Judgment No. HB 103/2003
Case No. HC 593/2003
X-Ref HC 2238/02 & 2683/02

JAMES COURT PRIVATE LIMITED

Versus

G. MWALE & 20 OTHERS

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 19 MAY & 2 OCTOBER 2003

J J Moyo for the applicant
Dhlamini for the respondents

Opposed Matter

CHIWESHE J: In this matter the applicant issued summons in which it sought an order declaring the respondents' continued occupation of its premises to be unlawful and for the eviction of the respondents on the grounds that the respondents were in breach of the terms and conditions of their tenancy, statutory or otherwise.

The respondents entered appearance to defend the matter and filed their plea. The applicant then filed the present application for summary judgment arguing that the respondents have no *bona fide* defence to its claim and that appearance to defend had been entered for purposes of delay.

In order to succeed in this application the applicant must show that it has a clear case and that it ought not to be subjected to the expense and delay of going to trial. It must show that its version of events is unanswerable. (See *Gaffe* v U*niversal Trading (Private) Limited* 1976 (2) RLR 200 (GD).

On the other hand in order to successfully oppose the application the respondents must show that they have a *bona fide* defence to the applicant's claim in the main action. In *Jena* v *Nechipote* 1966(1) ZLR 29 at 30D-E it was held that the respondent has to establish that there is a mere possibility of his success or that he has

a plausible case or that there is a triable issue or that there is a reasonable possibility that an injustice may be done if summary judgment is granted. The respondents must set up a defence which is honest and which if proved at the trial will constitute a defence to the applicant's claim in the main action. (See *Joan Spencer Rex* vs *Rhodian Investments Trust (Private) Limited* 1957(4) SA 631 (SR) 633G.

In its declaration in the main action the applicant avers that in respect of all respondents (save the 19th, 20th and 21st respondents) a lease agreement was entered into in respect of its premises, known as James Court, the unit let to each respondent being the one constituting his residential address. The terms of the standard lease agreement signed by each of the respondents provided *inter alia* that each respondent would in addition to the rental pay for rates, water, security and repairs and maintenance to the lift (collectively referred to as "service charges").

The lease expired at the end of December 2001. The respondents refused to enter into a new lease following a dispute over the rental and continued to occupy the premises as statutory tenants. The matter was then referred to the Rent Board. The parties agreed that the Rent Board fixes the rent to which the applicant would then add the service charges. The Rent Board then issued a provisional rent order which came into effect on 1 July 2002. It was understood that the applicant would add to the rental the service charges. Whilst the provisional rent order was acceptable to both parties, the respondents refused to pay the service charges. Further according to the applicant in respect of September 2002 no rental at all was paid on due date, that is the first day of the month or within seven days of that date. The applicant further avers that as tenants, statutory or otherwise the respondents are obliged to comply with all their obligations as set out in the last lease entered into. These obligations

according to the applicant are that respondents pay the rental fixed by the Rent Board on due date or within seven days of due date and in addition that they pay the service charges.

It is clear that the applicant's claim is based on two causes of action, namely the failure by the respondents to pay rent timeously and the refusal by the respondents to pay the service charges. Do the respondents have a *bona fides* defence to these claims?

While admitting that the September 2002 rentals were paid out of time, the respondents, argue that the delay was by one day and that such delay was not unreasonable. It is also contended that the applicant had contributed to the delay by initially refusing to accept the rentals when they were tendered on time because such rentals had not included the amounts due by way of service charges. As a result the respondents had to arrange to pay those rentals into their legal practitioners' trust account. If the respondents were to prove these averments at the trial such would constitute a defence to the applicant's first cause of action, namely failure to pay rent on due date. It appears to me that the question of rentals should (notwithstanding the fact that the applicant prefers to have both payable at the same time) be treated separately from the service charges *per se*.

I now turn to the second cause of action that is the non payment of service charges. These comprise water, rates, electricity and security services. While the respondents do not in respect of these charges (save rates) dispute the fact that they are liable to meet expenses arising, they query the various increases levied by the applicants without consultation with the respondents. They aver that the charges have become exorbitant and seek that the applicant justify the increases. Although in terms

of their last signed agreement, the respondents are obliged as statutory tenants to pay for these charges, I do not understand that they are obliged to pay any figures without complaint. If they can show that the figures are exorbitant, unjustified or unreasonable then a triable issue will arise.

With regards the rates the respondents argue that these are for the account of the property owner and not the tenants. The applicants argue that it is in order for the landlord to pass on to the tenant the obligation to pay rates should such be provided for in the lease agreement.

The respondents argue that there is a statutory prohibition against such an arrangement. Clearly a dispute on a point of law arises from the above. Such dispute is best resolved by a trial court.

In the circumstances I am of the view that the respondents should be afforded the opportunity to proceed to trial and argue their case on the merits. It cannot be said that they do not have a *bona fides* defence to the applicant's claim.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

Calderwood, Bryce Hendrie & Partners applicant's legal practitioners
Messrs Lazarus & Sarif respondents' legal practitioners