Judgment No. HB 63/10
Case No. HC 2435/05

SALLY MAPLANKA

Versus

B. A. NCUBE HOLDINGS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 JULY 2009 AND 15 JULY 2010

J Tshuma, for the plaintiff
S S Mazibisa, for the defendant

Civil Trial

NDOU J: This matter was commenced by way of summons. At the pre-trial conference the parties agreed to proceed by way of a stated case in terms of Order 29 Rule 199 of the High Court Rules, 1971. The stated case agreed upon is the following:

"1. Outline of agreed facts

1.1 Plaintiff is Sally Maplanka, a private individual who resides and does business in Bulawayo.
1.2 Defendant is B A Ncube Holdings (Private) Limited a company which is duly registered in accordance with the laws of Zimbabwe ("the defendant") entered into a lease agreement in terms of which the plaintiff agreed to let the defendant the filling station.
1.3 Plaintiff is the registered owner of a piece of land known as Lot A Old Breweries, Bulawayo Township, corner Robert Mugabe Way and Escort Avenue, Northend, Bulawayo, also known as Airport Road Service Station on which there is constructed, *inter alia* a filling station commonly known as Airport Road Service Station ("the filling station").
1.4 Sometime in or about October 2001 the plaintiff and defendant entered into a lease agreement in terms of which the plaintiff agreed to let to the defendant the filling station.
1.5 On or about 1 October 2001, the defendant took occupation of the filling station. Occupation was taken on the strength of an oral agreement between the parties.
1.6 Sometime in or about March 2002, the parties reduced the terms of their agreement to writing. The written agreement was drawn by Messrs John Pocock and Company (Private) Limited. Before signing the agreement the defendant deleted clause 20 of the draft written agreement (hereinafter

referred to as "written agreement") and inscribed on the margin "Needs verification". The agreement is attached hereto and marked "A".

1.7 The deleted clause 20 was an option clause in terms of which the lease could be renewed for a further period of 3 years at the instance of the defendant provided the defendant notified the plaintiff, in writing of its desire to exercise such an option by no later than 30 June 2004 otherwise option would lapse.

1.8 When presented with the written lease agreement the plaintiff refused to sign it because of the deletion of clause 20 by the defendant.

1.9 Notwithstanding her non-signing of the agreement plaintiff allowed defendant to continue in occupation of the leased premises and continued to receive rentals for the property.

1.10 In terms of the written lease agreement the lease was for a period of 36 months "commencing on 10 October, 2001 and expiring on the 30th of September 2004.

1.11 The parties are agreed that the written lease agreement even though not signed by the plaintiff reflects the terms of their agreement serve [sic] for clause 20 which was deleted by defendant.

1.12 In terms of clause 3.2 of the lease agreement defendant is bound to pay rentals for the premises monthly in advance on the first day of each month. More specifically clause 3.2.(a) and (b) provide as follows:

(a) The rent shall be payable monthly in advance, without deduction, free of exchange and bank or other charges on or before the first day of each month, at the offices of the agent.

(b) Should the tenant fail to pay the rent in full by the 7th day of the month for which it is due he [it] agrees that he [it] will be liable to pay on demand "a late payer's administration charge" levied by the agent."

1.13 Clause 17.1 of the lease agreement states that:

"In the event of the rent of the premises being unpaid within 7 days of due date or in the event of the tenant committing a breach or disregarding any of the other terms … then the owner shall be entitled at his [her] option to cancel this lease agreement…."

1.14 By letter dated 2nd December 2005, plaintiff's legal practitioners advised the defendant that the rental for the month of October 2005 had not been paid and that as a result they had been instructed by the plaintiff "to issue summons cancelling … [the lease agreement"]. This was followed up by a letter dated 6th December 2005 in which plaintiff's legal practitioners advised that "the lease agreement between … [the defendant and plaintiff] is hereby cancelled."

The letter further demanded that defendant vacate the premises forthwith and also threatened that if defendant did not vacate the

premises within 48 hours summons for eviction would be issued. The letters are attached hereto and marked "B" and "C" respectively.

1.15 On 21st December 2005, plaintiff caused to be issued out of this honourable court summons for the eviction of the defendant from the filling station.

1.16 The summons set out the cause of action in paragraph 7 as being the failure of the defendant to pay the rentals for the month of October 2005 and to pay timeously the rental for the month of November 2005.

1.17 In paragraph 8 of the declaration the plaintiff pleaded that the lease agreement had been cancelled by the letters of 2nd and 6th December 2005.

1.18 Contrary to the letter of 2 December 2005 and paragraph 7 of the declaration, rental for the month of October was paid timeously. Consequently, it is conceded by plaintiff that the alleged non-payment of the October rental is not correct and hence the same cannot found a cause of action.

1.19 The rental for the month of November 2005 was paid on the 8th November 2005.

2 Issues for determination

2.1 Whether the payment of the rental for the month of November 2005 on the 8th of November 2005 entitled the plaintiff to cancel the agreement of lease and if so whether on the facts and the applicable law the plaintiff validly and effectively cancelled the lease agreement.

2.2 More specifically, defendant will contend that this honourable court has no jurisdiction to determine this matter in the light of the provisions of Statutory Instrument 678/83.

2.3 Who would pay the costs of this action and if it is the defendant whether such costs should be on an attorney-client scale."

At the commencement of this hearing the issue 2.2, *supra*, was withdrawn by consent.

In his supplementary heads of argument the defendant has raised a further issue which is not part of the above state case. I propose to deal with the latter last if it is still necessary for me to do so.

The starting point in this matter is clause 3.2 (a) of the lease agreement which provides that:

"The rent shall be payable monthly in advance, … on or before the first day of each month …" The meaning of this clause is plain. It is that the rent is due and payable on or before the first day of each month. However, clause 3 (2)(a) must be read with clause 17.1 which provides that:-

> "In the event of the rent …. Being unpaid within seven days of the due date … the owner shall be entitled at his option to cancel the lease forthwith …"

The essence of this clause is that the right to cancel the lease agreement for none or late payment of the rent accrues only if the rent due on the first day of each month remain unpaid after the 7th day of its due date. On the agreed facts, it is common cause that the rent for the month of November 2005, was only paid on the 8th November 2005. The legal question to be determined is therefore whether the payment of rent on 8th November 2005 was "within seven days of due date." As alluded to above, the due date of the rent payment is fixed by clause 3.2(a) of the lease agreement as the 1st day of each month. Thus it is plain that the due date for the rent of November 2005 was 1st November 2005. The defendant paid the November 2005 rent on the 8th November 2005.

It is sometimes unclear which is the last day for payment in such cases as this one, where the lease agreement instead of fixing an exact date for payment merely provides that the rent must be paid within a certain number of days of, or from, or after a fixed date or day. My understanding of the law in this regard is the following.

If on the one hand, the language used in the lease agreement is sufficiently clear in fixing the last day of payment, the court will give effect to the clear intention of the parties.

On the other hand if the language used in the lease is not sufficiently clear or explicit in fixing the last day of payment, in that event the civil method of computation of time is or must be used or followed, in which case the first day is included in, and the last day excluded from the computation – *National Bank* v *Levson Studios Ltd* 1913 AD 213 and *Joubert* v *Enslin* 1910 AD 6 at 25. *In casu*, the question is what exactly is the meaning of the phrase "within seven days of the 1st day of each month?" Does it mean defendant has seven days "after the 1st day of the month" or does it mean "within the first seven days of the month?"

If it means seven days after the first day of the month then the last day for payment is midnight on the 8th of each month. On the other hand, if it means within the first seven days of the month, then the last day of payment is midnight of 7th day of each month. If on the other hand, the phrase is unclear, the civil method of computation applies and the last day of payment would be midnight on the 7th day of each month. I hold the view that "within seven days of the due date" clearly means payment is due within the first seven days of each month. The due date being the 1st of the month, surely it follows that within seven days of that month must mean within a period of no more than seven days from due date including the due date itself. In this respect the phrase "within seven days of due date" is clearly distinguishable and

different from the phrase" within 15 days after the same should have become due" which the court had to interpret in the *National Bank* – case, *supra*. The use of the word "after" in the latter clause suggests that you start counting days after the due date. But the phrase "within seven days of due date" suggests you start counting from the due date itself. In the premises the meaning of "within seven days of due date" is reasonably clear and it refers to the first seven days of the month that is to say, up to midnight of the 7th day of each month. This conclusion is fortified by the fact that it is clear from reading the written lease agreement as a whole that the parties understood and intended the phrase to mean up to midnight on the 7th day of the month. This is borne out by clause 3.2(b) which provides that: "should the tenant fail to pay rent by the seventh day of the month for which it is due, he agrees that he will be liable to pay on demand a "late payer's administrative charge levied by the agent." This makes it clear that the parties intended and understood the phrase "within seven days of due date" to mean up to midnight on the 7th day of the month. Alternatively, even if I am wrong that the meaning of "within seven days of due date" is clear within the context of lease as a whole and a reasonably good thorough argument can be made that it means seven days after the 1st day of the month it is my view that in that event the meaning of the phrase is not sufficiently clear and therefore the civil method of computation of time must apply. If that be the case, then in accordance with the civil method of computation of time the last payment date was midnight of 7th November 2005. It is significant that in its plea, the defendant concedes that the last date for timeous payment in terms of the lease agreement is the 7th of the month and hence the plea that the delay of one day is not negligible as to be noticeable – (clause 5(d) of defendant's plea).

All in all when clause 17.1 is read together with clause 3.2(b) it is clear that its true meaning is that the last date of payment of rent is the 7th day of each month. Consequently, payment of rent on the 8th November 2005 is a breach of the contract of lease entitling the landlord to cancel the agreement of lease under the terms of the forfeiture clause *viz* clause 17.1. The fact that the delay was merely one day is wholly irrelevant to the plaintiff's entitlement to cancel the contract. As soon as the rent is not paid by midnight on the 7th of the month the landlord acquires the right of cancellation. Whether rent is then paid on the 8th or 9th or 10th does not affect this legal position except in those circumstances where the acceptance of the rent amounts to a waiver of the right of cancellation. In the absence of waiver the right to cancel is unassailable – *Middelburgse Stadsraad* v *Trans-Natal Steenkool Korporasie Bpk* 1987 (2) SA 244 (T); *Human* v *Rieseberg* 1922 TPD 157 at 163 and *Thomson* v *Ross* 1947(2) SA 1233. The next question for consideration is whether or not plaintiff validly cancelled the lease agreement. The written lease agreement does not contain any clause stating the method of cancellation or notification of the cancellation. As a general rule cancellation must be communicated to the other party – *Swart* v *Vosloo* 1965 (1) SA 100 (A) at

105G and *Phone-a-Worldwide Copy Ltd* v *Orkinand Anor* 1986(1) SA 729(A) at 751A-G. It is also a principle of our law that if cancellation has not been previously communicated, it takes effect from service of summons or notice of motion/application – *Middelburgse Standsraads* – case, *supra* at 249A-G. In other words, the institution of proceedings is adequate notification of cancellation. It, therefore, follows that even if the cancellation letters of 2nd and 6th December 2005 were ineffectual for the reasons stated the defendant's supplementary heads, or for whatever reason the service of summons on 6th January 2006 was, at law valid and effective notice of cancellation. The fact that the true or correct reason of cancellation was not contained in the letters of 2nd and 6th December 2005 does not affect the matter. What is crucial is that true and valid and correct ground for cancellation was failure to timeously pay the November 2005 rental. That reason or ground is included in the summons and declaration. Admittedly, an additional incorrect ground was added as alluded to above. In *Beck* v *du Toit* 1975 (1) SA 366 at 368F-G it was stated that:

> "I do not, however, understand the law to be that a party who alleges facts which disclose more than one breach of contract justifying cancellation must in addition to stating that he claims cancellation specifically state that he is cancelling on each ground available to him on pain of being precluded from relying on particular ground not expressly stated, to do a ground of cancellation."

It is further stated at 369:

> "I am accordingly of the view that where the applicant has on 28 March 1974 consistently manifested the attitude that the deed of sale has been cancelled by her, and where he had a valid and undisputed ground for cancellation at the time she instituted motion proceedings for cancellation she is entitled to rely on such ground even though she has not stated in her affidavit in so many words that she is claiming cancellation on that ground."

Having regard to the above principles the service of summons on defendant, to which summons was attached, a declaration which stated a valid and undisputed ground of cancellation, namely non-timeous payment of November 2005 rent, constitutes sufficient and legally valid notification of cancellation of the lease agreement. The fact that the letter of purported cancellation did not include the only valid ground of cancellation, *viz* non-timeous payment of November 2005 rent, is irrelevant since the summons contained a valid ground of cancellation.

Accordingly, the plaintiff has made out an unanswerable case and is thus entitled to judgment in her favour.

Accordingly, it is hereby ordered that:-

(a) The cancellation of the agreement of lease between the parties be and is hereby confirmed.
(b) The defendant be and is hereby ejected from premises known as Lot A, Old Breweries, Bulwayo Township, corner Robert Mugabe Way and Escort Avenue, Northend, also known as Airport Road Filing Station.
(c) The defendant shall pay costs of suit on the ordinary scale.

Webb, *Low & Barry*, plaintiff's legal practitioners
Cheda & Partners, defendant's legal practitioners