

THE RIGHTS AND DUTIES OF LANDLORDS AND TENANTS OF COMMERCIAL PROPERTIES IN ZIMBABWE UNDER THE CURRENT STATUTORY PROVISIONS

As you may be aware, the legislature came up with Statutory Interventions to alter the common law rights and duties of Landlords and Tenants in this country. For commercial properties, the interventions came in the form of the Commercial Premises (Lease Control) Act [chapter 14:04] (Hereinafter referred to as "the Act") and the Commercial Premises (Rent) Regulations, 1983 (Hereinafter referred to as "the regulations").

The Act, *inter alia*, empowers the Minister of Industry and Commerce to make regulations limiting the powers of courts in making orders for the eviction of Tenants and also limiting the usual common law rights of landlords. The Minister's powers in this regard are spelt out in section 5 (1) and (2) of the Act.

Pursuant to the aforesaid powers, the Minister promulgated the Commercial Premises Rent regulations in 1983. Of particular interest for purposes of this article are sections 22 and 23 of the regulations which provide as follows:-

"22.(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 the 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 provides as follows:-

“23. 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 ejectment of a Lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the Lessee.” (the emphasis is my own).

In the recent Judgment of **ELNOUR UNITED ENGINEERING GROUP (PRIVATE) LIMITED v MINISTER OF INDUSTRY AND COMMERCE N.O & 2 OTHERS HH 81-23**, the High Court ruled that sections 22 and 23 of the Regulations are *ultra vires* the Act and set them aside. The Minister and the other two Respondents have appealed to the Supreme Court and the effect is that the full provisions of the Regulations remain in force and binding until and unless the Supreme Court confirms the Judgment of the High Court.

The reasoning behind the High Court Judgment is that the regulations unduly favour the interests of Tenants at the expense of the competing interests of landlords of commercial properties.

In my respectful and considered view, sections 22 and 23 ought not to be looked at in isolation from the enabling Act and the entire Regulations.

The enabling Act gives the Minister wide powers to override the common law, including the power to restrict or suspend the rights enjoyable under the common law by Landlords of commercial premises. The Minister’s powers are only subject to one limitation namely that he/she shall have regard to the interests of both Lessors and Lessees.

Also in my considered view, the Minister does not necessarily have to always achieve an equitable balance between the competing interests of the Landlord and Tenant as that may be practically impossible to achieve.

Where it is impossible to achieve equality or parity of treatment between the parties at all times, the Minister may curtail the common law rights of the Landlord although the Minister must consider the effects of his/her decision on the Landlord and proceed with utmost caution so as not to curtail those rights beyond what is reasonably necessary. In such a situation, the duty to

consider the interests of the Landlord may simply imply a duty to mitigate his/her prejudice.

In this context, I am not convinced that the Regulations, to the extent that they create a Statutory Tenancy regime which prevents the Landlord from evicting a Tenant who continues to pay a fair rent and observes all the other terms of a tenancy agreement, can be said to be *ultra vires* the Act.

The Regulations, by stipulating that the Tenant must abide by all the terms of the original contract and pay a fair rental or the rental set by the tenancy agreement before he/she can avail him/herself of the protection of statutory tenancy, take into consideration the interests of the Landlord, even though they impede on his/her common law right to freedom of contract. Also to the extent that the Court is given a discretion to issue an eviction order in circumstances where the Landlord can show good cause for the grant of such an order, the Landlord's interests are also protected. In this regard, good cause may include such circumstances like the Landlord requiring the premises for his/her own use or the need to do some renovations on the property. It may also include a situation where the statutory Tenant fails or refuses to pay a fair rental determined by the Rent Board and the Landlord identifies another Tenant willing to pay such fair rental.

Even though the regulations bind the Landlord to a particular Tenant, they still ensure that the Tenant abides by the terms and conditions of the original contract of lease and remains liable to pay a fair rent at the instance of the Landlord or alternatively, the Rent Board

Finally, it is significant to note that the wording of both the Act and the Regulations is not something peculiar to our jurisdiction alone. The South African equivalent of both the Act and the Regulations are not dissimilar and the Minister in that jurisdiction enjoys similar powers to those enjoyed by his/her Zimbabwean counterpart with regards to Statutory Tenancy and the attendant protection mechanisms.

In due course, the Supreme Court decision on the pending appeal will determine the future of the statutory tenancy regime in this jurisdiction unless there is a further appeal to the Constitutional Court.

Thank you.



ABSLOM MUCHANDIONA