

ELNOUR UNITED ENGINEERING GROUP (PRIVATE) LIMITED

versus

MINISTER OF INDUSTRY AND COMMERCE N.O.

and

COMMERCIAL AND INDUSTRIAL RENT BOARD HARARE N.O.

and

ATTORNEY GENERAL N.O.

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE, 20 October 2021 and 6 February 2023

Court Application

Adv T Zhuwarara, for the applicant

Mr D Jaricha, for the respondents

CHINAMORA J:

Introduction:

This is an application for a declaratory relief where the applicant is seeking the following relief as per the draft order:

“IT IS DECLARED THAT:

- a) Sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 are ultra vires the Commercial Premises (Lease Control) Act [Chapter 14:04] and are thereby set aside.
- b) Sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 be and are hereby declared to be unconstitutional as they violate Sections 44, 56, 64, 71, and 86 of the Constitution of Zimbabwe No. 20 of 2013 and are accordingly invalid.
- c) Respondents to pay the Applicant’s costs of suit.”

Factual background

The applicant is the registered owner and landlord of two commercial shopping complexes in Harare commonly known as the Gulf Complex and Sunshine Bazaar situate in the Harare central business district and Mbare, respectively. The applicant’s core business is that of letting commercial premises. The applicant entered into multiple lease agreements for units at the Gulf Complex with

three companies namely Chartprill Enterprises (Private) Limited, Sino Electrical Systems (Private) Limited and Leadward Investments (Private) Limited. These entities are also before this court under HC 4419/20 against the applicant. The lease agreements with all the three entities aforementioned expired on 31 December 2019. Prior to the expiry of those lease agreements, the applicant notified the tenants that it wanted to use the premises for its own lubricant retail business, a shoe making factory and a hardware.

However, on the expiry of the lease agreements, the three tenants refused to vacate the premises, despite the notices to vacate being served on them. The tenants placed reliance on the provisions of the sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 (hereinafter referred to as “the Regulations”). In particular, they argued that when the leases expired, they became statutory tenants in that they had continued to occupy the leased premises and abide by the terms and conditions of the expired leases. The argument continued that the applicant was precluded from evicting them. In addition, the tenants rejected the applicant’s contention that the applicant wanted the units for its own use. As a result of this disagreement, the applicant referred the matter for arbitration in line with the provisions of the lease agreements. The arbitrator (Retired Justice Smith) issued an award directing the tenants to vacate the premise and the registration of the award is pending before this court.

It against this background, that the applicant has approached this court seeking a declaration that the Regulations are *ultra vires* the Commercial Premises (Lease Control) Act [*Chapter 14:04*] (“the Act”). The applicant submits that the Act directs the first respondent to make regulations that address the interests of both the lessors and the lessees and, in so far as the regulations provide for statutory tenancy, they are *ultra vires* the Act. Further, the applicant contends, to the extent that the Act purports to curtail the eviction of a tenant that remains in occupation after the lease has expired; it fails to ensure that statutory tenancy is not abused by *mala fide* tenants. Consequently, it is applicant’s submission that the statutory tenancy provision lacks sufficient safeguards to prevent the abuse of the regulations to the detriment to the lessor. Furthermore, the applicant submits that the provisions of sections 22 and 23 of the Commercial Premises (Rent) Regulations, 1983, are unconstitutional as they violate section 44, 56, 64, 71, and 86 of the Constitution of Zimbabwe.

The first and second respondents opposed the application. In essence, they raised three preliminary points, namely, that the applicant had no *locus standi*; the second respondent was

wrongly cited; and that the applicant had failed to exhaust local remedies. On the merits the respondents contended that sections 22 and 23 of the Regulation were not *ultra vires* the Act as the Act protected the interest of both lessor and lessee. The first respondent argued that there was nothing discriminatory in the said provisions, since section 23 of the Rent Regulations deals with the rights and duties of the lessee. A lessee who, by virtue of section 22, retains possession of any commercial premises observing the terms and conditions of the lease, shall be entitled to the benefit of all terms and conditions of the original contract. On the other hand, the second respondent adopted the first respondents' opposition.

In its answering affidavit, the applicant took issue with the fact that the respondents did not comply with the rules of this court as they did not serve the notice of opposition on the applicant as soon as possible. To substantiate this, the applicant argued that the respondents filed their notice of opposition on 22 March 2021 and only served it on the applicant on 9 April 2021. Another cause of complaint by the applicant was that the opposing affidavit was not properly numbered as required by the rules of this court. The applicant maintained that it correctly cited the second respondent in so far as s 3 of the Commercial Premises (Lease Control) Act did not provide that the Chairperson is the only person that can legally represent the second respondent. On the question of exhausting local remedies, the applicant submitted that the present application is for an order declaring the regulations to be *ultra vires* the Act and that they are unconstitutional and the second respondent is not empowered to give such an order. In respect of the merits, the applicant persisted with its case that the regulations were *ultra vires* the Act.

Before delving into the matter, I wish to address applicant's draft order, particularly, paragraph (b) to the draft order which reads:

“Section 22 and 23 of the Commercial Premises (Rent) Regulations, 1983 be and are hereby declared to be unconstitutional as they violate Section 44, 56, 64, 71, and 86 of the Constitution of Zimbabwe No. 20 of 2013 and are accordingly invalid.”

The relief sought in paragraph (b) relates to the constitutional invalidity of specified provisions of the Regulations. Noticeably, there is no declaration sought to the effect that the provisions of the Commercial Premises (Lease Control Act are unconstitutional in that they (in any way) infringe any of the fundamental rights and freedoms. Thus, it is not the business of this court to grant such

relief. If only a portion of the subordinate legislation is *ultra vires*, this court can annul the offending portion only and leave intact the valid portion(s). I will address the preliminary points.

Points in *limine*

The preliminary points taken by the respondents were essentially two, namely, that the second respondent had been wrongly cited; and that the applicant had failed to exhaust domestic remedies. In relation to the first objection, it was argued that the applicant should have cited the Chairman of the Commercial and Industrial Rent Board (“the Board”). Section 3 of the Regulations, which was the basis of the point in *limine*, deals with how the second respondent is to be constituted. Crucially, the provision does not designate the Chairman as the person to be cited in proceedings against the board. The object has no merit and is dismissed.

I am somewhat puzzled by the preliminary point that the applicant should have exhausted domestic remedies before approaching this court. The application in *casu* seeks a declarator that sections 22 and 23 of the Regulations are *ultra vires* the enabling statute and the Constitution. The remedies outlined in section 7 of the Regulations cannot cure the issue that arises in the present application, since the Board cannot make declaratory orders, since it has no jurisdiction to do so. For this reason, the point in *limine* is dismissed for lack of merit.

The merits of the case

In respect of the merits of the case, let me begin by examining sections 22 and 23 of the Commercial (Rent) Regulations, 1983. Section 22 provides as follows:

- “(1) For the purpose of subsection (2), “rent due”, in relation to commercial premises, means- (a) where the determination of a fair rent in terms of Part II is in force in respect of premises, the rent fixed thereby, as varied from time to time of that Part; or (b) in any other case, the rent due in terms of the lease.
- (2) No order for recovery of possession of commercial premises or for the ejection of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee –
 - (a) continues to pay the rent due, within seven days of due date; and
 - (b) performs the other conditions of the lease; unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that –
 - (i) the lessee has declined to agree to an increase in rent; or
 - (ii) the lessor wishes to lease the premises to some other person.”

Section 23 of the Regulations states that:

“A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:

Provided that, notwithstanding anything contained in the contract of lease a lessor who obtains an order for recovery of possession of the premises or for the ejection of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee.”

It is these two provisions that applicant contends are *ultra vires* s 5 (1) and (2) of the Commercial Premises (Lease Control) Act. In this context, s 5 (1) of the Act empowers the first respondent to make regulations limiting the powers of court in making orders of ejection and /or limiting the common law powers of lessors. I observe that subsection (2) to section 5 of the same Act mandates the first respondent to have regard to the “*interest of both lessors and lessees*” in making the regulations. From reading of subsection (2), it is clear and unambiguous that the Act requires the subsidiary legislation to take into account the competing interests of the lessor and lessee. The court must examine whether the regulations, in fact, achieve this legislative objective.

A cumulative reading of sections 22 and 23 of the Regulations shows that these provisions unfairly limit the powers of a court in ordering eviction and heavily restricts the lessor’s right to terminate occupancy or to seek eviction and possession of the premises after the lease expires. The regulations create a forced relationship between lessor and lessee known as *statutory tenancy*. My view is that sub-paragraphs (i) and (ii) of s 22 (2) effectively preclude the lessor from increasing rentals or leasing out the property to another person once the statutory tenancy protection applies. I would add that s 23 fortifies the protection accorded under section 22 of the Regulation and entitles the lessor to all the other benefits arising from the original contract. It is precisely for this reasons that sections 22 and 23 of the Regulations were *ultra vires* the Commercial Premises (Lease Control) Act and set them side. Since I came to this conclusion, on the principle of constitutional avoidance, it was not necessary for me to decide the constitutionality of sections 22 and 23 of the Regulations vis-à-vis sections 44, 56, 64, 71, and 86 of the Constitution.

Accordingly, I granted an order in the following terms:

1. Sections 22 and 23 of the Commercial Premises (Rent) Regulation, 1983 are *ultra vires* the Commercial Premises (Lease Control) Act [*Chapter 14:04*] are hereby set aside.

2. The respondents shall pay the applicant's costs of suit.

Farai & Farai Attorneys, applicant's legal practitioners
Civil Division of the Attorney's General's Office, respondents' legal practitioners