

WAGLEY INVESTMENTS (PVT) LTD

Versus

TADEU MUPANEMUNDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 JULY 2011 & 26 JANUARY 2012

J James for the applicant
E. Mangezi, for the respondent

Judgment

NDOU J: The applicant issued summons out of this court against the respondent, claiming arrear rentals and ancillary relief. The respondent filed an appearance to defend, a plea and a counter-claim. The applicant has filed an application for summary judgment, which the respondent has opposed. The applicant persists with the application for summary judgment. The applicant's case is simply that the parties entered into a written contract and it was signed by Mr Mafundu, as a witness on 4 April 2010. Mr Mafundu deposed to a supporting affidavit confirming this. The respondent does not deny that he was party to the agreement in his plea. This is what he said in his plea –

“Ad paragraph 2 – 4

This is denied in as far as it implies that the written agreement was the only and complete agreement between the parties ...”

The written agreement states –

“... Agreed to rent the yard with two sheds and 3 gates to carry my business in shoes making from Wagley Investments at 125D Fort Street/13th Ave for the six hundred US600 dollars a month. As from the 1st April 2010 till the 31st December. Thereafter the rent shall be agreed plus municipal rates and insurance and other charges. I will put up the wall and door, window and electrical ZESA meter at my own expenses. No refund or compensation is expected. All the alterations will be carried out at my expenses. I promise to pay my rental, or any other dues such as rates, insurance, by the 1st of every month. I will repair and maintain the premises and yard, and keep it in neat and clean.

I will have my own ZESA meter, water and toilet with Oriental Builders and pay them my share to them regularly.

Received R3 000 Balance R1 500 towards the rates.

T M (signed)

Witness Mr M. [signed]

04/04/10"

The respondent failed to pay rentals as follows:

- \$300 for the month of June 2010
- \$600 for the month of July 2010
- \$600 for the month of August 2010.

A written demand was sent to the respondent, on 13 August 2010 by the applicant's legal practitioners. The respondent has not paid the arrear rentals. In his plea and counter-claim the respondent does not state that he paid these rentals. In fact, he now brings into picture the existence of a "verbal" lease agreement. In his opposing affidavit the respondent gives a diametrically different version from the one in his plea. In his opposing papers he is now claiming costs for expenses he undertook to carry in the above-mentioned written lease. It is trite law that not every defence raised by a defendant will succeed in defeating a plaintiff's claim for summary judgment. The defendant must raise a *bona fide* i.e. plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusary allegations not substantiated by solid facts – *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S); *Jena v Nechipote* 1986 (1) ZLR 29 (S); *District Bank Ltd v Hoosain & Ors* 1984 (4) SA 544 (C) and *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86. These principles are most apposite in this matter. As alluded to, the defence in the respondent's plea differs materially with the one he raises in the opposing affidavit in this case. The respondent has given a convoluted story in his defence. The written agreement captures clearly the terms of the lease agreement. The respondent has failed to abide by those terms and has sought to create two other lease agreements to explain his non-payment of rentals. On the one hand he relies on a verbal agreement. On the other hand he seeks to introduce another written which was not signed by the parties.

It is not clear what his defence is really. He is blowing hot and cold on his defence. The applicant has made out a case for the summary judgment.

Accordingly, it is ordered that summary judgment is entered for the applicant against the respondent in the following terms:-

- 1) An order is granted for the eviction of the respondent and all those claiming title through him from 125D Fort Street/13th Avenue Bulawayo.
- 2) That the respondent pays applicant arrear rentals as follows:
 - 2.1 US\$300,00 for month of June 2010
 - 2.2 US\$600,00 for month of July 2010
 - 2.3 US\$600,00 for month of August 2010
- 3) That the respondent pays damages of US\$20 per day calculated from 1 September 2010 to date when respondent vacates the said premises.
- 4) That the respondent bears cost of suit on the ordinary scale.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners

Maronedze, Mukuku, Ndove & Partners, respondent's legal practitioners