MINING INDUSTRY PENSION FUND (MIPF) **APPLICANT**

Versus

BANLAX **1ST RESPONDENT**

And

TAURAI TADERERA **2ND RESPONDENT**

And

JORAM TAPFUMA **3RD RESPONDENT**

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 FEBRUARY AND 3 MARCH 2011

Mr Ngwenya, for the applicant
Mr Mlala, for the respondent

OPPOSED APPLICATION

MATHONSI J: This is a summary judgment application in which the Applicant seeks the eviction of the Respondents from premises known as shop 40 Entumbane Complex, Bulawayo by reason of non-payment of rent.

The Applicant alleges that the rent in question was determined by the rent board following an application in which both parties were represented. The decision of the rent board was communicated to the parties by letter of the Rent Board Secretary dated 23 August 2010 and it reads:

> ''APPLICATION FOR A DETERMINATION OF A FAIR RENT: MIPF VERSUS ENTUMBANE COMPLEX TENANTS
>
> Your C. Rushwaya / Mr of 6th May 2010. After having taken into consideration of (sic) all arguments raised by all parties involved that is to say Mr Kholwani Ngewnya for the land-lord and Mr Hezel Ndlovu for the tenants the board has fixed the net rent at US$2, 25 per square metre.
> The Board took into consideration the viability of the business in the suburban complex. You are also advised to give the tenants all the breakdown of the amenities such as City

Council rates, Zesa and or operation costs. This is with effect from your date of application i.e 1st May 2010 to 31st December 2010.''

Yours faithfully

MK SIBINDI

''Secretary of Industrial and Commercial Rent Board

for Secretary of Industry & Commerce''

The Respondents has not paid any rental in terms of the order of the rent board arguing that the rent as fixed by the rent board should take effect at the end of October 2010 because they received the ''determination'' of the rent board on 5 October 2010. They have attacked the letter written by the rent board secretary communicating the decision of the rent board and its effective date saying it was written by a ''former secretary of the rent board who has now been dismissed due to corruption.''

It is alleged without any evidence or elaboration, that the letter was ''a fictious letter purporting to have been given instruction to do so by the rent board.'' As to why the latter is not an official rent board communication, the Respondents are silent. Instead they have sought to rely on the subsequent report of the chairman of the rent board in respect of the issue. That report is silent as to the effective date of the rent fixed by the rent board.

In determining a fair rent, the rent board has authority to fix an effective date of such rent. Section 13(1) of the Commercial Premises (Rent) Regulations, S1 676/83 provides:

> ''Subject to the provisions of subsection (2), a board shall specify the date from which the determination of a fair rent made, or the variation of such a determination granted, by it shall have effect which shall not be a date prior to the date on which the application for such determination or variation, as the case may be, was received by the secretary of the board.''

In this case the application for determination of a fair rent was made in May 2010. The matter was considered by the rent board which accorded all interested parties a fair hearing before determining the fair rent. The effective date of the rent was given as May 2010. Accordingly the rent board acted within its powers provided for in the regulations in determining the fair rent and setting the effective date.

The determination of the rent board was communicated by its secretary in terms of section 14 of the regulations which provides:

'' 14 Notification of decision of board

The secretary of a board shall –

(a) give written notification to the parties concerned of any decision of the board in terms of sections 9, 12 or 28; and

(b) where the determination of a fair rent has been made, or a variation of such determination has been granted by the board, send with such notification, free of charge, details of such determination or variation as the case may be.''

Clearly therefore, the notification of the determination of a fair rent has to be made by the secretary of the board. He did just that. To say that the secretary has since been dismissed for corruption or that he sent a fictitious letter is, with respect, red herring of unacceptable proportion.

In order to succeed in contesting a summary judgment application a party is required to allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence. *Rex v Rhodian InvestmentsTrust (Pvt) Ltd*1957 (4) SA 631 (SR) at 633G; *Jena v Nechipote* 1986(1) ZLR 29(S) at 30D.

Such a party must at least disclose his defence and material facts upon which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. It will be material for the court to have regard to in determining the *bona fides* of a defence, if it is bald, vague and sketchy *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 238 G and 239A.

In the present case, no material facts disclosing a defence have been set out at all. In fact the Respondents have been shameless in their attempt to buy time. This is particularly so regard being had to the fact that even after October 2010, which they argue should have been the effective date of the fair rent determined, they have not paid anything towards rent.

It is now in vogue for tenants to occupy commercial premises for several months without paying rent and when proceedings for their eviction are instituted they shamelessly raise frivolous defences while continuing to trade at a profit to themselves without paying any rent. Such abuse of process should be condemned in the strongest of terms and should invariably be visited with costs on a punitive scale in order to transmit the right message that the courts will brook no such abuse of its process.

Indeed it is apposite to make reference to the observation of MacDonald ACJ (as he then was) in *Beresford Land Plan (Pvt) Ltd v Urquart* 1975 (3) SA 619 (RAD) at 621 G-H where he said:

> '' There are numerous ways in which the legal process in civil cases may be abused by unscrupulous litigants, and of these by far the most common, persistent and deleterious in its adverse effect on the administration of justice is the use of such process to delay the enforcement of just claims. It is this aspect of the administration of the Civil Laws which, more than any other, has tended to bring it into disrepute and there can scarcely be a more important duty imposed upon the court than to suppress firmly and without delay any manifestation of this all too common abuse. The greater the law's delay, the greater the temptation for unscrupulous litigants to defend claims solely to gain time, and in the result, the evil, unless it is eliminated at its first attempt, tends to escalate.

There can be no worse case of abuse than in the present case where, even before dollarization in March 2009 the Respondents had long stopped paying rent. They continued trading for their benefit at the Applicant's premises without paying anything after dollarization on the basis that there was no agreed rent. They would not agree on any proposed rent because that would enjoin them to pay. When the rent board finally fixed the fair rent, they again did not pay anything and that situation has subsisted up to now.

Not having had enough free accommodation, they have contested these proceedings even as it was pretty obvious no defence existed.

In the circumstances I make the following order:
1. Summary Judgment be and is hereby entered in favour of the Applicant against the Respondents.

2. The lease agreement between the parties be and is hereby cancelled.

3. The Respondents be and are hereby ordered jointly and severally to pay the Applicant the sum of US$1 769,75 together with interest at the prescribed rate from due date to date of payment being error rentals for the period of 1 May 2010 to 1 November 2010.

4. The Respondents be and are hereby ordered jointly and severally to pay the applicant US$179,34 being management costs for the period 1 May 2010 to 1 November 2010 and holding over damages of US$9,39 per day until the date of eviction.

5. The Respondents and those claiming through them should be evicted from shop 40 Entumbane Complex, Bulawayo.

6. The costs of suit shall be borne by the 3 Respondents jointly and severally, on an attorney and client scale.

Mabhikwa, Hikwa and Nyathi, Applicant's Legal Practitioners
Messrs Cheda and Partners, Respondent's Legal Practitioner