HB 157/16
HC 1579/15

NRZ CONTRIBUTORY PENSION FUND

Versus

JOSRO ENTERPRISES (PVT) LTD
t/a ASCOT PUB & GRILL

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 FEBRUARY & 16 JUNE 2016

Opposed Application

Advocate L. Nkomo for the applicant
Ms V. Chikomo for the respondent

TAKUVA J: This is an application for summary judgment in the summons proceedings under case number HC 39/15 wherein the applicant claimed the following:

(a) An order declaring that the defendant's refusal to sign a lease agreement with the applicant in respect of the applicant's premises namely shop 24/25 Ascot Shopping Centre, situate on stand 16440, Bulawayo constitutes repudiation of the lease between the parties and same is terminated with effect from the date of this order;
(b) Alternatively, an order that the lease agreement between the parties be and is hereby terminated forthwith in terms of clause 33.1 as read with sub-clauses 33.1.1 and 33.1.3 thereof by reason of the respondent's breach of 8.1; 17.1.2; 17.1.3; 20.1 and 20.5 of the lease agreement.
(c) An order that the respondent vacate the applicant's premises namely shop 24/25 Ascot Shopping Centre, situate on stand 16440, Bulawayo within 14 days of this order failure of which the Sheriff of this court be and is hereby ordered to forcibly evict the respondent.
(d) Payment of US$16 000 and US$866,20 being arrear rentals and operating costs respectively, hold over damages of US$26,66 per day and further operating costs the respondent would have incurred as at the date of judgment.

(e) Costs of suit on an attorney and client scale in terms of clause 33.2 of the lease agreement.

In this application the applicant sought summary judgment in respect of paragraph (a) (b) (c) and (e). The claim in paragraph (d) has been excluded.

What happened here is that the parties entered into a written agreement on the 20th of October 2004, prepared by the applicant's erstwhile real estate agent, Knight Frank Zimbabwe, in terms of which the applicant let to the respondent certain business premises being shop 24/25 Ascot Shopping Centre, situate on stand number 16440 Ascot Township, Bulawayo. The lease agreement is attached as Annexure C to the founding affidavit. In terms of the lease agreement the parties were entitled to seek renewal of the lease as and when it expires. That agreement expired on the 30th of November 2013. Prior to the expiry of the lease the applicant through its current real estate agent John Pocock and Company (Pvt) Ltd, prepared a written lease agreement to renew the expired lease between the parties with effect from the 1st of December 2013.

On two separate occasions the respondent collected copies of the written lease agreement from John Pocock and Co. (Pvt) Ltd to sign and return same but despite several reminders, respondent never signed or returned the draft lease agreement. To date the respondent persists with its refusal to sign a written lease agreement to renew the expired one and the applicant has not condoned that conduct. In sub-clause 33.1 as read with sub-clause 33.1.1 and 33.2.3 the lease provides that the applicant is entitled to forthwith cancel the lease agreement in the event that the respondent commits any of the breaches specified therein.

The respondent failed to pay monthly rent and operating costs in advance on the first day of each month and not later than the seventh day of the month, thereby breaching sub-clause 8.1 as read with sub-clause 33.1.1 of the lease agreement. The respondent further breached sub-clauses 20.1 and 20.5 as read with sub-clause 33.1.3 of the lease agreement by failing to carry on

its business in the leased premises in compliance with the laws and regulations governing the Restaurant Special Liquor Licence.

The application for summary judgment is opposed by the respondent on the following grounds:

1. there is inordinate delay in filing the summary judgment application. The contention here being that for a summary judgment application to qualify as summary, it must be made summarily. Reliance was placed on *Stanbic Bank Zimbabwe Ltd* v *Dickie and Ano* 1998 at p 208C – D.
2. in case number HC 39/15, the applicant claimed payment in a sum of US$1 600,00 and US$806,20 as arrear rentals and hold over damages in a sum of US$26,66 per day in addition to the other relief recited. Yet in this application there is no monetary claim against respondent.
3. the matter ought to be referred to arbitration.
4. respondent was not obliged to sign the draft lease agreement as it became a statutory tenant upon expiry of the lease on the 30th of November 2013.
5. the applicant by accepting payment of overdue rentals and operating costs waived its right to cancel the lease on the ground of breach of sub-clause 8.1.
6. respondent did not breach sub-clauses 20.1 and 20.5.

The issues

1. whether respondent has any *bona fide* defence to applicant's claims.
2. Whether the respondent ought to pay costs of suit on an attorney and client scale.

The Law

The starting point is O 10 R 64 which states-

"(1) Where the defendant has entered appearance to defend to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
(2) A court application in terms of sub rule (1) shall be supported by an affidavit made by the plaintiff or by any person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no bona fide defence to the action.
(3) A deponent may attach to his affidavit filed in terms of sub-rule (2) documents which verify the plaintiff's cause of action on his belief that there is no *bona fide* defence to the action.
(4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

The courts have on innumerate times stated the legal principles applicable to summary judgment applications. In *Scropton Trading (Pvt) Ltd* v *Khumalo* 1998 (2) ZLR 313 (5) at p 313D, it was held that:

> "A plaintiff seeking summary judgment must bring himself squarely within the ambit of r 64 (1) of the High Court Rules which requires that the cause of action must be verified. It must be substantiated by proof and the supporting affidavit must contain evidence which establishes the facts upon which reliance is placed for the contention that the claim is unimpeachable."

The nature of the defences that ought to be raised to successfully oppose an application for summary judgment was highlighted as follows in *Kingstons (Pvt) Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at p 451F – H:

> "In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which, if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bold, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not contend himself with vague generalities and conclusory allegations not substantiated by solid facts."

The Supreme Court further held at p 452E that:

> "Care must be taken, in a suit for ejectment, not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lease against whom ejectment is sought to raise fictitious issues of fact, thereby delaying the resolution of the matter to the detriment of the lessor." See also *Hales* v *Doverick Investments (Pvt) Ltd* 1998 92) ZLR 235 (H) at p 253E – F.

In casu, in order to assess whether or not defendant has a *bona fide* defence, it is necessary to examine more closely the grounds of opposition to the application. Firstly, respondent argued that the application for summary judgment is stale in that it was not raised "summarily". This argument is without merit in my view in that the primary rule on when a summary judgment application can properly be made is rule 64 (1) of the Court's rules. It provides as follows:

> "Where the defendant has entered appearance to a summons, the plaintiff may, <u>at any time before the pre-trial conference is held,</u> make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.' (emphasis added)

In casu, the respondent's contention that there has been inordinate delay is misplaced as the application was made within the time limit stipulated in r 64 (1) *supra.*

Secondly, respondent argued that the cause of action has not been verified because of the variance in figures in the summons and founding affidavit. Again, this submission is without basis in that it overlooks the fact that the applicant has relied on two distinct causes of action, namely, (i) repudiation and (ii) breach. In respect of the latter the respondent has not sought a specific remedy in respect to the figures. In any case, from the nature of the contract, the figures were always going to vary. The issue in respect of the breach was that respondent by failing to pay rent in terms of lease agreement was in breach. The extent of the breach is insignificant in the circumstances.

Thirdly, respondent submitted that the matter ought to have been referred to arbitration in terms of the arbitration clause in the lease agreement. *In Recoy Investments (Pvt) Ltd* v *Tarion (Pvt) Ltd* 2011 (2) ZLR 65 (H), it was held at p 66B – D that:

> "In terms of article 8 of the schedule to the Arbitration Act, which is clear and admits of no ambiguity, the court has the jurisdiction to hear the matter where none of the parties has applied for a stay of the proceedings and a consequential referral to arbitration. A party wishing to have the matter decided by arbitration is obliged to set the terms of the dispute. An arbitration process cannot be set in motion in the absence of a dispute. Before reference to arbitration there must therefore exist a dispute which is capable of formulation prior to the appointment of an arbitrator. In the absence of a dispute, an arbitrator cannot be appointed and therefore can be no reference to arbitration … the respondent did not allege that there was a dispute and had not applied for a stay of proceedings. The court accordingly had jurisdiction." See also *Cargill Zimbabwe* v *Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H).

By parity of reasoning, respondent *in casu* did not frame a dispute for referral to arbitration and did not apply for stay of action proceedings under HC 39/15. Consequently, nothing turns on the arbitration clause in the lease agreement. In any case, the relief sought by the applicant being a declaratory order, can only be issued by this court in the exercise of its power under section 14 of the High Court Act [Chapter 7:06].

Fourthly, applicant's contention is that respondent's refusal to sign a written lease agreement renewing the lease entered into on 20th October 2004 which expired on 30th November 2013, constitutes repudiation by respondent of the landlord-and-tenant relationship between the parties. The basis of applicant's contention is that from July 2013 it changed its real estate agents from Knight Frank to John Pocock and Company (Pvt) Ltd. The agreement entered into by the parties on the 20th of October 2004 was prepared by Knight Frank. It became imperative that John Pocock and Company (Pvt) Ltd assume their mandate to administer the applicant's property at issue in terms of a written agreement prepared by them and not by Knight Frank. Thus, the expiry of the lease on the 30th of November 2013 was the rightful opportunity to replace the Knight Frank lease agreement with one prepared by John Pocock & Co (Pvt) Ltd.

Respondent admitted that it refused to sign the lease but denied that this is tantamount to repudiation. It contends that once a written lease agreement expires, the tenant becomes a statutory tenant and the lease is automatically extended by operation of the law on the same terms and conditions as those which obtained under the expired lease. It appears respondent's

contention is not applicable *in casu* because of the provisions of clause 3.5 of the lease agreement signed by the parties. It provides:

> "If the tenant fails to give notice as provided in this clause this lease will continue from the termination date of the lease period (or the renewal period) on the same terms and conditions but subject to three calendar months written notice of termination by either party …"

In view of the above, there was no justifiable reason for the respondent's refusal to sign a renewal lease prepared by John Pocock and Company in November 2013. I take the view that such refusal constitutes a repudiation of the landlord-and-tenant contractual relationship between the parties. In light of that, the applicant is entitled to accept the respondent's aforesaid repudiation.

Waiver of the right to cancel was the fifth ground raised by the respondent. The argument is that by accepting the payment of overdue rentals outside the stipulated time, the applicant waived its right to rely on the failure to pay rentals on time as a ground for termination of the lease. This contention is devoid of merit in light of the carefully and extensively worded provisions of sub-clause 40.1 of the lease agreement which reads as follows:

> "The failure by the landlord to exercise any right shall not be deemed to be a waiver of any of his rights in terms of this agreement and the acceptance of any overdue rent shall not constitute a waiver of any right which the landlord has to cancel this lease arising out of such breach or late payment of rent." (emphasis added)

The net effect of non-variation and non-waiver clauses is to negative the raising of such defences. In *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 (SC), the court had occasion to consider the combined effect of a non-variation and non-waiver clauses in a lease agreement which are similarly worded to sub-clauses 40.1 and 40.2 of the lease *in casu*. The court's decision is captured in the head note which reads as follows:

> "A non-variation clause in a contract entrenches the requirement that any variation has to be in writing but does not prevent a party for whose it is inserted from waiving the requirement.

> A non-waiver clause negatives any raising of a waiver or any estoppels in that it amounts to notice given in advance acknowledged by the other party, that conduct which might otherwise be a waiver or give use to an estoppels may not be taken to be such conduct.
>
> The combine effect the two clauses is that two parties to a written agreement containing carefully and extensively worded non-variation and non-waiver clauses cannot enter an enforceable oral agreement departing from the written terms since to the extent it is a variation of the contract it is precluded by the own variation clause whereas if it be said to be a waiver or conduct giving rise to an estoppels then the non-waiver clause provides the complete answer to the point." (my emphasis)

In casu, the respondent's contention that the applicant waived its right to cancel the lease on the ground of breach of sub-clause 8.1 thereof is not a *bona fide* defence. The non-waiver clause in the lease agreement (sub-clause 40.1) provides the complete answer to the respondent's contention and applicant's claim for cancellation of the lease agreement on grounds of breach by the respondent is in my view unassailable.

Finally, respondent denied breaching sub-clauses 20.1 and 20.5 of the lease agreement. These two sub-clauses provide as follows;

> "20.1 The tenant shall keep and maintain the Leased Premises and carry on his business therein in compliance with all laws and for regulation made from time to time.
> 20.5 The tenant agrees to abide and comply with all such Government or Municipal Regulations or Bye-Laws as may relate from time to time to the use of the Leased Premises. In the event of the Tenant failing so to carry out any obligation imposed by any such Regulations and Bye-laws … and the Landlord may treat any breach of such Regulations and By-laws as a breach of the Agreement."

In order to prove the breach, applicant attached annexure "D" to the founding affidavit which is a copy of the respondent's "Restaurant Special Liquor Licence". Also attached is annexure "E" a letter from the Bulawayo City Council dated 25 March confirming at the respondent's licence for the leased premises is for a restaurant special. Further, in paragraph 4 (b) (vi), 10 and 11 of the respondent's plea attached to the founding affidavit as annexure "B", it is clear from the averments therein that the respondent, in breach of the terms of the Restaurant Special Liquor Licence operated as a pub and night club.

In light of the above, it cannot be a *bona fide* defence to deny such a glaring breach. Applicant as the innocent party is entitled, in terms of clause 33.1 as read with sub-clauses 33.1.1 and 33.2.3 of the lease agreement to exercise its right to seek cancellation of the lease agreement.

In view of the above, the applicant's claims for cancellation of the lease on the basis of repudiation by respondent or alternatively on the basis of breach of the lease, are unassailable and the respondent has no *bona fide* defence thereto.

The applicant prayed for costs on an attorney and client scale on the basis of the provision of clause 33.2 of the lease agreement between the parties. It provides that in the event of litigation by the applicant as a result of the respondent's breach of the terms and conditions of the lease, then the applicant is entitled to recover legal costs from the respondent on an attorney and client scale.

The principles applicable to the award of costs on an attorney and client scale are discussed by the learned authors M Jacobs and N.E.F. Ehlers in their book *Law of Attorneys' Costs and Taxation* thereof, Juta & Co Ltd, 1979, at p 59 as follows;

> "An award of attorney and client costs … will be made only in exceptional cases to mark the court's disapproval of … reprehensible conduct usually persisted in, by a party to a suit. There is another basis upon which a court may award attorney and client costs and this is where people … enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

In *Engineering Management Services* v *South Cape Corp* 1979 (3) SA 1341 at p 1344 – 1345 NICHOLAS J had this to say:

> "In almost every defended action, the successful litigant is put to expense which in the result, is seen to be unnecessary. But it is only where such unnecessary expense is something which he "ought not to bear" that a special order for costs will be made. It seems to me that, generally speaking that situation will exist where the unsuccessful party has acted unreasonably in his conduct of the litigation, or where his conduct is in some way reprehensible."

In casu, I agree with *Advocate Nkomo* that there are not compelling reasons why the applicant should remain out of pocket as a result of these proceedings and that respondent ought to be ordered to pay costs of suit on an attorney and client scale. Respondent in my view conducted itself in a reprehensible manner in that despite accepting that it refused to sign the lease agreement, it proceeded to proffer flimsy and illogical excuses. It also accepted that it failed to pay rent and operating costs in terms of the lease, but sought to justify this conduct on applicant's alleged interference with respondent's right to "free and unrestricted use and enjoyment of the leased premises without any hindrance or interference on the part of the landlord during the currency of the lease."

Surprisingly, despite the alleged "blatant breach of clause 30" by the applicant, respondent did not refer any dispute to arbitration in terms of the lease agreement.

In the result it is ordered that:

1. Summary judgment be and is hereby granted to the applicant.
2. A declaratur be and is hereby issued that the lease agreement between the parties in respect of shop 24/25 Ascot Shopping Centre, situate on stand 16440, Bulawayo, be and is hereby terminated by reason of the respondent's repudiation.
3. Alternatively, it is ordered that the lease agreement between the parties be and is hereby terminated forthwith n terms of clause 33.1.1 and 33.1.3 thereof by reason of the respondent's breach of clause 8.1; 20.1 and 20.5 of the lease agreement.
4. The respondent and all those claiming occupation through it, be and are hereby ordered to vacate shop number 24/25 Ascot Shopping Centre, situate on stand 16440, Bulawayo within 14 days of this order failure of which the Sheriff of this court be and is hereby ordered and empowered to forcibly evict the defendant.
5. The respondent to pay the costs of suit on an attorney and client scale.

R. Ndlovu & Company, applicant's legal practitioners
Messrs Majoko & Majoko, respondent's legal practitioners