U-TOW TRAILERS (PRIVATE) LTD
versus
CITY OF HARARE
and
SUPERLUX (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 30 June, 13 July and 21 October 2009.

OPPOSED APPLICATION

Advocate L Mazonde for applicant.
Mr S Chirowe for 1st respondent.
Mr C Daitai for 2nd respondent.

MAKARAU JP: The brief background facts to this matter are largely common cause. I set them out as follows.

In 1994 the applicant entered into a lease agreement with the first respondent in respect of certain premises situate at number 9 Market Street, Eastlea, Harare, ("the premises"). The lease agreement was constantly renewed over the years with the last renewal being agreed upon on 20 June 2007 for a further three years. Thus the lease agreement between the parties is due to expire by effluxion of time on 31 March 2010.

It was a specific term of the agreement between the applicant and the first respondent that the applicant would not sublet the premises without the written consent of the lessor.

In 2008, the applicant and the second respondent reached an understanding in terms of which the second respondent moved onto and took occupation of part of the premises. I shall revert to the details of this understanding in due course.

In January 2009, the first respondent wrote to the applicant summarily terminating the lease agreement and seeking the ejectment of the applicant from the premises. This was on the allegation that the applicant was subletting the premises to the second respondent without the prior written consent of the lessor and in breach of the specific term of the lease agreement against subletting. When the applicant tendered rentals for the month of February 2009, these were rejected on the basis that the lease agreement had been cancelled. This in turn prompted the applicant to approach this court seeking firstly an order holding the first respondent to the

lease agreement on the basis that it was not subletting to the second respondent as alleged and secondly an order ejecting the second respondent from the premises.

The application was opposed by both respondents.

In opposing the application, the first respondent contended that it had proceeded in terms of the lease agreement to summarily cancel the lease agreement as the applicant was in breach. It justified its action by relying on clause 21 of the lease agreement which provides that:

"If the lessees shall fail to pay the rent on the due date or at the latest within ten days thereafter or if the lessees shall commit any other breach of the terms or conditions of this lease then the Municipality shall have the right in its discretion summarily to terminate this lease and retake possession of the stand without payment of any compensation whatsoever and without prejudice to any claim which it may have against the lessees for rent already due or for any damages which it may suffer by reason of such breach or termination."

The second respondent's opposition to the application is in my view somewhat curious. The second respondent is the alleged sub-lessee and it objects to the continuation of the lease agreement between the applicant and the first respondent. While admitting as contended by the applicant that it took occupation of the premises in anticipation of a joint venture between itself and the applicant, the second respondent does not proffer any defence as to why it should not be evicted from the premises at the instance of the applicant. Instead, and curiously so as I have observed above, it adopts and pleads the case of the first respondent that the applicant was in breach of the lease agreement, indeed epitomizing the proverbial stranger who mourns louder than the bereaved. It further avers that in February 2009 when the applicant's rentals were turned down, this was because it had paid these in respect of the property. It however falls short of alleging that it is now the tenant in respect of the property.

In its opposing affidavit, the first respondent does not admit any formal relationship with the second respondent. It simply maintains that the applicant's rentals for February 2009 were not accepted as its lease had been cancelled.

I believe it is pertinent at this stage that I dispose of the issue between the applicant and the second respondent. As observed above, the applicant is seeking the eviction of the second defendant from the premises on the basis that the proposed joint venture between the parties has failed. This is not disputed by the second respondent which then proceeds to aver that after the joint venture had failed to materialize, the applicant demanded rentals from it, thereby creating the sublease. The totality of the averments made by the second respondent, even if proved, do not constitute a defence to an order for eviction at the instance of the applicant.

Thus, in the event that I find for the applicant and hold the first respondent to the agreement, I must perforce order the eviction of the second respondent from the premises on the basis that the second respondent has failed to proffer a defence to the applicant's claim.

The issue that remains for my determination is between the applicant and the first respondent. It is whether the first respondent was justified in summarily canceling the lease agreement without first affording the applicant a chance to respond to the allegations that it was subletting the premises to the second respondent.

It is trite that even where a lease agreement grants the lessor the right to cancel the lease on account of breach and to re-take possession of the leased premises as was the position between the applicant and the first respondent, such cancellation is always subject to the control of and confirmation by the court. The lessor has to approach court for the confirmation of its cancellation of the agreement and for the eviction of the tenant. The right to summary termination of the lease agreement, no matter how clearly worded, does not oust the jurisdiction of the court to grant the eviction order. The existence of the grounds for and the validity of the cancellation of the lease agreement are always subject to validation and confirmation by the court which alone can order the eviction of the defaulting tenant. The lessor cannot exercise self help and retake possession of the property without a court order even where the agreement specifically provides so. (See Livingstone *v Solomon* 1924 SR 117; *Joubert v Bester* 1977 (2) SA 641 (T); Towers *v Chipata* 1996 (2) ZLR 261 (HC) and *Bater and Another v Muchengeti* 1995 (1) ZLR 80 (SC) at 85).

In *casu*, the first respondent did not independently approach the court for the eviction of the applicant after it became aware of the alleged breach in the form of subletting. After being served by this application, it did not seek to counter apply for the confirmation of its cancellation of the lease agreement and the eviction of the applicant. The validity of its actions in canceling the lease agreement and its threat to re-take possession of the premises have been brought before the court by the applicant not for its confirmation but for it to be set aside on the basis that the first respondent did not give the applicant an opportunity to respond to the allegations before it acted summarily.

Thus, it appears to me that even if I were to find that the purported cancellation of the lease agreement by the first respondent was justified in the circumstances, that finding would not automatically translate into an order evicting the applicant from the premises as there is no prayer before me for the eviction of the applicant from the property. In my view, such a

finding, if I were to make it, would simply lay the foundation for the issuance of an eviction order against the applicant at the instance of the first respondent whenever it is moved to seek such an order.

It is on the basis of the above that in my view, it is not necessary that I make a finding as to whether or not the applicant was subletting to the second respondent and was therefore in breach of the lease agreement. In my view, to do so would be to tie down the court that may be approached by the first respondent for an order evicting the applicant from the property.

In my view, the legal issue that must be resolved in this matter is whether in light of the promulgation of the Administrative Justice Act [Chapter 10.28], ("the Act"), the powers of the first respondent as a local authority to act summarily as it did has been modified. Hence at the hearing of the matter, I directed the parties to make reference to the provisions of the Act, which came into operation on 3 September 2004. My anxiety not to overlook the provisions of the Act was prompted by the admitted fact that the first respondent acted strictly in terms of the lease agreement between the parties and did not afford the applicant a chance to be heard before it summarily cancelled the lease agreement on the allegation that the applicant was subletting the premises to the second respondent.

I have now received extensive heads of argument from both counsel in this matter and I appreciate the assistance rendered me in this regard.

Mr Chirowe for the first respondent, ingeniously in my view, put the issues that arise from a consideration of the provisions of the Act as follows:

1. "Whether or not the applicant by entering into a lease agreement which entitles first respondent to summarily terminate the lease agreement can be held to have waived its right to be heard as provided (for) in the Administrative Justice Act.
2. Whether or not first respondent cannot validly enter into a contract with the applicant which varies or excludes some provisions of the Administrative Justice Act."

I view the settling of the issues by Mr Chirowe as ingenious as the Act came into operation on 3 September 2004 when the parties were already in the landlord and tenant relationship. The applicant could thus not have waived rights under the Act when it contracted with the first respondent as such rights were not in existence and had not accrued to it. By the same token, the parties could not have expressly excluded the provisions of the Act in their

agreement as the lease agreement preceded the coming into operation of the Act. All in all, I gain the impression that Mr Chirowe in settling the issues in the manner that he did, was at pains to show that the provisions of the Act are not binding on the parties before me. Whether the first respondent is bound by the provisions of the Act is the issue that I address in this judgment.

Advocate Mazonde for the applicant on the other hand, perceived the issue arising from the provisions of the Act as simply whether these have introduced the application of rules of natural justice into the filed of contract law where one of the parties is a local authority as is the first respondent before me. I tend to agree with his definition of the issue that falls for my determination in this suit.

The rule at common law is that tenets of natural justice have no application in the law of contract unless the aggrieved party can prove that the contract impliedly imported and incorporated such into the contract. (See *Machaya v BP Shell Marketing* (Pvt) Ltd 1997 (2) ZLR 473 (H)).

With the promulgation of the act, it appears to me that this common law was varied in some instances as it applies to administrative authorities to which the Act applies.

I first have to determine whether the Act applies to the first respondent.

In section 2, the Act defines administrative authority to include any person, committee or council of a local authority. In *casu,* it is common cause that the decision to summarily terminate the lease agreement between the applicant and the first respondent was taken on behalf of the first respondent by a duly authorised employee or committee of the first respondent, who or which by virtue of the provisions of the act, becomes the administrative authority for the purposes of the Act. This is not in dispute.

In the same section, an administrative action is defined to include any action or decision taken by an administrative authority. The definition given in the section appears to me to be immensely wide. I would venture to suggest that the definition of "administrative action" in the Act is wider than that given in section 1 of the South African promotion of Justice Act as reported in decisions such as *Sikutshwa v MEC for Social Development, Eastern Cape, and Others* 2009 (3) SA 47 (TkH) and *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division, and Others* 2009 (3) SA 403 (W) where it is stated that "administrative action" in terms of s 1 of the Act means any decision taken, or any failure to take a decision by an organ of State when such organ of State is exercising a public power or performing a public

function in terms of legislation, which adversely affects the rights of any person and which has a direct, external legal effect .

In my view, the definition of 'administrative action" as given in section 1 of the South African equivalent of the Act, as compared to the definition given in the Act, marks the point of departure in the laws of our two countries.

Thus, in South Africa, if action is taken on the basis of a contract between the parties, such has been held not to constitute 'administrative action" that is subject to the provisions of the Act. (See *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) (2008 (3) BCLR 251 and *De Villiers v Minister of Education, Western Cape, and Anothe*r 2009 (2) SA 619 (C)). In excluding contractual relations from the application of PAJA, the south African courts have been guided by the definition of "administrative action" that I have referred to above and is captured in the following remarks by NQCOBO J (as he then was), in para 142 of the judgment in *Chirwa's* case:

"The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action."

With much commendable foresight, (or hindsight), the legislature in enacting the Act specifically included acts by all public authorities, even where the power to carry out the Act is derived from a contract, thereby obviating the need for our courts to debate the issue that fell for determination in the South African courts in matters involving the termination of employment contracts. Section 2 of the Act defines "administrative action" as follows:

"(1) In this Act—
"administrative action" means any action taken or decision made by an administrative authority and the words "act", "acting" and "actions" shall be construed and applied accordingly;"

in the same section, empowering provision, is defined as follows:
"(1) In this Act—
""empowering provision" means a written law or rule of common law, or an agreement, instrument or other document in terms of which any administrative action is taken;"

My reading of the two definitions put together makes me arrive at the conclusion that for the purposes of the Act, any decision made by an administrative authority under the

empowering provisions of any enactment, in pursuance of any rule of common law' in terms of an agreement between itself and another party or in terms of any legal instrument, shall be made fairly and in accordance with the provisions of the Act.

In my view, one can say the statutory provisions protecting the public's rights to fair administrative decisions as given under the Act are considerably wider than those conferred under the South African equivalent and to construe them restrictively would be to take away from the public by judicial interpretation that which the legislature has given.

That the promulgation of the Act brings in a new era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities as there has been a seismic shift in this branch of the law. The shift that has occurred is in my view profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of section 3 (3) of the Act applies.

On the basis of the foregoing, I find that the decision by the first respondent to summarily terminate the lease agreement between itself and the applicant was an administrative carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applies fully to such a decision.

The Act provides in the main that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect the rights interest or legitimate expectation of any person shall inter *alia*, act reasonably and in fair manner. The Act proceeds to define what a fair manner for the purposes of the Act shall entail and this includes the adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi arteram partem* rule.

In my further view, the Act is simply a codification of the position that was gaining general acceptance at common law to the effect that rules of natural justice have to be observed before any administrative decision is taken where such may adversely affect the rights or property of an individual. (See *Grundling v Beyers and Others* 1967 (2) SA 131 (W). Thus, even prior to the enactment and promulgation of the Act, courts in this jurisdiction were generally alive to the need to import fairness into administrative decisions even those that were founded primarily on contract, especially the employment contract. (See *Machaya v BP Shell Marketing (Pvt) Ltd* (supra)).

On the basis of the above, it is therefore my finding that the first respondent was bound to act fairly in terminating the lease agreement between itself and the applicant. It failed to do so. By failing to act fairly in the circumstances, it breached the obligations placed upon it by the law. Its consequent decision, arrived at in circumstances where it had failed to act fairly cannot therefore stand.

I make this decision in the full knowledge of the fact that the first respondent genuinely believed it had a case against the applicant and that the lease agreement between itself and the applicant allowed it to act as it did. Notwithstanding all that, because the law imposes a duty on the first respondent to act fairly in the matter, its decision has to be set aside as it was arrived at unfairly. The decision is set aside even without an examination of whether or not the applicant was subletting the premises in promotion of the need to advance fairness in public administration as embodied in the Act.

Before I dispose of this matter, I need to deal with a point in *limine* taken by the first respondent in this matter and arising out of adjectival law. The first respondent contends that the applicant did not approach this court for relief under the Act and thus I cannot apply the provisions of the Act to its advantage.

Section 4 of the Act provides that any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.

It is common cause that the applicant filed this application challenging the decision of the first respondent to summarily cancel the lease agreement. It filed a court application in terms of the rules. While the application does not make any reference to the provisions of the Act, in my view it makes allegations that fall squarely within the provisions of the Act. I was satisfied before I referred the question to the parties for further argument that the allegations and contentions made by the applicant in its court application fell within the purview of the Act even if the Act was not specifically invoked.

In my view, generally, it is not necessary for an applicant to specifically plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law unless the law under which he or she is proceeding requires that certain averments be specifically pleaded.

The court is not a slave to the form of the law. It is always a slave to justice whom it must always serve.

For the avoidance of doubt, if I have erred in allowing the applicant to bring a deformed application before the court and the correct position is that it was necessary for the applicant to specifically invoke the provisions of the Act, I will condone that oversight in terms of section 4 (c) of High Court Rules 1971.

As correctly pointed out by the first respondent, this is not an application for review. It is an application for the setting aside of an administrative decision on the basis that it was not arrived at fairly and thus at law, contravenes the Administrative Justice Act.

In view of the fact that the applicant succeeds on a matter that it did not specifically raise in its initial heads of argument, I will not punish the first respondent with an award of costs. The same does not apply to the second respondent.

In the result, I make the following order:

1. The decision by the first respondent to summarily cancel the applicant's lease agreement is hereby set aside.
2. The second respondent and all those occupying through it are to vacate the premises at number 9 Market Street within 7 days of this order failing which the deputy sheriff is hereby authorised to evict the second respondent and all those occupying through it from the premises.
3. The second respondent shall bear the applicant's costs of suit.

Muzangaza, Mandaza &Tomana, applicant's legal practitioners.
Gambe & Partners, 1st respondent's legal practitioners.
Magwaliba & Kwirira, 2nd respondent's legal practitioners.