Judgment No. HB 80/2003
Case No. HC 1638/2002
X-Ref HC 1773/02 & HC 2040/02

ZOMUNODA CHIZURA

Versus

GUY TENDAI CHIWESHE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 17 JULY 2003

Judgment

CHEDA J: This is an application for summary judgment against a notice of appearance to defend entered by respondent and filed on 25 July 2003.

Applicant is the executor of the estate late Grace Chizura and is acting as such being the lessor of certain premises known as 101 Netherby Drive, Sunnyside, Bulawayo and respondent is a lessee of the same. A lease agreement was entered into between the parties on 30 January 2001.

On 15 July 2002 applicant issued out summons for the cancellation of the said agreement and eviction of the defendant on the basis that defendant had breached the lease agreement. Reliance was placed on clauses 3 and 8 which reads:-

> "3. **Rental**
>
> The rental payable by the lessee shall be $7 000 (seven thousand dollars) per month (unless varied by a Rent Order issued by a Rent Board in terms of The Rent Regulations 1982 Statutory Instrument 626 of 1982 or any subsequent legislation), payable monthly in advance free of exchange of other deductions on or before the first day of every month into Zimbabwe Banking Corporation Limited (ZIMBANK) account number 43302-130444-101 in the name of MISS NOBUKHOSI NCUBE. Payment may also be made at such other place directed by the Lessor from time to time.
>
> Should the Lessee fail to pay the monthly rental within seven (7) days of due date the lessor without prejudice to any of his/her rights, shall further have the right to demand and recover from the Lessee all legal costs incurred in consequence of such late rent including party and party attorney and client

costs and any collection commission charged to the lessor, all of which amounts the lessee agrees to pay.

Furthermore, whether or not the Lessee thereafter pays his/her rental and all legal costs as aforesaid, the Lessor shall have the right to evict the Lessee from the premises with immediate effect. The Lessor shall also have the right to deny access by the Lessee to the premises while eviction procedures are being executed."

And clause 8 which reads:-

"8 **Condition of premises**

The Lessee shall, on taking possession of the premises, satisfy himself that the leased premises and any appurtenances or contents thereof including keys, locks, windows, sewage pipes, and pans or electrical installation and fittings, including thermostats and elements, plumbing, especially washers, ballvalves and wash hand basins, refrigerators, fire-place fixtures or furniture, are in a good and proper state of repair and in a clean and sanitary condition and shall within seven (7) days of so taking possession notify the Lessor in writing of the details of any defect in the state of repair or condition of the leased premises, the appurtenances or contents aforesaid, AND THE FAILURE OF THE LESSEE TO SO NOTIFY THE LESSOR shall be deemed an acknowledgement that the whole of the same are in good and proper state of repair and in a clean and sanitary condition. Notification of any defect not rendered the Lessor liable to repair such defect."

Respondent filed an appearance to defend on 25 July 2002 to which applicant responded by filing an application for summary judgment which is subject of these proceedings.

Point *in limine*

At the hearing *Mr C P Moyo* raised a point *in limine* in the form of a special plea basically that this matter involves the same parties and the same subject as in cases HC 1462/02 and HC 1638/02. He argued that of the two cases only case number HC 1638/02 had been withdrawn by applicant and 1462/02 was still pending. It is therefore his argument that this matter should not be dealt with before

the above matter is disposed of. It is indeed correct that in all the above cases respondent has been entering an appearance to defend and filing pleas. In case 1462/02 one of the issues he raised is that applicant is not the executor of the estate of the late Grace Chizura.

Even if applicant was not, respondent should not forget that when he entered into the lease agreement, he signed and accepted applicant as having authority to sign as the lessor and in fact continued to pay rent to him and/or his agent. This argument is in my view without merit.

I have examined the cases referred to by *Mr Moyo* which give rise to the defence of *lis pendens* or *lis alibi pendens*. Herbtein and Van Winsen in the *Civil Practice of the Superior Courts* in South Africa 3rd Ed at page 269-270 state,

> "If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendants to take the objection of *lis pendens* that is another action respecting the identical matter has already been instructed, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

It is clear that the principle of *lis pendens* or *lis alibi pendens* is not an absolute bar. It is discretionary upon the court to decide whether it is just and equitable that it must be allowed to proceed. The question then is, is it just and equitable to allow the present case to be heard or allow the objection raised by respondent to bar the hearing. I believe it is important in order to make a proper assessment of this case to look at the history of the matter. Respondent accepted applicant's position as executor of the said estate when he entered into the lease agreement. When he is now called upon to pay up in time he then raises a defence of

lack of authority to act on the part of the applicant and has been forcing applicant to withdraw his claim. This matter involves an estate which in my view should receive the court's sympathetic hearing and urgent attention, for failure to do so will result in beneficiaries suffering. It will therefore be unjust and inequitable that the finalisation of this matter be suspended by a defence of *lis alibi pendens* which is not *per se* absolute. In *Loader* v *Dursot Bros P/L* 1948(3) SA 136 at 138 ROPER J clearly stated,

> "It is clear on the activities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to he proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter. The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist – *Wolff N O* v *Solomon* (15 SC 307); *Michaelson* v *Lowenstein* (1905, T S 324; *Osnan* v *Hector* (1933, CPD 503)."

The rule is therefore not immutable see also *Baldwin* v *Baldwin* 1967 RLR 289 (G) at 290D and *Mhunga* v *Mtindi* 1986 ZLR 171 (SC). It is my view that this is a proper case where a court can ignore the existence of this defence in the interest of justice and above all bearing in mind that this dispute involves a deceased's property the balance of convenience favours that the matter should proceed.

Merits

It is not disputed by respondent that their terms and conditions of the agreement are governed by the lease agreement. He, however, is of the view that applicant has always allowed him to pay his rent outside the stipulated date. This may well be so, but that in my view does not take away applicant's rights to enforce the agreement. Any variation of the lease agreement was to be in accordance with clause 21 which reads –

> "21. **Variation of lease**
>
> It is recorded that this agreement is the whole agreement between the lessor and the lessee and that there have been no warranties, guarantees, representations or conditions precedent, save as are specifically recorded herein. No alteration, variations or permitted cession of this lease shall be of any force and effect unless in writing and signed by both parties hereto."

Respondent further argued that he is a statutory tenant in accordance with the Rent Regulations (Statutory Instrument 626/82). A party who seeks protection under these regulations should also comply with the obligations imposed on him by the same regulations as well. In the case of *Chibanda* v *Musunhiri & Another* 1999(2) ZLR 50 (HC) his lordship MUBAKO J at p 59D-E had this to say-

> "The Rent Regulations only protects the respondent as long as he remains a *bona fide* statutory tenant. Section 30(2) stated that no eviction order shall be made by any court – so long as the lessee continues to pay rent due within 7 days of due date and performs other conditions of the lease."

Judging by respondent's performance and behaviour during the lease he certainly falls outside the ambit of this protection. He is therefore not a *bona fide* statutory tenant. It is therefore clear that respondent is in breach of the lease agreement and applicant was perfectly entitled to take the action he took.

Costs

Applicant is asking for costs at a higher scale. Clause 19 of the lease agreement is explicit. In addition to this I would like to observe that respondent's attitude and actions has been that of frustrating applicant at every given opportunity. His conduct is reprehensible and it is the type of conduct which even if there had been no clause regarding the payment of costs the court would have been bound to order costs at a higher scale. He has always known and appreciated that he had no defence

to resist eviction but persisted in his hallow defence. This is borne out by his response in his opposing affidavit when he stated –

> "I am of the opinion that should she approach me in a civil manner we should resolve this matter without going to court and obviously at lesser expense on both of us."

In awarding costs at a higher scale the losing litigant's attitude in the proceedings is an essential ingredient which should be taken into account as it impacts negatively in the expenses of the litigant – see *Mahomed & Son* v *Mahomed* 1959(2) SA 688. It is clear that, respondent knew that he had no defence but rather wanted applicant to bend down on her knees in claiming her property back. Applicant has indeed done so at a considerable expense and it is only proper that she recovers all her expenses thus putting her back to where she was prior to the commencement of these proceedings – see *Nissi Global P/L* v *Eubert Stationery Manufactures P/L & 7 Others* HB-76-2003 (unreported).

In conclusion therefore the following order is made –

1. An order for the summary judgment termination of the lease agreement, regarding stand number 101 Netherby Drive, Sunnyside, Bulawayo be and is hereby granted.
2. Respondent be and is hereby ordered to vacate stand number 101 Netherby Drive, Sunnyside, Bulawayo with seven (7) days of granting of this order failing which the Deputy Sheriff is hereby ordered to evict him together with all claiming through him.
3. Respondent be and is hereby ordered to pay costs of suit at an attorney-client scale.

Cheda & Partners applicant's legal practitioners
Messrs Majoko & Majoko respondent's legal practitioners