessee then acts otherwise and pays rental after the seven (7) days. When told that by doing so, he is in breach of the statutory tenancy he admits the breach and seeks that the breach be excused on the basis that he decided instead to pay rental outside the seven (7) day period because that is what he used to do before the lease expired and the landlord would accept the rental.

The problem with the above argument is that the provision to pay rental within seven (7) days is absolute and would supercede whatever arrangements there were prior to the statutory tenancy coming into being. In fact, for all practical purposes s 22(2) of the Commercial Premises Rent Regulations can be taken as keeping the expired lease in place or extending it in the terms existing on expiry save for the payment of rental which becomes regulated to the extent that it be paid within the seven (7) days. The respondent did not plead that despite the provisions of s 22(2) the applicant and respondent agreed upon payment of rental after the expiry of seven (7) days. Clearly, the intention of the legislative was to regulate the time lines for payment of rental and would have considered that period as just and reasonable. The legislature cannot have intended that the statutory lessee having been protected from eviction upon meeting the conditions of protection should nonetheless violate

them and hide under the doctrine of substantial compliance. The court therefore reasoned that the doctrine of substantial compliance could not on the facts of this case apply to statutory tenancy as set out in s 22(2) aforesaid.

Having determined that there are no reasonable prospects of success of the appeal succeeding on any of the listed grounds of appeal. I proceed to consider the issue of whether or not there would be irreparable harm or prejudice to the applicant or respondent as the case may be were leave to execute to be refused or granted including the balance of convenience if the potentiality of suffering irreparable harm or prejudice are on some balance between the applicant and the respondent. In the *Artuz* v *Zanu (PF)* case HMA 27/2018, case MAFUSIRE J observed that each case depends on its own facts. The applicant herein averred that it wanted to renovate its property because it continued to deteriorate if not attended to so that the property is returned to good condition. The details of the renovations were not provided by the applicant.

The applicant averred that it also required the premises for its own use because it had a business that it wished to conduct at the property at the property. The applicant further averred that it was suffering pecuniary loss due to the respondent's continued occupation of the premises. It averred that the respondent was paying holding damages of US$50.00 per month when the rental is converted to USD. It did not state what amount in Zimbabwe dollars the holding over damages were. It averred that the expired lease agreement had a figure of USD3 700.00 as rent. The applicant pleaded unjust enrichment as the rental paid by the respondent was too low. It averred that the prejudice suffered could not be ameliorated other that by issuing an order for the grant of leave to execute pending appeal.

The respondent in relation to the issue of prejudice was also coy with facts. It averred that it would suffer irreparable loss because it would be evicted from the business premises which it occupies. It averred that it continued to pay the rental stipulated in the expired lease agreement and that it substantially complied with the provisions of the statutory tenancy. It averred that the applicant can engage with it on the issue of the rentals. It also averred that the applicant could approach the rent board on the issue of rent. The respondent averred that were an order of execution pending to be granted, there would be irreparable harm to the operation of the respondent's business.

The court takes the view that neither the applicant nor the respondent has provided sufficient information from which the court can make an informed determination on the preponderance of irreparable harm or prejudice. The applicant generalized the facts from

which it sought to persuade the court to accept that it would suffer irreparable harm and prejudice were an order of execution pending appeal denied by the court. It made general averments that the buildings needed immediate renovations. No evidence of the extent dilapidation, the extent of renovations needed or even plans, the cost, duration to make renovations and related matter was presented to the court. Despite the advert of video technology, no pictures of the building(s) to be removed were presented. Equally there was no evidence presented by the applicant on the nature of the business which it intended to carry out on the premises. The obligation that there was prejudice arising from low rentals was again not clothed with objective facts. There was no evidence that any study had been made on what the fair rental for the property is. Unjust enrichment should be proved by evidence to establish it.

The respondent as noted did not fare any better. It made general submissions that if it is evicted, its business would halt and resultantly it would suffer irreparable harm. It said nothing further. There was no allegation made that the respondent could not find comparable rent premises with the same locality or elsewhere. It did not aver that it cannot manage to relocate. When a tenant rent a premise under a lease agreement which has a time limit, it must expect to and be ready to relocate in the absence of a renewal. It is therefore important that facts from which irreparable harm or prejudice can be inferred by the court be adduced.

In respect of prejudice being allegedly suffered by the applicant caused by a rental payment of the equivalent of USD$50.00, the respondent did not deny that the expired lease agreement had provided for a rental payment of USD$3 700.00. It becomes a fact by deductive reasoning that under the circumstances the rental amount of USD$50.00 becomes a pittance. The respondent then suggested that the issue could be discussed between the parties. It did not however aver that it had initiated or suggested a discussion. It also suggested that the applicant could approach the Rent Board to determine the fair rental for the premises. The respondent therefore averred that the applicant had other avenues of relief and that there was therefore no unjust enrichment nor lack of alternative remedy. There was no allegation that the respondent was proactive in relation to following alternative remedies.

It becomes important to consider the balance of convenience or hardship to either party. The applicant is the owner of the property in question. He has real rights in it. The lease agreement in relation to the property between the parties expired. A statutory tenancy as found by the trial and appeal courtcame into play. It is a tenancy arrangement created by law. The

respondent failed to pay rental within 7 days of due date by its admission. Its prospects of success on the argument of substantial compliance is gloomy with no reasonable prospects of success.

The respondent did not deny that the rental of US$50.00was a pittance. It is objectively speaking a mockery if one considers that the rental used to be USD$3 700.00. Under the expired lease agreement. The suggestion that the applicant should engage the respondent or the Rental Board is something that the respondent could have initiated. It is an issue which would require consensus between the parties and the court cannot order such that the parties should do so.

In the ARTUZ case MAFUSIRE J stated in para(s) 6 and 7 of his judgment and I subscribe to his *dicta* therein:

> "[6] In variably the decision whether or not to grant an application for leave to execute turns on the relative strength or weakness of the appeal. This necessarily entails ploughing substantially the same field as done at the original hearing. It also entails the peeking into an appeal that is pending before the superior court and in some way pronouncing a verdict on it. That as one of the shortcomings of this type of application. Mr Mushangwe for the first respondent argues that this in fact amounts to a usurpation of the functions of the superior courts. That seems true but to a limited extend.
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> [7] In an application for leave to execute it is necessary to weigh the relative strength or weakness of an appeal to guard against frivolous and vexations appeals that are noted to buy time and not for any genuine intention to correct a wrong by the lower court. Each case depends on its own facts. Some factors assume greater or lesser importance in some cases than do others in other cases."

The appropriate approach is obviously that where a court is required to consider several factors in making a determination, unless the law makes a distinction on what weight be placed upon a singular factor, then the factors are to given equal consideration or pronounce and they are to be considered cumulatively in their effect. However, as MAFUSIRE J points out, because an appeal is intended as a mechanism for *bona fide* litigants who seek to genuinely test the correctness of a judgment, where the grounds of appeal raise arguable issues at law or fact and law as are likely to result if successful in the appeal court reversing the decision of the lower court, prospects of success or lack thereof gains more prominence. However as stated by MATHONSI J (as he then was) in the case of *Nzara* v T*sanyau* HH 303/13, borrowing from the *dicta* of MAKARAU JP (as she was) in *Old Mutual Life Assuarance Company (Pvt) Ltd* v *Makgatho* HH 39/07, the respondent in an application to execute pending appeal has an

absolute right of appeal, thus the application for leave to execute pending appeal should not in the exercise of court's discretion be granted unless the court determines that the appeal has been noted without a bona fide intention to test the correctness of the judgment but is motivated by the desire to buy time and harass for leave to execute pthe successful party. Accordingly, the prospects of success as stated by the learned judge, could not be the sole consideration for the grant of refusal of the application. See also *Apostolic Faith Mission in Zimbabwe* v *Cossam Chiangwa* HH 21/22.

Proceeding as duly guided by the *dictas* referred to, in the authorities cited, I am satisfied that this is a proper case to exercise the court's discretion in favour of the applicant. I consider that the appeal noted was filed with no *bona fides* of a success result but to delay the day of reckoning. The respondent deliberately failed to abide the conditions which protects its occupation of the premises in question under statutory tenancy. It chose well knowing that it was required by law to pay rental within 7 days of due date to pay the rent outside of the 7 days. Its argument that it did so because that was what it did before the statutory tenancy took effect does not hold. The argument on the late payment as amounting to substantial compliance is illogical. It would mean that no lessee can be held to be in material breach of a lease agreement for late payment of rental. Considering that the owner of the property has real rights to it as opposed to the tenant, where the tenant who has personal rights can relocate, the owner suffers more prejudice because he fails to enjoy the real rights he has because of a stubborn tenant.

The respondent did not ask the court to consider allowing it some time to find an alternative premise to rent. On costs, they should follow the result in the appeal. I dispose of the application as follows;

IT IS ORDERED THAT:

1. The application for leave to execute judgment HH 527/21 dated 29 September, 2021 in respect of case No. MC 4305/19 pending the determination of the pending Supreme Court Appeal SC 377/21 is granted.

2. The costs of the application shall follow the event or outcome of case No. SC 377/21.

Matizanadzo & Warhurst, applicant's legal practitioners
Tavenhave & Machingauta, respondent's legal practitioners