UK ELECTRIAL (PRIVATE) LIMITED
versus
COMMERCIAL AND INDUSTRIAL HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 25 November 2020 and 15 July 2021

Opposed Application

A Dracos, for the applicant
N Chidembo, for the respondents

ZHOU J: This is an application to compel the respondent to provide certain information pertaining to the review of the rentals in the lease agreement between the respondent and the lessor in the principal lease agreement. The draft order also seeks a declaration to the effect that the applicant is entitled to such information in terms of the contract of lease between it and the respondent and that a failure/refusal to provide the information constitutes a breach of the lease agreement. The alternative relief sought in the draft order is for a declaration that the failure/refusal to provide such information violates s 62(2) of the constitution of Zimbabwe 2013.

The application is opposed in its entirety by the respondent.

FACTURAL BACKGROUND

Both the applicant and respondent are companies incorporated in accordance with the laws of Zimbabwe. The respondent is a tenant in respect of an immovable property known as the remainder of Stand No. 4916 and Lot No, 1 of Stand 6178 Salisbury Township in terms of a lease agreement (the principal or main lease). In June 2017 the respondent entered into a lease agreement with the applicant in terms of which it sublet to the applicant a portion of the premises. The sublease was reduced to writing. The applicant is therefore a subtenant of the respondent. Clause 1.4 of the written sublease agreement provides as follows:

> "The rent is US$9 000 (Nine thousand United States dollars) plus VAT per month from 1 October 2017 to 30 June 2018. No rentals will be charged from 8 June 2017 to 30 September 2017. Rentals

> are reviewed annually as at 1st July and should rentals increase from the primary landlord to the lessor, then rentals for the lessee shall be reviewed accordingly."

Clause 4 of the sublease provides as follows:

> "The rental shall be reviewed in line with percentage increases as may be applied by the primary landlord to the lessor. The review take into account the conditions of the lease and the current open market in so far as annual or periodic escalations in rent are concerned. Should the lessor or lessee fail to reach agreement within one month of the rent review date or the last day for the lease rent and any escalations thereof shall be determined in accordance with clause 22 Abitration."

The respondent took two objective in *limine i*n addition to contesting the matter on the merits. The first ground of objection is that the matter ought to have proceeded to arbitration as enjoined by clause 4 of the agreement. The second ground of objection is that the applicant's papers disclose no cause of action.

THE ARBITRATION CLAUSE

In making the point that the matter must be dealt with by way of arbitration the applicant relies on clause 4 which has been cited above. The clause applies to disagreements on the rent and escalations thereof in so far as these must take into account the open market rent. This is the correct meaning of that clause especially when it is read together with clause 22 which provides, *inter alia* that:

> "should any dispute arise between lessor and lessee in regard to the determination of the open market rent such dispute shall be settled by a mutually agreed arbitrator.." (emphasis added).

This application does not pertain to the open market rental. Instead, the applicant wants information on the percentage by which the rent in the main or principal lease was increased. This is so because where a rent increase in the sublease is predicated upon the increase in the principal lease then clause 4 specifically states the review shall be "in line with" the percentage increases applicable to the main lease. The question of the percentage by which the rent in the main lease was increased falls outside the ambit of the arbitration clause.

Accordingly the objection that the matter be referred to arbitration must fail.

THE CAUSE OF ACTION.

The objection that there is no cause of action is founded upon the premise that the applicant is seeking an interdict and has not satisfied the requirements of an interdict. Clearly the respondent misses the point in this respect. The application is founded upon a contract, it being the applicant's case that it is entitled in terms of the contract to the information sought. There is also the alternative

cause founded upon s 62(2) of the Constitution of Zimbabwe. Both causes are cognizable at law, which makes the objection meritless.

THE MERITS

In opposition to the application, the respondent states that

> "This application is unnecessary as the information being requested has always been availed to the applicant." (Paragraph 6 of opposing affidavit.)

In other words the respondent concedes the applicant's entitlement to the relief sought, see also paras 15 and 19 of opposing affidavit. Indeed, the letter attached to the opposing affidavit as annexure "B" shows an acceptance that the applicant is entitled to information on the percentage increases applied to the main lease.

The applicant doubts the correctness of the information as conveyed by the respondent through its letter. In other words, it would want proof, possibly in the form of communication from Mashonaland Holding Limited which is said to be the principal lessor, or the lessor in the main lease agreement, in order to authenticate what the respondent has communicated to the applicant. The lease agreement clearly contemplated that such information would be availed to the applicant otherwise it would have no knowledge of the percentage by which the rent in the main lease agreement has been increased. Thus the applicant is merely enforcing a term of the contract, a right which even the respondent acknowledges.

Applicant sought costs on the attorney-client scale. These are a special order of costs which is warranted where there are special reasons, such as the vexatiouness of the defence or some other reprehensible conduct on the part of the affected party. No such special reasons exist.

Given that this dispute can be readily resolved based on the ordinary principles of contract, it is unnecessary for the court to consider the constitutional issues raised in the applicant's papers. The doctrine of constitutional avoidance entails that where a dispute can be resolved without reaching out to a constitutional issue the court must avoid determining the dispute based on principles of constitutional law. Constitutional law is reserved for serious constitutional disputes, not those that can be resolved through the application of other principles of law such as contract law principles.

In all the circumstance the applicant is entitled to the relief sought. I do not believe, though that the declaratory relief sought in paras 1 and 2 of the draft order is necessary. It represents the

very basis upon which the applicant has been found to be entitled to the information on the percentage increased in rentals in the main lease.

In the result, IT IS ORDERD THAT:

(1) Respondent be and is hereby ordered to provide the applicant with information from the principal lessor, including any agreement and other documents, showing the percentages by which the rentals in the main lease agreement were increased, within 10 business days from the date of this order.

(2) Respondent shall pay the costs.

Honey and Blanckenberg, applicant's legal practitioners
Joel Pincus Konson and Wolhuter, respondent's legal practitioners