EDMOND TOTRI

And

GEORGE PATRINOS

Versus

PHATHISANI S. NKOMO

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 8 AND 15 OCTOBER 2020, 11 MAY AND 3 AUGUST 2021

Civil Trial

L. Mpofu, for the plaintiffs
V. Majoko, for the defendant

KABASA J: The plaintiffs co-own a commercial property situated at 101 R. Mugabe Way, Bulawayo. They leased the property to the defendant and the lease was to run from 1 October 2011 expiring on 30th September 2012.

Clause 4 of that lease agreement stated the terms regarding the renewal or termination of the lease. This clause stated that: -

> 4(a) "Subject to any option to renew this lease hereinafter contained, unless the tenant gives to the owner notice as set out below, that he will vacate the Premises upon the expiry of this lease, the lease will be deemed to be renewed from date of expiry on the same terms and conditions subject to two calendar months' notice of termination by either party to the other.
>
> (b) Notice under this clause shall mean two calendar months' notice in writing delivered to the owner or the Tenant on or before 12 noon on the first day of such notice or if the first day is a non-business day, then by the close of business on the last day before that date."

The defendant did not give notice as envisaged in clause 4(a) so the lease agreement was thus automatically renewed with each anniversary until 2019. On 4th June 2019 the plaintiffs' legal practitioners wrote to the defendant giving him notice of termination of the lease. The lease was not going to be renewed upon its expiration on 30 September 2019. The notice was given in terms of clause 4(a) of the Lease Agreement. The notice to the defendant was informed by the plaintiffs' desire to take over the premises so as to run their own business therefrom.

The defendant refused to vacate the premises, arguing that the plaintiffs did not want to use the premises but to lease them to a tenant who would pay more and in United States dollars.

As a result of the stalemate the plaintiffs issued summons on 9th October 2019 in which they claimed: -

> "a) An order for the eviction of defendant and all those claiming occupation through him from number 101 R. Mugabe Way, Bulawayo, a property owned by plaintiffs which they now require for their own use upon lapse of Lease Agreement.
>
> b) Costs of suit on an attorney-client scale."

In resisting the claim, the defendant's response was to the effect that the plaintiffs did not require the premises for their own use. The termination was premised on a desire to increase rent and to have such paid in foreign currency.

The defendant further contended that he was a statutory tenant and could only be evicted on good and sufficient cause. The plaintiffs did not have such good and sufficient cause. The parties' understanding was also that the defendant would be allowed to recoup expenses incurred in the repairs and renovations he had made to the building, as well as monies expended in buying the business from a previous tenant. The defendant was therefore not budging.

With the closure of pleadings, the parties attended a Pre-Trial Conference where the following issues were referred to trial: -

a) Whether or not plaintiffs require the premises for their own use.

b) Whether or not defendant is entitled to continue in occupation of plaintiffs' premises.

c) Whether or not defendant is entitled to continue in occupation of the premises to recover any money expended on the renovations or improvements effected on the premises in terms of the Lease Agreement.

At the hearing of the matter the first plaintiff testified and was the only witness. His evidence was to the effect that the Lease Agreement signed on 30 September 2011 embodied the entire terms of the agreement. The parties' relationship was governed solely by what was in the Lease Agreement. Any improvements to the property were not to be effected without

the written consent of the plaintiffs. The same lease contained a clause governing how such lease was to be terminated.

A notice of termination was served on the defendant as per the Lease Agreement. Summons were then issued when the defendant refused to vacate at the expiration of the lease, which was 30th September 2019.

The plaintiffs decided to terminate the lease to allow them to utilise the premises. This was necessitated by the fact that both plaintiffs are in the twilight of their years. The first plaintiff is now unable to actively conduct his panel beating business which was bringing in income. His health is failing and so both plaintiffs decided to run the business as a family and allow the proceeds therefrom to sustain them. Both of them have grown up children who can assist and this is more viable than the $40 - $45 United States dollars renting the premises is bringing in.

Under cross examination, the first plaintiff denied that the motivation to terminate the lease was so as to offer the premises to a new tenant who would pay more. They do not want to be beggars and an attempt had been made to forge a partnership with the defendant, all in efforts to realise a meaningful return from the premises. The economic environment has made it necessary for the plaintiffs to utilise the building and not any other ulterior motive.

Ultimately the intention is to sell the premises and the defendant spurned the plaintiffs' efforts to advertise such sale by refusing to allow 'FOR SALE' notices to be put up at the premises. Running their business from the premises will give them better returns and make it easier to sell once a buyer is secured. This decision saw them turning down offers from several people who had expressed interest in renting the premises. They therefore do not intend to lease the premises but to utilise them as a family business.

This witness gave his evidence well and without rancour. I found his candidness disarming. He was quick to accept that the USD$45 which is what RTGS 4 500 the defendant is paying as rent amounts to, is inadequate to sustain them in their old age. He equally admitted overtures made to the defendant for the parties to enter into a partnership but added that this was all meant to find a solution which would work for him, the second plaintiff and the defendant.

The upshot of the first plaintiff's testimony is that the Lease Agreement was terminated in terms of the parties' agreement embodied in the written lease. The reason stemmed from a desire to sustain themselves due to the harsh economic environment. Summons were issued upon the defendant's refusal to vacate at the expiration of the notice period.

An application for absolution from the instance was made after the plaintiffs' case was closed but the application was dismissed. The reasons thereof are contained in the court's judgment which was handed down on 15th October 2020.

At the resumption of the trial, the defendant testified and he was the only witness. His testimony was to the effect that he took over the lease of 101 Robert Mugabe Way from a Dr Mumbengegwi and bought the goodwill and assets.

He then signed a Lease Agreement with the plaintiffs at an initial rental amount of USD$3 200. However, he paid USD2 500 from October to December of the first year as he had to effect repairs to a variety of broken items at the premises. He also had to pay utility bills that were in arrears.

The plaintiffs would always negotiate an increase in rentals every year the lease was up for renewal. The issue of rent increases became acrimonious and his suggestion that they engage the Rent Board for a fair assessment of rent was rebuffed.

He was then served with the notice of termination of the lease. He doubts the truthfulness of the plaintiffs' claims that they now want to utilise the premises. This is because they had separately wanted him to pay a "signing on fee" which he resisted before they asked for partnership which he again resisted. A number of people had informed him that the plaintiffs wanted to rent the premises out and this was evidence that the taking over was not for the reasons given but it was a ploy to offer the premises to a new tenant at an increased rental.

The defendant acknowledged that the plaintiffs' attempts to increase rent were not always done at the end of the lease period in any given year. They had also withdrawn their demand for payment in United States dollars when it was pointed out to them that such was not legal. He also acknowledged that he was given written notice of termination of the lease on 4th June 2019 when the lease was due to expire on 30 September 2019.

The defendant equally accepted that the talk of a partnership was at variance with a landlord who was still interested in renting out the building and that finally the plaintiffs indicated that they were no longer interested in renting out the premises but wanted the premises back for their own use.

The defendant's evidence did not detract from the plaintiffs' evidence as regards the reason for wanting the premises back. The plaintiffs are both very old and it is not difficult to understand their intention to look to their building for sustenance as other streams of income have dried up.

The defendant's confirmation that the 1st plaintiff's children visited the premises expressing the intention to run it as a family was in support of the first plaintiff's testimony that they wanted to run the business as a family and realise more than they would renting it out. Are the plaintiffs entitled to seek the defendant's eviction? Is the defendant a statutory tenant? If so, what is it that the law expects a landlord to satisfy before successfully evicting such a tenant?

Mr Majoko for the defendant referred to the decision in *Paget -Pax Trust* v *Highlife Investments (Pvt) Ltd* HH 518-15, where the court said: -

> "A statutory tenant is one whose continued occupation of the landlord's premises after the expiry of the lease agreement, either by the effluxion of time, or on due notice of termination having been given, is by operation of the law. That law is the Rent Regulations. The Statutory tenant must continue to pay the rent due within seven days of the due date, and to perform all the other conditions of the expired lease. However, such a tenant can still be evicted if the landlord proves to the court that he has "good and sufficient grounds" for wanting back the premises."

Section 22 of the Commercial Premises (Rent) Regulations 1983 (S.I 676 of 1983) provide that: -

> "(2) 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 the 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 has 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."

In casu the lease expired in consequence of notice of termination but the defendant did not vacate the premises. He therefore became a statutory tenant. He therefore can only be evicted upon the showing of good and sufficient cause.

Have the plaintiffs shown such good and sufficient cause? In *Boka Enterprises (Pvt) (Ltd)* v *Joowalay and Another* 1988 (1) ZLR 107 (SC) GUBBAY CJ (as he then was) had this to say: -

> "Each case of an owner genuinely seeking to use the leased premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: "the premises belong to me and I now desire to use them for my own purpose." That would not constitute good and sufficient grounds. The court would want to know the precise use to which it was intended to put the premises."

I have already alluded to the purpose the plaintiffs intend to utilise the premises. They were in that business before, operating under the banner of Silver Fox Night Club. Exhibit 3, 4 and 5 showed quotations of beverages and the plaintiff testified to the effect that such quotations were obtained in anticipation of running the business. Whilst the plaintiffs are advanced in years, the plaintiff explained that he does not require physical energy to run the business as was the case with the panel beating business.

The plaintiffs' reasons for wanting the property must be assessed on their own merits. The evidence proffered by the plaintiffs in the form of the quotations, the undisputed visits by the plaintiffs' children expressing their intentions and the undisputed fact that RTGS 4 500 cannot possibly sustain the plaintiffs in their old age, accords with what the Supreme Court said in *Kingstons (Pvt) Ltd* v *L D Ineson* (Pvt) Ltd SC 09-08.

> "…. 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 genuiness of his assertion and it rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuiness of the lessor's claim."

I am unable to hold that because there were earlier negotiations for rent increase and talk of a partnership, the plaintiffs are not genuine in stating that all they want is to earn a decent living and these overtures were done for that very purpose. The fact that these failed and they have decided to run the business themselves cannot be held against them. To conclude that their intentions are far from being honourable is to place an onus on them more onerous than the "proof on a balance of probabilities" which is the civil threshold expected of a litigant.

Counsel for the plaintiff referred to the case of *Miller* v *Minister of Pensions* (1947) 2 ALL ER 372 at 347 where the court said: -

> '… if the evidence is such that the tribunal can say "we think it more probable than not" the burden is discharged …"

The first plaintiff's evidence successfully discharged the onus placed on the plaintiffs. The probabilities of the matter lean in favour of the plaintiffs. There was really nothing tangible to controvert the plaintiffs' evidence that the premises are to be utilised as a family business with an intention to eventually sell.

There is no law that militates against the owner of premises from terminating a Lease Agreement in an attempt to earn a living therefrom by operating their own business from such premises. All they have to show is that the reason is genuine (*Kingstons (Pvt) Ltd* v *L. D Ineson (Pvt) Ltd* (supra)). The unsubstantiated claims by the defendant that he was aware of individuals who wanted to lease the premises do not cast doubt on the genuiness of the plaintiffs' claim.

Counsel for the defendant referred to the remarks made by Malaba CJ in *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Another* SC3/20 where the learned CJ said:

"The Court finds that the arguments by counsel are devoid of merit. Counsel would like the court to believe that a conversion of a foreign currency denomination to a local currency denomination amounts to a lesser value in the local currency. This reasoning is wrong at law. There can be no parity to talk about once it is accepted that the RTGS dollar is a currency denomination with a set legal value. It is the legal tender used in Zimbabwe and as such carries a specific value……..."

I did not understand the plaintiffs' argument as one seeking parity but that the amount itself cannot sustain them. It will be disingenuous to argue that RTGS 4500 can sustain the plaintiffs in their old age, with no other source of income. It is also worth noting that whilst SI33/2019 deemed all assets and liabilities expressed in United States Dollars immediately before 22nd February to be values in RTGS at a rate of 1:1, after this effective date, section 4(1)(e) of SI33/2019 such rate was to be at the rate at which authorised dealers under the Exchange Control Act exchange the RTGS for the United States Dollar.

I would respectfully associate myself with NDOU J's remarks in *Fort Enterprises* v *Sibanda* HB 20-13: -

> "In this long period of around seven years one would expect rent increases, especially bearing in mind that the substantial part of that period was during the hyperinflation era. The plaintiff's conduct has to be viewed in that context … These actions do not impeach the genuiness of the plaintiff's desire to reclaim the premises for its own use."

In casu the effects of SI 33-2019 which saw a rental of USD 4 5OO equated to RTGS 4 500 must be seen in its proper context. The plaintiff's claim that such an amount was no longer sustaining them and so when all else failed they decided to run the business with a view to eventually sell cannot be dismissed off hand. It must also be borne in mind that section (4) (e) already alluded to, acknowledged that the RTGS was not at par with the USD after 22nd February 2019. The plaintiffs issued summons in October 2019.

The hyperinflation referred to by Ndou J over the 7 year period in the Fort Enterprises case (supra) may not portray the same volatility over the 8 period *in casu*, but the difficult economic environment which informed the plaintiffs' decision to take over their premises and run their own business cannot be disputed. If all they were interested in was payment of rent in United States Dollars, they would have accepted the defendant's offer to pay US$2500 but they did not.

The first issue is therefore resolved in the plaintiffs' favour. Besides the bald unsubstantiated assertions by the defendant the plaintiffs' evidence established the reason why they want to take over the premises.

This brings me to the second issue on whether or not the defendant is entitled to continue occupying the plaintiffs' premises. He would have been entitled to had the plaintiffs failed to show that they genuinely want to take back the premises so as to run their own family business. The second issue is subsumed in the first issue and I am of the considered view that only 2 issues should have been referred for trial.

This then leads to the question of whether he can be so entitled in order to recoup money expended on renovations to the premises.

Clause 6 (i) of the lease agreement specifically stated that: -

> "The owner shall not be responsible for the cost of any repairs carried out by or at any instance of the tenant without the owner's permission in writing."

Clause 9 thereof equally states that: -

> "… Any alterations or additions made by or on behalf of the tenant shall, on the termination of the agreement, remain the property of the owner and the tenant shall not be entitled to compensation. Should the owner require the alterations or additions to be removed then the tenant shall at his own expense remove them and restore the premises to their original condition, making good as necessary."

These were the terms of a contract the parties voluntarily entered into. The renovations and repairs the defendant effected were done at the time the parties' contract was not yet terminated. So too the amount paid as goodwill and to buy assets from the previous tenant. The lease agreement made no mention of such amount and so whatever amounts the defendant paid cannot be read into a contract that was silent on that issue.

In *Magodora and Others* v *Care International Zimbabwe* SC 191-13 PATEL JA had this to say: -

> "It is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive."

This court cannot hold that the defendant is entitled to remain in the premises so as to recoup expenses he incurred in improving such premises when there is no evidence to show that he incurred such expenses with the written permission of the plaintiffs. There was reference to the monies expended in buying good will and assets from a former tenant. Such was not covered in the contract between the plaintiffs and the defendant. I therefore fail to see how this court can consider expenses excluded in the contract the parties signed. Such expenses have no bearing on the issue of the lease agreement and its termination. This court can only look to the terms of that lease agreement, which lease agreement was in force at the time of the said improvements and purchase of good will.

The defendant only became a statutory tenant upon the notice of termination which he resisted and continued in occupation. Now that the plaintiffs have shown good and sufficient reason to reclaim their premises, it follows that the defendant cannot legally resist the eviction.

The plaintiffs have therefore proved their claim and are entitled to the relief they seek.

As regards costs, the defendant's decision to defend the claim cannot be held against him. His attitude must be looked at in light of his genuine belief that he was being evicted

unfairly. It cannot be said his decision to defend the plaintiffs' claim was meant to harass them thereby unnecessarily putting them out of pocket.

In the result, I make the following order: -

1. The plaintiff's claim succeeds. The defendant and all those claiming occupation through him be and are hereby evicted from number 101 Robert Mugabe Way, Bulawayo.
2. The defendant shall pay costs at the ordinary scale.

Messrs. Malinga and Mpofu Legal Practitioners, plaintiffs' legal practitioners
Messrs. Majoko and Majoko, defendant's legal practitioners