CHARLTON TSHABALALA
versus
JOEL MUGADZA
and
AROSUME PROPERTY DEVELOPMENT (PVT) LTD
and
SALLY MUGABE COOPERATIVE
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 9 March 2022

**Opposed Application**

*S. M. Bwanya*, for the applicant
*E. Moyo*, for the 1st respondent
*No appearance* for the 2nd to 4th respondent

BACHI MZAWAZI J: The applicant and the first respondent are both in possession of Lease agreements entered into with the fourth respondents, over the same piece of property. Both claim that they have certain rights and interests over the property emanating from the lease agreements. The second to the fourth respondents have not filed any opposing papers nor did they attend the hearing. It is the representative of the fourth respondent who, by way of a letter dated the 11th of September, 2020, addressed to the Registrar of this court said that they are not opposed to the order being sought.

Initially this was an urgent chamber application later referred to the opposed roll for lack of urgency. The applicant is seeking a declaratuer confirming the validity of his lease agreement and at the same time an interdict order barring the first respondent and all who act through him from interfering with his occupation and constructions on Stand 220 Carrick Creagh Farm, Borrowdale, as consequential relief.

**FACTS**

It is not in dispute that, the second to the fourth respondents entered into a tripartite agreement over a piece of land in Borrowdale, namely Carrick Creagh Farm. In terms of that agreement, the fourth respondent, the Ministry of Local Government and Public Works, representing the State are the owners of the land. The second, Arosume Property Development Private Limited, a duly registered Company in terms of the laws of this country, are the developers. The third respondents, Sally Mugabe Cooperative, are the beneficiaries. Accordingly, the roles of all the above stakeholders are defined in the Tripartite agreement. From the record, lease agreements where then entered into between the fourth respondent and respective individuals including the applicant and the first respondent. The lease was the embodiment of the obligations and duties of the parties as well as the consequences of breach.

On the face of it, it seems like a case of double allocation of stands and competing rights over the leased property stand 220 Carrick Creagh Farm, Borrowdale. However, the first respondent was the first to enter into a lease- to- buy agreement, with the fourth respondent, the Ministry on the 23rd of April, 2014 and was subsequently allocated the stand in question. Subsequently, the applicant on the 3rd of June, 2020 also entered into another lease agreement with the fourth respondent, over the same piece of property and was given vacant possession of the property, after having paid all the required amounts in full.

It is alleged that the first respondent after getting wind of this new development invaded the piece of land claiming that he was a lease holder of the same property and subsequently proceeded to erect some temporary structure. Alarmed, applicant enquired from the fourth respondent and was informed that indeed the first respondent was the first lease holder of the said premises whose lease had been terminated for default of payment and other breaches.

Applicant then sought legal recourse resulting in the present application after a failed attempt to bar the first respondent from further encroachment, by way of an urgent chamber application ruled not urgent giving rise to this application.

In light of the above the main issue that fallsfor consideration is,

Whether or not the first respondent’s lease was validly cancelled?

In their opposing papers the first respondents raised three preliminary points which they urged the court to determine and dispose before proceeding to the merits. In their view any one of the raised three points would dispose of the matter.

The *points in limine* were that, the applicants as a co-lease holder of the same property have no real but personal rights. As such the personal rights were only exercisable against the lessor and not against any other third parties as opposed to real rights which are exercised against the whole world. In that regard the applicants lack locus *standi in judicio* to bring any action against the first respondents.

In their second ground they took to task the information supplied by the applicant in the form of annexure, to their papers which emanated from the offices of the 4th respondent, as hearsay evidence. In respect of that they then argue that, the founding papers bearing such kind of information are defective and cannot stand as a case stands or falls on its founding affidavit.

Lastly, they contend that there are material disputes of facts that can only be resolved by hearing vocal/oral evidence from the other cited respondents who have not filed any opposing papers. The gravamen of their third point is that there is need for the fourth respondent to give a definitive statement on a number of issues revolving on their own lease agreement instead of placing reliance in their official documents which have been produced by a third party.

After hearing arguments from both sides on the preliminary issues the parties then urged the court to hear the merits and then make a final determination on both since the facts supporting the raised issues were interwoven and would invariably be clearer after submissions on the merits. Notably the same arguments and supporting case law used in the preliminary points are the same, making up the whole case. This court agrees with that approach.

**APPLICANT'S CASE**

Turning to the merits of the case, the applicant contends, that he is a bona fide lease holder having complied with all the essential terms of the lease agreement between himself and the fourth respondent. He states that he was not aware of the existence of any other lease holder over the same property prior to his own as he was given vacant possession of the same after complying with all the requirements of and to the satisfaction of the second to the fourth respondents and

upon paying for the property in full. It is the applicant's argument that the first respondent only moved onto the property to construct some temporary wooden structure after he learnt of his existence. Purportedly, it is this encroachment that activated applicant's need for legal recourse culminating in these proceedings. The first respondent simultaneous to the applicant's urgent chamber application, initiated a lawsuit, for spoliatory relief in case HC5835/20 against the second to the fourth respondent to the exclusion of the applicant and before the finalization of the current application. The application was dismissed.

It is the applicant's submission that there is ample evidence on record from firstly, the documents obtained from the fourth respondent, those submitted by the first respondent himself and the reasons underlying Muremba J's decision in case HC5835/20 above, that the lease agreement between the first and fourth responded had been formally and legally cancelled. As such it is the tenor, of their argument that the first respondent has no legal basis to remain or lay a claim on the property. Therefore, he must be stopped from any further encroachment of the land. Applicant thus, urges the court to declare him the rightful holder of the lease over stand number 220 Carrick Creagh Farm, Borrowdale. Reference is made to annexures I, a letter from the fourth respondents dated the 3rd June 2014, on page 59 of the record, official receipts from both the offices of the fourth respondent and the local authorities on page 79 to 81, dating back to the 3rd of March 2014 as well as annexure D and E on pages 26 and 27 of the court's record respectively, as evidence of official records illustrating that the second respondent's lease was legally cancelled and he has no legal title to the said property in dispute.

In support of his arguments the applicant relied on the cases of.*Mwayera v Chivizhe CS16 /2016, RAMA v Minister of Local Government* HH687/20, amongst others.

On the preliminary objections raised, the applicants state that they have satisfied the requirements of a declaratory order in that they have both a direct and substantial interest in the subject in contention as they are holders of a fully paid up lease agreement. They propagate that the second respondent's lease had been terminated. They also are of the view that it is within the court's discretion to issue the consequential relief sought. They argue, that theytherefore have *locus standi* to sue and their rights are not restricted to suing the lessor only. It is their submission that, in any event, Muremba J, recognized their interest and impliedly endorsed their *locus standi* in her reasons for judgment in HC735.20, which categorically stated that they, applicants should

have been enjoined as parties. They state further that, this was after the respondents had confirmed that applicant was the one in occupation in their opposing papers filed before MUREMBA J.

Applicant's counsel, further contends, that nothing turns on the second preliminary point as nothing contained in their founding affidavit is hearsay but official documents attached as evidence to augment their case. He states that since the veracity of the documents is not being challenged as it is in sync with the presumption on the validity of official documents both in their contents and their delivery. It is their argument that the laws of privity of contract nor double sale do not apply as they do not fit in the matrix of the facts of this case. They state that it is absurd forthe fourth respondent being the State and owner of land to blindly enter into a second lease without concluding that the second lease has been cancelled.

On the last preliminary point they state that there are no material disputes of facts. If any, they are capable of resolution on the papers.

**RESPONDENT'S CASE**

The respondents countermanded, on the merits that, their lease was the first to come into existence. As such, they have the right of first succession and they are the ones who should be on the property not the applicants. They likenedtheir agreement of lease- to –buy, to those in cases of double sales. On the faith of the case, of Pedzisa *v Chikonyora* 1992 (2) they submit that, their rights take precedence over those of the applicants.

Further, the first respondent still maintains that, it is the fourth respondent who has the right to institute legal proceedings as he is the real rights holderas opposed to the applicants , in their perception, a mere holder of personal rights. Citing the cases of *Pedzisa v Chikonyora* 1992 (2) ZLR 445 at 451 and *Gwarada v Johnson & Ors 200 9(2)* ZLR 159 (H), they contend that a person with personal rights over immovable property can only exercise those rights to the lessor or through the real rights holder. In turn, they allege, the lessor is the one who should sue for eviction. They argue in light of the Gwarada case, applicants can only have the right to evict if they have been given vacant possession.

In their submissions, the first respondent equates the contract of lease to any other contract. In that regard they insists that the contract between the applicant and the fourth respondent has nothing to do with them so is theirs with respondent which has no bearing on that of the applicant. The case of *TBIC Investments (Pvt) (Ltd) & Chidawanyika P. v Mangenje K, Minister of Lands,*

*The Registraar of deeds & the Attorney General SC13-18* was used to buttress this averment. They emphasize, that the applicants have no *locus standi in judicio* to bring this action.

First Respondent, asserts that, the so called letters of cancellation of their lease agreement were not served at their *domicillium standi* as stipulated in the agreement of sale. They argue that the addresses reflected in those letters are different from his consciously elected address. So because of that, the cancellation even if valid as borne by those letters was not communicated to him. As such, that is a fatal flaw that invalidates the termination of their own lease valid.

The respondent maintains that, since the issue of service of the notice of cancellation and the communication of the cancellation of the lease are in contention there is need for evidence *alliunde* to be led from the fourth respondent as to whom they actually served with both documents. As far as they are concerned this is a material dispute of fact entwined with their preliminary point in objection which cannot be resolved on the papers but in a trial.

In addition the first respondent asserts that he is already in possession of the property as evidenced by his approved building plans and receipts from the local authority on the payment of the same. Further, that he is in the process of constructing a structure as dictated by the lease therefore he cannot be barred from completing his structure as the applicant has not established any right to evict him.

**AN EXPOSITION OF THE LAW FACTS, AND EVIDENCE.**

This application has been brought by way of a declaratory order which is statutorily provided for. By virtue of Section 14 of the High Court Act Chapter, 7,06. The High Court is bestowed with the powers to exercise its discretion to enquire into and then determine, existing, future and contingent rights and obligations if so called upon by any person with any of those vested rights and obligations notwithstanding that the person cannot claim any consequential relief. This has been pronounced in several authorities in this jurisdiction as well as in South Africa.

> "M*unn Publishing (Pvt) Ltd v ZBC 1994 ,(1) 337 (S) 343*held that,'any interested person with a direct and substantial interest may approach the court for the determination of an existing , future and contingent right which could prejudicially affected by the decision of the court as the first step. The second rung is that the court must decide whether or not the case in question is one it should properly exercise its discretion."

In *Adbro Investment Co .Ltd v Minister of the Interior & Others* 1961(3) and *Johnson v AFC* 1995(1) ZLR 65(H) are both illustrative of the position, that, despite the fact that no

consequential relief is sought, justice or convenience demands that a declaration be made as to the existence of or the nature of a legal right claimed by the applicant or the respondent.

Greenland J, enunciated, in the case of *Mushishi v Lifeline Syndicate & Anor* 1990(1) ZLR 289 (H) at 289

> ",…..Still as the facts reveal a competition for rights in respect of claims, justice common sense, and good order require judicial confirmation as this issue and the seeking of a declaratory order was indicated."

> Smith J, in the *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt)* Ltd 1998 (1) ZLR (H), with reference to a declaratory relief, stated that, "it confirms the right of applicants, it does not confer rights".

It thus follows, that in judiciously exercising my discretion in light of the above authorities, I am of the view that the applicant as a holder of a lease agreement over a property which is being threatened by another person does have direct and substantial, existing and future interest in the present matter. He therefore is within his rights to institute proceedings in the manner he did.

Moving on to the first *point in limine* raised, that of locus standi. I am inclined to agree with the applicants counter arguments, in that though the applicants may not have real rights in terms of property law, they have rights derived from their lease agreement and can institute legal action to protect such rights. Gowora J. (as she then was ) in the *Gwarada v Johnson case* , above clearly stated that the rights of the lease holder including the right of occupation arise at the conclusion of the lease agreement.I will associate with the views of honorable, Gowora J (as she then was), in *Gwarada* above, in differentiating the rights of a lease holder to evict in contrast to those of an offer letter holder, she held that,

> " the applicant herein does not have an agreement to lease instead an offer letter, which courts in this jurisdiction have found not constitute a lease,…..clearly therefore an offer letter is not a lease agreement . The applicant has premised his right to claim the relief on the basis of such rights as would ensue on the conclusion of an agreement for lease., …… it cannot be said that the applicant can claim the same right as a lessee occupying under an agreement to lease."

Further, in the case, *Stephenson* v *Minister of Local Government and National Housing and Ors,* SC 38-02, Sandura J, held that,

> "locus standi, exists when there is direct and substantial interest which in thesubject matter of the litigation and the outcome thereof. A person who has *locus standi* hasa right to sue which is derived from the legal interest recognized by the law". See also, *Ndlovu v Marufu,* HC 7886/2014/ HH480/2015 *Augustine Banga & Another v Solomon SC54-15."*

In my considered view the applicant had been given possession of the stand at the conclusion of the agreement of sale .In addition, as conceded by the first respondent he was shown the pegs of the stand , the stand was a vacant piece of land. No person was on sight and nostructures had been erected. Evidence on record shows that, structures where then put in place after the presence of the applicant on the property. Moreover, **Silberberg and Schoeman's "The Law of Property", second edition at p 114** as cited in *Augustine Banga & Another v Solomon SC54-15* by GWAUNZA J( as she then was) acclaimed that,

"..possession has been described as a compound of a physical situation and of a mental state involving the physical control or *dententio* of a thing by a person's mental attitudes towards the thing…..whether or not a person has physical control of a thing , and his mental attitude is towards the thing are both questions of fact."

Based on the foregoing, I am thus satisfied that the applicant has*locus standi* to bring an action against the first respondents. The first *point in limine* is therefore dismissed. I find nothing turning on the first respondent's challenge on the privity of contract.

The other issue that had been raised by the first respondent stating that the letters from the Ministry, herein the fourth respondent, having been attached to the applicant's papers and are the main thrust of his, application are hearsay and inadmissible has to be resolved. Applicant in his rebuttal relied on the presumption of validity of official documents. In essence what they submitted is that not only the contents are to be taken as authentic but the service as well.

In my assessment the issue in contention as regard the validity of public documents and the presumption thereto was succinctly enunciated in,

*Afritrade International Limited v Zimra* SC3/2021, where it was held that,

> "The fact that the entries therein were not made by a public officer of the state does not detract from their status as admissible evidence, for the obvious reason that their originals were, or should have been, in the custody of a state official. The court a quo was very much alive to the presumption of regularity attaching to the bills of entry .It accepted that those bills were "public" documents whose contents *are primafacie* correct.,, and that , therefore, the evidentiary onus to disprove the correctness of the contents of the bills of entry to the respondent ."

What can be deduced from the above dicta is that if applied to the facts of this case. The two letters are admissible evidence as their source is an official source. Since they are official documents the authenticity of their contents cannot be questioned until proven otherwise. The burden of proof lies on the respondents who have failed to discharge it. Therefore, this preliminary point lacks merit and is dismissed. See. *Mhandu v Mushore &Ors HH80/2011, Sahawi*

*International (Pty) Limited and Yakub Ibrahim Mahomed v John Arnold Breden Kemp &Breco International (Pvt) Limited HH-24-10.*

In his last preliminary objection, the respondent argues that the applicant's case hinges on the cancellation of his lease agreement, whose cancellation he is disputing for the simple reason that it was not validly cancelled. He contends that no notice of cancellation was given and that even if notice was given, no termination of the lease was communicated to him as required by the law. As such he advances that there is need to lead viva voce evidence especially from the 4th respondent.

A dispute of fact is as the word connotes. The parties versions of the state of affairs is so polarized that there is need to get a third version to clarify the issues or that in the absence of viva voce evidence the issue is irresolvable.*The case of da Mata v Otto N. O*. 1992 (3) SA 858 CA,Wessels JA, said the following at 882F-H, "Material issues in which there is a bona fide dispute of fact capable of being properly decided only after viva voce evidence has been heard.".

The same was echoed in,*Room Hire Co. (Pty) Ltd v Jeppe Street Mansions* (Pty) Ltd 1949 (3)SA,1155.In our jurisdiction, what constitutes a material dispute of facts was clearly outlined in the case of *Supa Plant Investments (Pvt) Ltd 2009* (2) ZLR 132 (H) at 136F-G as,

> "A material dispute of fact arises when material facts alleged by the applicants are disputed and traversed by the respondent in such a manner as to leave the court with noevidence.ready answer to the dispute between the parties in the absence of further evidence."

The case of *Peterson v Cuthbert and CompanyLimited* 1945 AD at 420, enjoins this court not to simply accept the averments that there are disputes of facts but to go a step further and examine alleged dispute of fact. By doing so the court eliminates the possibilityof a fictitious dispute of facts meant to frustrate and prejudice the applicant.

In the present case, the material dispute of facts emanate from the two divergent arguments proffered by the parties with respect to the validity of the cancellation of the respondent's lease. This in my view is the central issue to be addressed. Whilst the applicant states that there is ample evidence on record to settle the matter without calling any further evidence, let alone the fourth respondents. The first respondent is adamant that only oral evidence from the fourth respondents will iron out this issue once and for all.

In view of that impasse I am inclined to take a robust stance and invoke the Plascon Evans rule from the *Plascon Evans Paints v van Riebeeck Paints (Pty) Ltd* 1984(3) SA623 A. This rule

entails that the court shouldendeavor to resolve the dispute raised in an affidavit without hearing evidence if the matter is capable of resolution on the papers before it. The court is encouraged to take a robust and common sense approach not an over fastidious one. See, *Zimbabwe Bonded Fibreglass (Pvt) Ltd V Peech* 1987 (2) ZLR 338(S) at 339.

In this regard, I strongly believe the alleged dispute of facts can be resolved on the papers without calling evidence. Inevitably, this brings to the fore the two letters that were attached to the applicant's papers on pages 26 and 27 of the court's record. The following are extracts of the letters:

ref: LB/11/220Date 21-12 18

Mugadza Joel

27 Mrawi Crescent

Zengeza

RE: OUTSTANDING DEVELOPMENT FEES AND RENTAL PAYMENT FOR STAND 220 CARRICK CREAGH TOWNSHIP.

Please be advised that in terms of Clause 14 and 15 of the lease agreement with yourselves, the two clauses have not been complied with. In addition 5.2 and 5.4 of the Tripartite Agreement entered into between the three parties, you should have remitted development fees to the sum of$94 073-11 to the land developers of the project. Evidence before us reveals that this has not been complied with and this has derailed infrastructure of the entire project.

Please remit the above mentioned sum and failure to comply with the above before the 31st of January 2019, shall assume that you are no longer interested in the stand, hence the offer letter will be withdrawn.

R, Chembwa

**FOR SECRETARY FOR LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING**

Annexure D

REF: LB/11/220Date: 17 February, 2020

JOEL MUGADZA
27 Murewi Crescent
Zengeza 2 |
Chitungwiza

RE: POSSESSION OF STAND 220 CARRICK CREAGH TOWNSHIP

The above captioned matter refers,

Reference is made to our letter dated 21 December, 2018 which we requested that you pay your outstanding development fees.

Despite notice being given to you, you have neglected or failed to pay within the timeframe stated,

Be advised that the lease has been cancelled in terms of Clause 22 and 23 of the lease agreement and stand 220 has therefore been repossessed with immediate effect.

Be guided accordingly.

M. Sayi
FOR SECRETARY FOR LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING.

The question that arises is that given the two letters above which are self-explanatory is the dispute surrounding their communication to the respondent capable of resolution on papers. Having addressed the issue of the authenticity and admissibility of the above letters what remains unanswered is their communication to the intended recipient, in this case the respondent. After the spirited submissions of the parties against the backdrop of the above two letters, the respondent's counsel did not pursue the issue of notice. As a result, the common cause facts were that, notice of intention to terminate lease is not disputed. The contents of the two above letters is not challenged. What then remained in issue is that there was no communication of the cancellation of the lease. Therefore, first respondent disputes the validity of the purported cancellation contending that the address borne by all the letters was not the *domicilium standi* they had elected for service as per their lease agreement.

It is a long established legal principle that, as a general rule cancellation must be communicated to the other party. This position is recognized both in South Africa and in this country. as illustrated in the case of, *Swart v Vosloo 1965 (1) SA 100 at 105, Phone –a -World-Wide Copy Ltd v Orkinand & Anor 1986 (1) SA, 729 at 751 A-G.* Ndou J,in the case of *Maplanka v B.ANcubeHoldings.(*HC 2435) of 2005)[2010]ZWBHC stated the same in respect to the general rule.

In the present matter, the respondent proffered evidence as borne by the lease agreement between itself and the fourth respondent. It is not in dispute that the addresses on the letter of termination of lease27 Murewi, Zengeza, Chitungwiza, is different from that on the lease agreement as the *domicilum standi,* is 19890 Zengeza ,Chitungwiza.

Evidence has however been led that the second address used which is the address on the letters is an address of the first respondent. The first respondent did not unequivocally deny or distance himself from the alleged address. In actual fact there is a letter addressed to the first respondent, from the fourth respondent and attached by the first respondent himself in support of his documents. This letter is dated the 23- of April, 2014 and the address so cited is the 27 Murewi Zengeza Chitungwiza. This letter reads;

Date 23 April 2014

Mugadza Joel

27 Murewi Cres

Zengeza Chitungwiza

Dear Sir or Madam

RE: DELIVERY OF LEASE NUMBER A/534/14 STAND 220 CARRICK CREAGH TOWNSHIP

We have pleasure in forwarding your copy of the completed lease agreement with regard to the above mentioned stand.

At this point in time we would like to draw your attention to some of the most important clauses of the lease.

CLAUSE 3: Annual rentals should be remitted to this office on or before March of each year that is during the lease period.

CLAUSE 5: Plans should be approved and building commenced on this stand before December 2014.

CLAUSE 4: Buildings worth $US 100 00-00 should be erected on or before March 2018 but which at you will be expected to take the title to stand.

Yours faithfully

Chembwa R

**FOR: SECRETARY FOR LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT**

As early as April 2014, somehow the address for service was altered from that which appears on the lease, the *domicilium standi* and that is where service was to be served. This letter bears the official stamp of the fourth respondent. The first respondent did not bother to explain to the court why that was so or dissociate himself with the address in contention.

Further, there are official receipts on page 79, 80 and 81 of the court record attached to the first respondent's papers reflecting payments made at the fourth respondent's office bearing the 27 Murewi, Zengeza address. The first is from as early as 3 March 2014 with the sum of $1 400.00. The second one is dated 28 September, 2015 reflecting an amount of $85 .00 .Lastly, one dated the 10th of April, 2018 of S3000.00. The respondent is in actual possession of these receipts he is the one who produced them to support his arguments on payments done.

As if that is not enough, it was submitted by the applicants that the current court process as well as that in the case HH735/20, they all constantly referred to, were all served to, and received by the first respondent and were responded to. I am of the view that it is not a coincidence that the fourth respondent will wake up and start sending correspondence at an address which he has not been furnished with. At the same time that address happens to be the one the first respondent is not only using when paying his dues to them but in receiving court process.

I have no doubt that the first respondent was thrifty with the truth. He is well versed with how the new address ended up with the fourth respondents. One then wonders that if all the other documents find their way to him through the second address why is it that, it is the letter of termination only which failed to find its way to him.

I am convinced that the address on the letter of cancellation belongs to the first respondent as evidenced by his own receipts, the letter dated 23 April, 2014 above and the service of this processes which he received on the same address. I therefore conclude that the cancellation of his lease agreement was effectively communicated by the letter of the 17th of February 2020.

I find support in the cases of *Maplanka* supra and *Total Zimbabwe (Pvt) Ltd v Appreciative Investments (Pvt) Ltd* ZHC4104/2009, where it was noted that,

> 'it is a principle of our law that if cancellation has not been communicated previously , it takes effect from service of summons or notice of motion/application. In other words, the institution of proceedings is adequate notification."

The notification, in my view, of these proceedings albeit initiated by the applicants could have provoked the first respondent into action to challenge and verify the validity of their lease with the respondents. As such it was sufficient notice.

Even if my conclusion were to be faulted, the lease agreement between the first respondent and the fourth respondent had a termination clause. Clause 22 of the lease agreement says;

> " that in the event that the Lessee shall fail to carry out any of the terms , conditions or clauses of this agreement then the Lessor shall have the right to summarily cancel the agreement and to eject the Lessee from the said stand, without prejudice to any right to claim damage for breach of contract."

What this technically means is that pursuant to the breaches detailed in the letter of notice of 2018 above the lease on the faith of clause 22 was summarily terminated. The first respondent was supposed to have completed certain approved structures within a given period but failed. What entails from clause 22, of the lease is, that there was no need for notice if strict regard is to be given to the parties' contract of lease.

Further a careful analysis of the lease leads to the fact that the lease had also expired. It expired in 2018 through effluxion of time. In addition there is no evidence on record that the first respondent had paid rentals over the said property. There is an abundance of authorities stating that failure to pay rentals terminates a lease. The case of *Total Zimbawe and Maplanka case supra* is just but one of many decided cases to that effect.

His efforts to then prepare building plans and pay for the approval of those plans to the respective local authority could not bail him either, especially, when all that was done with the knowledge of the expired lease.

The proceedings in the MUREMBA J, HH735-20 case wherein the first respondent sought a spoliation order are a clear indication that he was not in possession of the property in question. In my view the version of the applicant that he only moved in after learning of the new lease holder is more probable if not accurate. The payment of the building plans was only made sometime in September, 2020 after the inception of both his case and the current application by the applicants. Nothing turns on the relocation of the lease as it too had expired and no rentals had been paid.

What is more surprising is that the first respondent never alluded to any steps or efforts made to ascertain the status of his lease with the fourth respondent in the face of a third player , applicant. In actual fact he sued all the other respondents herein for spoliation with the exclusion

of the applicant. This in my view buttresses the point made by the applicants that indeed his lease has been terminated and the respondents had no obligation to appear and repeat what was common knowledge to the first respondent that is the cancellation of the lease.

The applicants did not adequately address on the consequential relief sought as such I will not grant the relief sought.

*In casu*, costs will follow the event as is the general rule.

**DISPOSITION**

The totality of the evidence before me leads to the conclusion that the first respondent's lease was cancelled and the notice of cancellation was duly served on him. There are also other factors that emerged from the arguments in this case that point to the cancellation of the lease. The respondents failed to rebut that the lease had expired by both the effluxion of time and the non - payment of rentals. I am therefore satisfied that under the circumstances the applicants have demonstrated that they are bona fide lease holders and therefore their lease is valid.

Accordingly it is and hereby ordered that;

1. The application succeeds in part.
2. The lease agreement number A94/20 entered into between the Applicant and the fourth respondent is declared as the only valid lease in respect of stand number 220 Carrick Creagh Township
3. The first respondents shall pay the cost of suit.

*Mutuso Taruvinga and Mhiribidi*, applicants Legal Practitioners
*Scanlen and Holderns*, first Respondent's Legal Practitioners