

FBC BUILDING SOCIETY
versus
PAVIAN INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 14 FEBRUARY 2017 AND 23 FEBRUARY 2017

Civil Trial

A Muchandiona for the plaintiff
R J Gumbo for the defendant

MATHONSI J: The plaintiff, a registered commercial bank, is the owner of a vacant stand in the Gweru Central Business District, being stand 228 Gweru, which it let out to the defendant by lease agreement signed on 30 April 2013. The defendant required the premises for purposes of operating a flea market business wherein it sublet certain portions of the property to various small to medium enterprises.

On 10 October 2014 the plaintiff instituted summons action against the defendant for the latter's eviction from the premises, holding over damages of \$880-00 per month right up to the date of eviction and costs of suit on a legal practitioner and client scale. The plaintiff averred in its declaration that in terms of the agreement the tenancy was supposed to terminate in 30 April 2014. However on 18 November 2013, it had given the defendant notice of termination of the lease which notice ran from 1 December 2013 to 28 February 2014.

Despite the notice given in accordance with the provisions of the lease agreement, the defendant refused to vacate even though it was in breach of the lease agreement by failing to pay municipal rates due to the City Council of Gweru. The plaintiff then craved the grant of the relief aforesaid.

The defendant contested the action. In its plea it admitted receipt of the notice of termination but averred that it had become a statutory tenant. As such it was protected by s22 of the Commercial Premises (Rent) Regulations, 1983 and the plaintiff was not entitled to evict it from the premises provided that it continued to pay the due rent within seven days of due date

and performed other conditions of the lease. The defendant denied being in arrears in respect of rates due to the municipality maintaining that the bills were sent to the plaintiff which did not forward same to the defendant for settlement.

Alternatively, the defendant averred that it invested approximately \$234 000-00 towards construction of structures at the leased premises with the knowledge of the plaintiff whose officers even encouraged the defendant to do so. For that reason, it had a legitimate expectation that the lease would be renewed for a considerable period to enable the defendant to recoup its outlay.

At the pretrial conference held before a Judge the parties agreed on the issues for trial and filed a joint pretrial conference minute. The issues are;

1. Whether the defendant became statutory tenant after cancellation of the lease agreement.
2. Whether the defendant had a legitimate expectation that the lease would be renewed.
3. Whether the plaintiff is entitled to evict the defendant from the premises.
4. Whether the plaintiff is entitled to holding over damages of \$880-00 per month from date of termination to date of eviction.

Sharon Fadzai Mutanda, the plaintiff's Group Legal Manager testified on behalf of the plaintiff. She stated that the reason why the plaintiff acquired the piece of land was in order to construct a branch of its commercial bank as well as another branch of its building society. The plaintiff was not ready to commence construction and therefore decided to let out the property to the defendant. Even then the defendant was given a lease of only 12 months duration in recognition of the fact that the plaintiff would need the premises once it was ready to commence construction work.

Mutanda produced a bundle of documents, exhibit 1, containing the lease agreement signed by the parties on 30 April 2013 in terms of which the plaintiff leased out to the defendant stand 228 Gweru for a period of one year commencing on 1 May 2013 and terminating on 30 April 2014 for a monthly rental of \$880-00. In terms of clause 2 the rental was paid monthly in

advance on or before the first day of each month. In terms of clause 4.1 the premises was to be used for purposes of a flea market.

She stated that the agreement contained a non-variation clause, namely clause 14 which reads:

“14. NO VARIATION WITHOUT WRITING

- 14.1 The agreement shall supersede and replace all previous agreements, understandings and conditions and shall be the whole agreement between the parties hereto, the Lessee acknowledging that no representations or warranties, undertakings or promises whatsoever not embodied herein have been made or given to it by the Lessor.
- 14.2 No variation in any of the terms hereof nor any other agreement between the parties relating to the leased premises shall be valid unless reduced to writing and signed by either parties or their duly authorized representatives.”

When the plaintiff was ready to commence construction work and therefore requiring the premises for its own use it, it gave the defendant notice of termination by letter dated 18 November 2013 written by the plaintiff’s Executive Director-Finance and Administration which reads in relevant part thus:

“NOTICE OF LEASE AGREEMENT TERMINATION

This letter serves to notify you that we will be terminating our lease agreement with Pavian Investments for occupation of Stand 228 Gweru on 28 February 2014. With reference to clause 17 of the lease agreement FBC Building Society has resolved to commence construction works at the site in 2014 and three (3) months written notice from 1 December 2013 for vacation of the premises is hereby issued to that effect.

On handover of the premises to us, we expect the following issues to be addressed as per lease agreement.

1. The premises are to be restored to the original condition in which they were at the commencement of the agreement i.e. all structures fitted by the lessee should be removed from the premises.
2. All bills payable in respect of the premises i.e. City of Gweru rates, water bills, ZESA, etc. should be fully settled and up to date.
3. All rental arrears and penalties payable for late remittance of payments should be fully settled. Attached is a schedule enlisting all your rental obligations and the payments remitted since the inception of the initial lease agreement for your reference.

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The rental deposit was reviewed from \$1600 to \$1760 on renewal of the lease agreement in May 2013 but the top up of \$160 is still outstanding. The current \$1600 deposit withheld will be reimbursed in full on handover, subject to the above requirements being met.

We appreciate your co-operation during your tenancy and trust that you will fulfill all your obligations stipulated above by the time of handover on 28 February 2014.

Yours faithfully
For and on behalf of FBC Building Society

Agnes Kanhukamwe
Executive Director-Finance and Administration.”

Mutanda stated that the plaintiff acted in terms of clause 17 when giving the above-mentioned notice. That clause provides:

“17. NOTICE TO TERMINATE

- 17.1 In the event of the lessor deciding to rebuild, modernize and/or refurbish the premises or to make extensive alterations thereto, then the lessor shall have the right on giving three months written notice to the lessee to terminate the lease without compensation.
- 17.2 Should the lessor require the premises for his own use, the lessor shall have the right to give three months written notice to cancel this agreement without compensation and require the lessee to vacate the premises.
- 17.3 Should the lessee acquire own or other premises, it shall have the right to give the lessor three months written notice to terminate this agreement without compensation and vacate the premises.” (The underlining is mine)

According to Mutanda this is what the parties signed for and it is binding upon them. There could be no other agreement by other parties except the one signed on 30 April 2013 which is the memorial of the relationship between parties. At no time did the plaintiff bind itself to any other agreement whether written or verbal. In any event, if verbal it would not bind the parties by virtue of the non-variation provision in clause 14.

She said that the plaintiff was only prepared to lease out the premises to the defendant for a period of twelve months at a time because it has always had plans for that piece of land namely to build a branch there. It would not have fettered itself beyond that kind of period because it knew that it would soon require the premises for its own use. By the same token, the defendant

could not have possibly entertained a reasonable expectation to be allowed to renew the lease bearing in mind its duration. Indeed, when effecting improvements on the premises, the defendant had to be guided by the the lease period of 12 months meaning that it should not have expended too much money nor constructed structures of a permanent nature.

In erecting structures on the land, the defendant ought to have known that in terms of clause 17 of the agreement, it was not entitled to any compensation for those structures. The defendant was also aware that upon termination it would be required to demolish whatever structures it erected in order to allow the plaintiff to get on with the business of building on the land. She stated that although the defendant was given the notice of termination, it did not bother to respond. Although it was brought to the defendant's attention that there were rates arrears, the defendant did not bother to settle these forcing the plaintiff to settle the arrears from the good tenancy deposit which the defendant had paid.

The witness said that in preparation for the commencement of construction work the plaintiff had concluded an agreement with Architrave Design Group to perform architectural work for the plaintiff. That contractor was assigned to undertake feasibilities, preliminary and final tenders and to supervise construction. She made reference to agreements signed with Architrave Design Group in pursuance of that exercise including bills of quantities contained in exhibit 1. The whole project remains in limbo now because the defendant is holding over having refused to vacate the premises.

She maintained that the defendant did not enjoy the benefit of a statutory tenant provided by s 22 of the Commercial Premises (Rent) Regulations because it was in rent and rates arrears amounting to \$3 384-67 as at 31 January 2017. She made reference to a schedule of payments in exhibit 1 showing how that amount is arrived at. The schedule shows that at certain instances the defendant under paid rentals like in April 2014 when only \$500-00 was credited to the rent account instead of \$880-00. In October 2014 rent was not paid at all only for the defendant to make a double payment on 4 November 2014. In October 2015 rent was only paid on 29 October 2015 when it was due on or before the first day of October 2015. As at January 2017

the municipal rates were in arrears of \$2015-60 as shown on the City Council bill for that period also contained in exhibit 1.

As if that was not enough to deny the defendant statutory tenancy, Mutanda said that the plaintiff has amply demonstrated that it requires the premises for its own use for purposes of constructing a branch which is the reason why the land was acquired in the first place. Therefore the defendant cannot rely on that as a defence to the eviction claim.

Sharon Mutanda was subjected to prolonged, incisive and searching cross examination which she took in the stride and maintained her composure. Though the figures of rent payments may have appeared to confuse her as the defendant kept on introducing receipts and invoices during cross examination, her testimony remained intact. She insisted that the plaintiff is indeed entitled to the relief that it seeks.

Lorraine Gondomukandapi gave evidence on behalf of the defendant. She is one of the defendant's directors. Her main concern was the improvements that the defendant effected on the premises. She introduced the defendant's exhibit 2, containing a breakdown of the material and labour expended in the construction of a flea market. According to the breakdown prepared by AbmoDraughting and Design Services of Gweru a total of \$218567-00 was spent in the construction. She also produced photographs showing structures of almost permanent nature that were erected at the stand. She said the construction was done following an agreement between the parties and the structures were approved by the municipality of Gweru.

She acknowledged that in terms of the lease agreement concluded by the parties the structures should be removed and no compensation should be paid to the defendant for them. She however felt that the court should mediate between the parties so as to allow the defendant to remain in occupation for at least three years in order for it to recoup some profit from its investment. As it is now the defendant has sublet bays to 51 small scale operators who are paying rent to it. Gondomukandapi made reference to a document in exhibit 2 showing that in the 3 months from November 2016 to January 2017 the defendant made a profit of \$7801-00. She said it is this money that the defendant would like to continue making for 3 years to enable it to recoup something from its investment.

She said that after their initial structure was demolished by the municipality because it did not meet its minimum standards the defendant had decided to erect new structures meeting those standards. In doing so, it had consulted the plaintiff which gave an assurance that the defendant would not be let down. As a result the defendant had in January 2012 started putting up the structures at the cost already mentioned. The structures were completed in December 2013 with the first occupants taking occupation in January 2014. She did not mention any names of the plaintiff's officials that gave the assurance.

As far as she was concerned the notice to vacate given on 18 November 2013 came as a surprise especially as by then they had not even completed construction work. She is also surprised by the claim that the plaintiff now requires the premises for its own use because the place had gone for a period of 18 years without being used. The plaintiff had also assured them that they would be allowed to remain in occupation for a very long time, a claim not supported by evidence on the ground given that the plaintiff was only prepared to give a lease of 12 months duration. She complained bitterly about being given notice to vacate before the plaintiff had even done anything about their building plans.

Godomukandapi denied being in rent arrears stating that the arrears were created when the plaintiff decided to appropriate rent payments and apply them towards liquidating rates. In respect of those months where the plaintiff's schedule showed that no rent was paid she said she was sure she would find the receipts if given the time to look for them. This is because her papers were mixed up. Unfortunately that is not good enough to rebut the plaintiff's claim that no rent was paid for those months.

In respect of the rates she said they had paid the rates reflected on the water bills which they received. The rates were being sent to the plaintiff which did not forward the bills to them.

The first issue to be decided is whether the defendant qualified for protection in terms of s22 of the Commercial Premises (Rent) Regulations, SI 676/83 Subsection (2) of that section provides:

“No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by

effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—

- (a) continues to pay the rent due, within seven days of due date; and
- (b) performs the other conditions of the lease;
unless the court is satisfied that the lessor had good and sufficient grounds for requiring such order other than that—
 - (i) the lessee has declined to agree to an increase in rent; or
 - (ii) the lessor wishes to lease the premises to some other person.”

Therefore, a court faced with a defence in which a tenant relies on the protection offered by this provision has to adopt a two pronged inquiry. The first rung of the inquiry is whether the tenant has continued to pay the rent due within seven days of due date and to perform all the other conditions of the lease to the letter. If the answer to that first leg of the inquiry is in the affirmative, then the court must proceed to the next stage of the inquiry namely whether the lessor has good and sufficient grounds for requiring an eviction order.

If the tenant has not paid rent on time or has not fulfilled the other conditions of the lease then the inquiry must end there. Such a tenant would not qualify to benefit from the protection provided by that section as he or she would not be a statutory tenant.

Even if the tenant is a statutory tenant, the court is empowered to grant the relief of eviction where the lessor succeeds in establishing good and sufficient grounds entitling it to the eviction order. What constitutes good and sufficient grounds set out in s 22 (2) of the regulations has been discussed in a number of cases. See *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* S 146-86; *Moffat Outfitters (Pvt) Ltd v Hoosein and Others* 1986 (2) ZLR 148 (S).

The essence of the pronouncements of the Supreme Court is that while the Commercial Premises (Rent) Regulations 1983 were enacted to protect tenants, that protection is directed against unscrupulous landlords and not genuine ones who *bona fide* require to reclaim their property for own use. Although the phrase “good and sufficient grounds” is not defined in the regulations except to exclude from it the refusal of the tenant to agree to a rent increase and the desire by the landlord to lease out the premises to someone else who is not the tenant the courts have come out very clearly as to what constitutes good and sufficient grounds for reclaiming the leased premises.

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As stated by ZIYAMBI JA in *Kingstons Ltd v D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 457 A –C:

“Our courts have held that the landlord need do no more than assert his reasons in good faith and then to bring some small measure of evidence to demonstrate the genuineness of his assertion and it rests upon the lessee who resists ejection to bring forward circumstances casting doubt on the genuineness of the lessor’s claim. See *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H); see also *Newman v Biggs* 1945 EDL 51 at 54 and 55. ---. In determining what constitutes good and sufficient grounds, the court makes a value judgment which, if arrived at without caprice, bias, or the wrong application of principle, will not lightly be set aside on appeal.”

It must be stated that good and sufficient grounds for requiring the tenants’ eviction exist where the lessor genuinely requires the use of the leased premises for the operation of a business or it is necessary for the lessor to effect extensive repairs to the premises which repairs cannot be effected while the tenant is in occupation. See *Delco (Pvt) Ltd v Old Mutual Properties (Pvt) Ltd* 1997 (2) ZLR 415 (S) 417 D – E; *Mungadze v Murambiwa* 1997 (2) ZLR 44 (S).

While rejecting the old common law rule as propounded by authors on Roman Law and Roman Dutch Law allowing a lessor to eject the lessee without consent if the landlord required the premises for own use (see *Wille’s Landlord and Tenant in South Africa* 5 ed at 145; *Codex Justinianus* 4:65:3; *Cooper Landlord and Tenant* 3 ed at 322) GUBBAY CJ in *Mungadze v Murambiwa, supra*, at 46D –E remarked;

“In so far as the law of this country is concerned, I conceive of no basis upon which to hold that the rule – even assuming it was received as a legal principle in Holland is applicable today. The position is simply that a landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination will not be possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation would ordinarily be permitted to resume occupation upon completion of the repairs. See *Moffat Outfitters (Pvt) Ltd v Hoosein and Others* 1986 (2) ZLR 148 (S) at 153 A- F.”

I now turn to apply the above legal principles to the facts of the present matter. The evidence shows that the defendant did not pay rentals for certain months which I have already outlined. Although bound by the lease agreement to settle the rates bills, it did not pay some of the bills and is therefore in arrears as shown in the schedule produced by the plaintiff. The

defendant therefore did not enjoy the benefit accorded to a statutory tenant by s 22 of the regulations.

Even if I am wrong in making that finding, the defendant would still not qualify for that protection for another reason. It is that the plaintiff requires the premises for own use. I have no reason to reject the grounds given by the plaintiff. In doing so, I am mindful of the fact that where the land owner wishes to use the premises for its own purposes, the court enquires only as to its *bona fides* and not as to the reasons why it decided to use the premises for its own purposes: see *Mobile Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (S) 88 C- D; *Boka Enterprises (Pvt) Ltd v Joowalay & Another* 1988 (1) ZLR 107 (S).

The plaintiff is a commercial bank which acquired a vacant stand on which to build a banking building. In the letter notifying the defendant to vacate it made it clear not only that it was ready to commence construction work but also that the defendant was required to remove or uproot all the structures that it built on the land. Clearly therefore the plaintiff does not desire to benefit from the defendant's structures but merely to build its own. To the extent that the plaintiff genuinely reclaims the premises the defendant cannot shelter behind statutory tenancy.

In my view the resolution of that first issue also resolves the other outstanding issues. The defendant has tried to rely on some verbal assurances that were allegedly given by certain officials of the plaintiff that it would be allowed to remain in occupation for a considerate period. As a corollary to that, although the lease was for a fixed period, it had a legitimate expectation that the lease would be extended. In the first place, it would be difficult, if not well nigh impossible, to uphold that position when even those that allegedly gave the assurance have not been named. The defendant simply has not proved that assertion.

In any event, any other agreement not born out of the written lease would be invalid by reason of the non-variation clause. In *Ziswa & Another v Chadwick & Another* HH 240/15 (unreported) I cited a passage in R H Christie, *Business Law in Zimbabwe*, ed 2, Juta & Co Ltd at p107 to the effect that a non-variation clause imposes restriction on the power of the parties to vary or discharge their contract by subsequent conduct of theirs. A non-variation clause cannot be altered verbally. See *Fillanion v Esat & Another* HC 106/03.

Accordingly the defendant cannot rely on variations in the written lease which are not in writing and were therefore given in violation of the non-variation clause. To that should be added the fact that the parties entered into a fixed term contract of 12 months. There can therefore be no legitimate expectation that the lease would be extended for another 3 years. I therefore answer the second issue in the negative.

The case of *Mungadze v Murambiwa supra* is authority for the fact that the notice of termination given by the plaintiff was invalid. The lease had to run its course until 30 April 2014 as it was for a fixed period. On the other hand, to the extent that the plaintiff required the premises for own use, after its expiry the defendant had to vacate on that date. The plaintiff is entitled to evict the defendant now that the lease was expired.

The defendant has not mounted any challenge as to the entitlement of the plaintiff to holding over damages.

In the result, it is ordered that;

1. The defendant be evicted from stand 228 Gweru.
2. The defendant shall pay holding over damages in the sum of \$880-00 from the 30th April 2014 to date of eviction.
3. The defendant shall pay to the plaintiff the sum of \$3384-67 being rent and rates arrears.
4. The defendant shall bear the costs of suit on an ordinary scale.

Danziger & Partners, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & partners, defendant's legal practitioners