

ZHAX SUPPLIERS (PVT) LTD
and
PATRICK ZHARARE
versus
M. MUTSHINA
and
MONTE CARLO (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA AND MAKONESE JJ
BULAWAYO 15 JUNE AND 30 JULY 2015

Civil Appeal

1st appellant in person
2nd appellant in person
Mr M. Ncube for the respondents

MAKONESE J: This is an appeal against the decision of a magistrate at Bulawayo handed down on 13 June 2014. After hearing argument by the parties we dismissed the appeal with costs on a punitive scale. We have been requested to furnish reasons for the decision. The following are our reasons.

The appellants and respondents entered into a lease agreement in terms of which the appellants would occupy shop number 21 Monte Carlo Centre, Fife Street, Bulawayo. In its particulars of claim, the plaintiff averred that the rentals would be payable monthly in advance on or before the first day of every month without deduction. The rental was pegged at US\$300 per month. The plaintiff alleged that the appellants failed, refused and neglected to pay rentals and operational costs. The appellants defended the claims arguing they did not owe any amounts to the plaintiff. The second appellant alleged that he was not a surety or guarantor for first appellant and that he had been wrongly cited. The appellants alleged, further, that the same matter was pending in another case. The main argument presented by appellants, however was that they did not recognize the authority of a Mr Ilan Wiesenbacher, who was appointed by the

owners of the property as an agent to collect rentals from all the tenants. The only real issue for determination by the trial magistrate was essentially whether the defendants were in breach of the lease agreement, and if so whether the respondents were entitled to the relief sought in the summons.

The trial magistrate, in my view properly analysed the evidence in court and concluded that it was common cause that the appellants were tenants at shop number 21 Monte Carlo Centre, Fife street, Bulawayo. It was established from the evidence that the appellants were refusing to pay rentals for their occupation of the rented premises. They alleged that they were paying electricity, water and service bills and that those amounts were in effect supposed to offset the rent arrears. The undeniable fact is that the appellants were not paying rent and sought to occupy the premises rent free. Their contention that they did not recognize the agency of Mr Wiesenbacher is just but an excuse not to pay rent. It is instructive to note what the appellants stated in the defendant's plea filed in the court *a quo*. They state in their defence as follows:

- “1. The defendant denies the rental arrears being claimed by the Plaintiff.
2. There is no basis for suing the second defendant as he is not a surety to first defendant so on what basis is he being sued.
3. The same case is still pending in the magistrate's court under case number 1355/12 and 4503/12 under different legal practitioners and it has not been withdrawn by the plaintiff.
4. The plaintiff is trying to steal judgment by amending summons which had been in the courts and application for summary judgment had already dismissed. (sic).”

It is clear that the appellants did not have any recognizable defence at at law. The trial court did not find that there were other pending cases. There was no proof adduced by the appellants that they were paying rentals. Despite the numerous and sometimes confusing grounds of appeal raised in the Notice of appeal the only issue for determination was whether the appellants were in breach of the lease agreement by reason of non-payment of rent. The appellants do not deny that they are in occupation of the premises. They do not expressly admit that they are not paying rent but advert to the fact that they are paying operational costs. It is common cause that utility bills are not rentals. These are costs any tenant is expected to bear

over and above rentals. The legal position is well articulated in the case of, *Altem Enterprises (Pvt) Ltd v John Sisk and Sons (Pvt) Ltd* S 4/2013 at page 3 of the cyclostyled judgment where GARWE (JA), states as follows:

“The position is settled that a tenant has no right to occupy property save in return for payment of rent and that where there is no agreement on the amount of the rental payable, the lessee is liable to pay the lessor a reasonable amount for the use and occupation of the property, the rental value of the property in the open market being the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress – see Landlord and Tenant by W.E Cooper, 2nd Edition page 59.”

The court states at page 4 as follows:

“In my view a tenant who seeks protection of his statutory tenancy must endeavour to pay fair rent. Such fair rent must be objectively and not subjectively assessed.”

In the instant case the appellants have filed this appeal in bad faith and to frustrate eviction. They do not deny their liability to pay rentals and yet in the same vein they do not state that they are paying the required rent. It seems logical, that where the tenant becomes unreasonable or refuses to pay rent and has breached the lease agreement, the landlord is entitled to cancel the lease agreement and evict the tenant from the premises.

In *Supline Investments (Pvt) Ltd v Forestry Commission* 2007 (2) ZLR 280 (H) at page 281 it was held as follows:

“A tenant has an undisputed obligation to pay rental for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord’s property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rental is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentious as to what constitutes fair rentals are validated.”

See also the remarks in *Yvonne Chisese vs Alluvial Exploration Services* HH 13/12, and *Telone (Pvt) Ltd v Den Farm Properties* HH 119/12.

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I am satisfied that the trial magistrate did not err and the analysis of the evidence cannot be faulted. This appeal has absolutely no merit and has been filed for the specific purpose of delaying and frustrating eviction proceedings.

In the result, the appeal is hereby dismissed with costs on an attorney and client scale.

Mutema J, -----agrees

Messrs Ndove, Museta and Partners, applicant's legal practitioners