

POPWAVE INVESTMENTS (PVT) LTD  
versus  
ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 30 May & 12 July 2017

### **Opposed Application – Declaratory order**

*N Chamisa*, for the applicant  
*M Mutsvairo*, for respondent

CHAREWA J: This is an application for a declaratory order in the following terms:

- “ 1. Applicant be and is hereby declared the rightful lessee of Plot Number 227 measuring 10,288 hectares(*sic*) situate at Rainham Farm.
2. The subdivision of Plot Number 227 situate at Rainham Farm into various smaller units or the downsizing of Plot Number 227 situate at Rainham Farm from 10,288 hectares(*sic*) to 3 hectares(*sic*) by the Respondent be and is hereby declared unlawful.
3. Applicant and/or its agents, assignees, representatives be and are hereby declared to have unhindered access to a certain piece of land situate at Rainham Farm being Plot 227 measuring 10,288 hectares(*sic*).
4. Respondent to pay costs of suit on a legal practitioner-client scale.”

### **The facts and background**

The summary of the facts and background of this case are that the parties entered into a lease agreement whereby applicant leased, with option to purchase, Plot 227 Rainham Farm (the property), from respondent on 22 September 2008.

The record shows that applicant consistently failed to pay the deposit, rentals and assessment levies raised by respondent. As at 12 March 2010, the applicant had deposit arrears of \$1440, annual lease rentals due of \$4115 and development levy due amounting to \$103, all totalling \$5 658. Consequently, applicant was among a list of leaseholders given

notice, published in The Sunday Mail of 29 August-4 September 2010, to pay their arrears by 31 (*sic*) September 2010. This period was later extended to 31<sup>st</sup> December 2010, with a clear intimation that failure to comply with this new deadline would result in re-possession and re-allocation of the property without further notice.

In response to the notice, the applicant promised to clear its arrears by 31 March 2011. By then, the outstanding amount had ballooned to \$16 027.08, comprising rentals, development levy and service costs for gravelling roads.

The applicant still failed to clear its arrears or pay its rentals and other charges, in terms of its undertaking, such that respondent sent a final demand on 1 October 2011 in which it stated as follows in the final paragraph:

“Accordingly, you have been recorded as a debtor of Council and the council will use the legal means at its disposal to recover the money without any further notice save this one. It is also crucial to note that you have violated condition 15 of the lease with option to purchase to which you are a signatory. Therefore, in accordance with clause 22, Council have right and reason to cancel the lease and repossess the plot. Be advised accordingly.” (My emphasis)

Applicant still did not take heed to rectify its breach and on 10 October 2012, respondent made another “final demand for payment of \$17 937.52”. In response, persons claiming that the plot was leased to one Noah Sigauke, and purporting to act on behalf of his deceased estate then wrote on 16 November 2012 seeking an extension of time to pay, which respondents refused to grant.

Instead, on 28 May 2014, the respondent wrote to applicant advising that it had been given ample time to pay its arrears and applicant had failed to do so. Therefore the respondent had resolved, and was proceeding, to downsize the property into 3 hectare plots. This, applicant stated, was in order to allocate the subdivisions to other applicants so that it could be recompensed for any prejudice occasioned by the applicant’s default. However, respondent was prepared to offer the applicant 3 hectares of the remainder of plot 227, consequently, respondent invited applicant to come and sign a new lease agreement for the remainder. A plan of the proposed subdivision, where plots 619-622 were created, together with the remainder of Plot 227 was attached to the letter. At the same time, respondent issued a notice published in a newspaper to repossess the entirety of the property occupied by the applicant under the lease agreement, among other properties.

By October 2014, applicant had still not complied with the agreement despite the notice to repossess and subdivide plot 227. Consequently, having completed the downsizing

of plot 227, respondent allocated subdivisions 619, 620, 621 and 622 to Shonhiwa A. Tonderai and Nyaradzai Majachani, and others. It was only then that applicant made two payments of \$3 000 towards the outstanding rent and \$10 000 towards the plot deposit on 18 and 27 December 2014. As at 18 December 2014, the arrears accumulation, excluding the deposit, amounted to \$26 621.

On 15 May 2015, respondent once again (unnecessarily in my view) advertised its intention to withdraw offers of land and cancel leases of all defaulting lessees including applicant.

This seems to have jolted applicant to take action. Between 25 May 2015 and 12 October 2015, the applicant made six payments totalling \$15 500, towards its arrears. The seventh receipt dated 22 May 2015 is not legible. Therefore, it is not clear whether by 12 October 2015, applicant had cleared its arrears. However, respondent appears to confirm so by offering to allocate an amount of \$7 000 towards the title deeds, in applicant's name, for the remainder of plot 227, measuring 3 hectares.

It only remains to mention that on 19 November 2015, the applicant sought a *rule nisi*, at the Magistrates Court under case number 3192/15, interdicting respondent from partitioning Plot 227. The application for an interdict was dismissed and the *rule nisi* was discharged on 5 February 2016, most likely because the interdict had been overtaken by events, the partitioning having occurred in 2014.

### **Issues in dispute**

While several issues have been raised by the parties, it seems to me that the pertinent issues for the court to resolve and which I will confine myself to, are whether or not the agreement was cancelled in terms thereof, particularly since applicant does not dispute that it was in breach.

Obviously if respondent did cancel the agreement in terms thereof, it was well within its rights to repossess and subdivide the plot, and applicant has no right to the *declaratur* sought.

However, if the opposite is true, then the court must resolve the issue whether this is a case where the rights of innocent third parties override the applicant's entitlement to the relief sought.

### **The pertinent terms of the agreement**

The resolution of the issue lies within the provisions of the agreement between the parties and their conduct, the relevant clauses of which are as follows:

1. Clause 15 provides that in the event of the failure by the applicant to pay the rent on the due date, the respondent was at liberty to declare the agreement terminated, take possession of the property and evict the applicant without any prejudice to any claim for unpaid rent or damages in lieu thereof, and in any event, retain any rentals paid.
2. Clause 16 indemnifies the respondent from any adverse inference arising from any grant of extension of time to comply with the agreement.
3. Clauses 22 and 23 entitle the respondent to summarily cancel the agreement for any failure to comply with the terms thereof and eject the applicant without any prejudice to any claims for breach. In that event, applicant has no right to compensation for any improvements, which it either has to remove at its own cost, or if respondent has to carry out the removals, applicant is liable to compensate respondent for any expense incurred in such removal.
4. Finally, clause 25 provides that the deposit payment is not towards rent, but is towards costs of servicing the property, which cost is subject to revision and upward variation as necessary.

### **Parties' submissions**

At the hearing of this matter, the applicant submitted, *in limine*, that any downsizing of Plot 227 was contrary to statute, more particularly s 39 of the Regional Town and Country Planning Act, [*Chapter 29:12*], and was therefore void for illegality in that respondent did not obtain a permit from the planning authority to subdivide Plot 227. Mr *Chamisa*, wisely in my view, did not persist with this argument since it was devoid of merit. The respondent being the planning authority for the area, it was an absurdity to require it to make an application to itself to grant itself a permit in terms of s 39, more particularly since s 39(2) specifically excludes local authorities/municipalities from the operation of s 39(1).

A more substantive submission by the applicant was that the lease agreement was not cancelled in terms of clause 22. Therefore any downsizing and reallocation of the downsized plots by respondent was unlawful, especially since such downsizing took place before any cancellation of the lease and was thus improper. By the same token, applicant argued, the respondent was not entitled, unilaterally to novate the original lease agreement by offering

applicant a new agreement for a 3 hectare downsized remainder of Plot 227. In any case, the respondent's Finance Department continued to levy applicant for rent and services of the whole of Plot 227, even after the purported downsizing.

For its part, Respondent argued that its letter of 1 October 2011 was effectively, a summary cancellation of the lease in terms of clause 22. Further, in view of the fact that Clause 16 indemnified respondent against any adverse inference being drawn against its rights as a result of any extension of time it may have granted to applicant, the various periods accorded to applicant to pay its arrears did not amount to any waiver of its right to consider the lease cancelled. Therefore, that the respondent continued to levy the applicant with annual lease and other fees, or did not evict applicant, or even that it offered applicant the remainder of the downsized plot did not amount to a waiver of the right to cancel the lease.

In any event, that respondent's Finance Department continued to levy the applicant with lease fees for the entirety of Plot 227, rather than the remainder, was a mere oversight, arising from the department not being aware that Council had resolved to and the Planning Department had in fact, downsized the plot and offered the subdivisions to other applicants to recoup its losses arising from applicant's breach. In any case, because applicant remained in occupation of the property after 1 October 2011, it was still obliged to pay rentals or damages.

Additionally, respondent submitted that since innocent third parties were offered leases and have been in occupation since 2014, the relief sought by applicant was not competent, particularly in view of the fact that applicant has not joined those third parties to the suit. Further, applicant did not object to the downsizing within the time limits set in the notice to that effect, or rectify its breach, and cannot be entitled to the declaratory order sought.

Moreover, the order sought is not competent as it is not supported by the pleadings filed of record, which do not seek for a declaration that the purported cancellation of the lease was invalid.

Finally, the respondent submitted that the application is ill-founded, it being in fact an application to review the administrative processes of the respondent, couched as an application for a *declaratur*.

### **Analysis**

I will not dwell on the fact that applicant cleared its arrears. I do not believe that this point is of any moment. After all, if applicant had not cleared its arrears, respondent would have been entitled to recover them as damages according to the agreement between the parties. In any case, the payments were only made in 2015, long after applicant been informed, and did not oppose, the notice to downsize made in 2012. Besides, applicant would have been liable for damages since it remained in occupation of the entire plot up until new lessees took up occupation in 2014.

Nor will I be detained by the fact that after the sub-division of the plot, applicant continued to pay assessment levies and lease rentals for the entire plot. In proceedings before the magistrates' court in Case number 3192/15 aforesaid, and even in this application, this point has not been disputed. Respondent did in fact calculate the overpayment after the subdivision as \$7000, which amount it offered to apply towards the application for title deeds by the applicant of the remainder of Plot 227, should applicant accept the offer of that downsized portion.

For that matter, it is not crucial that I should determine whether or not this application ought to have been for review of respondent's administrative actions.

What is certain is that the applicant was consistently in breach of the lease agreement by remaining in arrears over several years, thus forcing respondent to downsize the plot. This is quite contrary to the misleading assertion at para 6.4 and 6.5 of the founding affidavit that respondent is in full compliance with the lease agreement and therefore that, regardless of this, respondent has proceeded to downsize applicant's plot unlawfully.

The only issue therefore is whether the lease was summarily and lawfully cancelled in terms thereof, thus allowing the respondent the leeway to legally downsize it.

#### *The Law*

It is trite that the court must enforce a valid agreement. It is equally trite that the law generally provides that any cancellation of an agreement must be unequivocal, otherwise it remains valid and enforceable.<sup>1</sup>

However, it is my view that the case of local authorities is slightly different from the general norm. By virtue of the law, local authorities are obliged, once there is a breach, to give individual written notice in terms of the agreement, as was done in this case, and further, to publish the list of all the properties subject to the breach and which, as a result, a local

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<sup>1</sup> Jackson v Unity Insurance Co Ltd 1999 (1) ZLR 381

authority intends to repossess. Now, it does not make sense that the law would entitle repossession where valid lease-to-buy agreements are in existence.

It is my view, therefore, that the purpose of these statutory notices is in fact to say to a defaulter, “you are in breach, and your agreement is cancelled. However, should you assert otherwise, you must, within the given period show cause why you believe you are not in breach and that therefore the lease still subsists, (perhaps by bringing proof of compliance) or seek the authority’s indulgence to excuse your breach, and thus a reversal of the cancellation of the agreement”.

In one of the notices issued, the phrase “withdraw offer and cancel leases” was defined in the notice as to “repossess plots and stands”. This is thus in line with my interpretation that a local authority cannot repossess unless the lease is cancelled. Therefore the notice of repossession is in fact a notice of cancellation.

#### *Application of the law*

As early as 2011, applicant was aware that respondent had run out of patience with its continued breaches and was exercising its right to summarily cancel the agreement. In my view the letter of 1 October 2011 was effective notice of cancellation of the lease agreement. Even if the respondent’s notification of cancellation was not worded in the direct terms that applicant expected, the fact that a notice to downsize was subsequently made in 2012 confirms that the respondent considered the lease cancelled. This is even more so, when regard is had to the fact that respondent refused to accede to applicant’s requests for more time to pay.

The facts reveal that the respondent made a series of decisions, all communicated to the applicant, the sum total of which was to effectively terminate the lease agreement. Firstly, it advised applicant, by repossession notice expiring on 31 (*sic*) September 2010 and gratuitously extended to December 2010, that failure to comply with the lease agreement would result, without further notice, in re-allocation of the plot. Then in October 2011, respondent advised applicant that it was still in arrears and that therefore respondent had the right to cancel the lease in terms of clause 22 and repossess the plot. I do not think that it was necessary for respondent to resort to clause 15 and 23 as they had the same effect as clause 22.

The letter of October 2011 was followed up by the repossession notice of July 2014, that applicant still being in breach, respondent was now engaged in the process of

repossessing the plot. Finally, on 15 May 2015, respondent advised that it intended to withdraw its offer to applicant and cancel the lease.

In this regard, it is important to note that the applicant did not contest the various repossession notices, but rather sought the respondent's indulgencies to be allowed to make payment and continue with the lease.

Throughout these events, the applicant never brought to respondent, any proof of compliance with the agreement, but rather implicitly admitted breach, by acknowledging its arrears and requesting time to pay. The indulgence to make late payments was granted until 16 November 2012, when the respondent refused to grant any further time to pay. In fact, respondent advised that it was proceeding to subdivide the plot and sell off the subdivisions to recover its losses.

Since it does not make sense that respondent would seek repossession of a property under a valid and existing lease agreement, it means that there was no longer any lease to buy agreement subsisting between the parties, at least as at 16 November 2012. Instead, respondent cancelled rather than varied the lease.

Therefore because clause 16 of the agreement indemnified respondent from any adverse inference being drawn from any indulgence it may grant, the lease remained cancelled.

Applicant did not seek a declaration that the purported cancellation was wrongful and unlawful. Neither did it at any time contest the various repossession notices or termination letters. This suggests that applicant also understood that the lease was cancelled and that it could only rely on respondent's indulgencies.

Hence, that the respondent did not seek the confirmation of the termination of the lease before the courts and attendant ejection of the applicant does not, in my view, amount to any waiver of its rights, or a withdrawal of the cancellation. It cannot be held against the respondent that it took the humane approach of offering applicant the remainder of Plot 227 on the basis that applicant had made some developments thereon.

Once I am in agreement with respondent, as indeed I am, that the lease was properly cancelled in accordance with its terms, the issue of novation cannot arise. The lease agreement no longer existed and could not therefore be novated. There was no replacement of the original agreement with a new one. The offer of 3 hectares was therefore a completely new offer which the applicant could accept or decline.

Consequently the applicant no longer had any rights, flowing from the lease agreement, requiring the court's discretion to order a *declaratur*.

I note that the downsizing was effected, and applicant notified thereof in May 2014. Still applicant did nothing. Innocent third parties were eventually offered the subdivisions in October 2014, and still applicant took no steps to assert its rights. Only in 2015, after third parties had taken occupation did applicant seek to interdict respondent from subdividing the plot. By then, the relief sought was academic as subdivisions had been done and innocent third parties, who were, incidentally, not joined to the suits, were in occupation. Applicant has not cast any aspersions against the third parties' innocence. It is a cardinal principle of law that innocent third parties may not be unnecessarily prejudiced, particularly where the applicant was the author of its own misfortune as in this case.<sup>2</sup>

In passing, I note that even at the time of filing this application in May 2016, applicant sought to mislead the court by asserting that respondent was "in the process of partitioning part of applicant's plot" (See paragraph 6.7 of the founding affidavit), when in fact more than two years had elapsed since the partitioning had been done. Neither is Annexure E, at p 22 of the record, a notice of illegal downsizing as alleged by applicant. It is, in fact, confirmation that the downsizing and reallocation had long been done and enjoining applicant from interfering with the new allottees.

Finally, the applicant's draft order is at variance with the relief sought in the submissions made during the hearing or in the heads of argument. If there is no order sought that the purported cancellation of the lease agreement was wrongful and unlawful, it means that the cancellation stands. How then can the court declare applicant the rightful lessee, or the subdivision as unlawful when there is no concomitant declaration as to the continued existence of the lease.

Consequently, I find that the agreement between the parties was lawfully cancelled as a result of applicant's breach thereof. Therefore respondent was at liberty to and did repossess and subdivide the property. Even if the agreement had not been lawfully cancelled, the conduct of the applicant is such that this is a case where the interests of innocent third parties ought to be protected. The applicant is thus disentitled to the *declaratur* sought.

The application is dismissed with costs.

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<sup>2</sup> Nicholas Hatidani v David Shonhiwa & Ors SC 75/2002 ([2002] ZWSC 75. See also Dube v Moyo (HC1699/03) 2004 ZWBHC 155

*Rubaya & Chatambudza*, applicant's legal practitioners  
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