Judgment No. HB 126/04
Case No. HC 832/03
X-Ref: HC 358/03 & HC 2627/03

SANDRA NOACH

Versus

MEDAS MOYO

And

SITHOKOZILE MOYO

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 7 OCTOBER 2004

J Dhlamini for applicant
N Mazibuko for respondents

Judgment

CHIWESHE J: In terms of an agreement of lease entered into between the applicant on the one hand and the defendantS (who are husband and wife) on 10 March 2001 the applicant leased to the defendants certain immovable property commonly referred to as number 10 Spreckley Road, North End, Bulawayo ("the property"). The property is a dwelling house. The lease was to run from 1 April 2001 to 31 March 2002 at a monthly rental of $15 000,00 payable in advance on the last day of each month or within one week after the due date. Clause nine of the lease agreement provided for the renewal of the lease at such monthly rentals as may be agreed for a period of one year.

According to the applicant the respondents were by letter dated 10 February 2002 given notice to vacate the premises by 31 May 2002. The respondents ignored the letter and remained on the property. Instead of following up this notice, the applicant by letter dated 8 July 2002 gave the respondents notice to increase rent from $15 000,00 to $25 000,00. By this conduct it may be inferred that the applicant Had

abandoned that course of action that sought to terminate the lease and had opted for the renewal of the lease and was proposing for that purpose the new rentals of $25 000,00 per month. The notice was sent by registered mail. The notice was never collected by the respondents and it was duly returned to the sender. Again instead of pursuing the issue of renewal based on the proposed new rentals the applicant instructed an estate agent to sell the property for $18 000 000,00. According to the applicant the estate agent as a matter of courtesy offered the respondents the property since they were sitting tenants. The offer was made in writing in or about October 2002. The applicant avers that the respondents did not take the offer as confirmed by correspondence from the estate agent dated 17 March 2003.

It is difficult to appreciate the reason why the question of the sale of the property is being mentioned. It is clear that the relationship between the parties is one of lessor and tenant. That relationship cannot be terminated solely on the grounds that the tenants are unable to accept an offer to buy the property. It is trite that lease comes before sale. Even if the property had been sold to a third party, the lease would have survived such sale until terminated in accordance with the agreement or according to the law.

The applicant agrees that the respondents had become to all intents and purposes statutory tenants whose obligations would be governed by the provisions of the “expired lease”. That notwithstanding the respondents (according to the applicant) stopped paying rent in October 2002. The implication of that averment being that all along the respondents had been paying their rentals in accordance with the existing lease agreement (expired lease) at the rate presumably of $15 000,00 per

month. According to the applicant as at 2 April 2003, the respondents were in arrears of their rentals by six months.

Based on these facts the applicant issued summons against the respondents seeking the following order:

"(a) an order confirming cancellation of the agreement
(b) an order declaring the continued occupation of plaintiff's property by first and second defendants as being unlawful
(c) an order ejecting the first and second defendants and all persons claiming through them
(d) payment of the sum of $15 000,00 being rental for November 2002 together with interest at the prescribed rate calculated from 1 November 2001.
(e) Occupation damages at the rate of $500,00 per day commencing on 1st day of December 2002 to date of ejectment; and
(f) Costs of suit on a legal practitioner and client scale."

The respondent entered appearance to defend that action. The applicant has instituted the present application for summary judgment on the ground that appearance to defend has been entered solely for purposes of delay as the respondents have no valid defence to the claim. I disagree.

Firstly it is not clear from the declaration on what basis the prayer set out in the summons is being sought. Is it on the basis that the applicant declined to renew the lease agreement? Or is it on the basis that the respondents declined an offer to buy the property or on the basis or further basis that the respondents failed to pay for electricity? Or is it on the basis that the respondents have breached the conditions of their statutory tenancy? Further the prayer includes an order for damages at the rate of $500,00 per day. These damages are subject to proof of quantum. It is trite that the procedure for summary judgment must be restricted to liquidated claims.

Further a reading of the papers will show that there are material disputes of facts which cannot be resolved on the papers. For example the second respondent

says they paid rent regularly to the applicant's father and nothing was ever mentioned o suggest that rentals had been increased to $25 000,00 per month. Besides any such increase must be the subject of mutual agreement. As regards the offer to sell the property to the respondents, the second respondent avers that the respondents accepted the offer through the estate agent and insists that on that basis the applicant is obliged to sell the property to the respondents.

As regards the November 2002 rentals the second respondent says the same was tendered but turned down by the applicant's mother. On account of this development the second respondent states that the December 2002 rentals and those for subsequent months were being paid to the respondent's legal practitioners for onward transmission to the applicant or her parents should they decide to accept the same.

It is also doubtful if the applicant's father has *locus standi* to file and sign affidavits on behalf of the applicant given the limited scope of the power of attorney granted in his favour by the applicants.

For these reasons I am satisfied that the applicant has not made a clear case for the order sought and I believe that the respondents have an arguable case on the merits.

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

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