

P. ROSATI & SONS (PVT) LTD
versus
P&C PANEL BEATERS & SPRAY PAINTERS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 22, 23, 25 July and 19 November 2008.

Civil Trial

Mr *D Halimani*, for the Plaintiff
Mr *A.A. Debwe*, for the Defendant.

UCHENA J: The plaintiff owns premises which are being rented by the defendant. The plaintiff is a company duly incorporated in terms of the laws of Zimbabwe. Its shareholding has changed by virtue of its majority shareholders selling their shares to Regimos Paints the current majority shareholder.

The defendant is a company duly incorporated in terms of the laws of Zimbabwe. It is renting the premises in dispute together with two other tenants who are not part of this litigation. It entered into a lease agreement with the plaintiff, for a ten year period ending on 30 January 2015.

The rentals were to be reviewed from time to time. In October 2006 they had a dispute over the rentals to be paid by the defendant. The plaintiff referred the dispute to the Commercial Premises Rent Board, which determined rentals to be paid by the defendant. The plaintiff's major shareholders at that time were not happy with the rentals set by the rent board. They decided to sell their shares as they were not getting a satisfactory return from their investment in the plaintiff. The plaintiff's identity has therefore not changed, as a company's identity is not affected by the sale of its shares from an existing shareholder to a new shareholder.

The issues between the parties are;

1. whether or not the lease agreement signed between the parties is still valid or lapsed on or after the 1 October 2006.
2. whether or not the defendant became a statutory tenant after the referral of their rent dispute to the rent Board, on 1 October 2006.
3. Whether or not the plaintiff has good and sufficient grounds to seek the Defendant's eviction from the premises.

The evidence in this case is mostly common cause. The parties agree that they entered into a ten year lease agreement. They also agree that rentals were to be reviewed from time to time. They agree that in October 2006 they could not agree on the new rentals to be paid by the defendant. That issue was referred to the Commercial Premises Rent Board by the plaintiff. The rent board set the rentals to be paid. The major shareholders then sold their shares, to Regimos Paints the new major shareholder. The plaintiff's identity was not affected.

Effect of the determination of fair rent, by the Commercial Rent Board.

Mr *Halimani* for the plaintiff submitted that the determination of fair rent by the rent board signifies the termination of the lease and its substitution by the defendant's statutory tenancy. Mr *Debwe* for the defendant argued that the referral of the rent issue to the Commercial Premises Rent Board does not terminate the lease but merely facilitates, for the determination of fair rental.

Section 10 (2) of the Commercial Premises Rent Regulations clarifies the issue. It provides as follows;

“(2) In fixing a fair rent for commercial premises, a board may specify different rents for different periods during the currency of the lease concerned”.

The wording of section 10 (2) clearly indicates that the intention of the legislature in providing for the determination of fair rental was not to terminate the lease agreement, but to determine fair rentals to be paid during the currency of the lease agreement. I would therefore not agree with plaintiff's Counsel's submission that the defendant became a statutory tenant, when the rent board determined fair rentals for the premises.

The lease agreement refers to review of rentals. The intention of the parties was to review the rentals while the lease remained in existence for the stated period.

In his application for the determination of fair rentals, the plaintiff on page 2 of exhibit 3 said;

“The respondent (sic) have a contract of lease which commenced on 1 January 2005 and shall terminate on (sic) January 2015”

The plaintiff was therefore aware of the continuance of the lease and even stated when it was to terminate. It therefore merely wanted the Commercial Rent Board to determine for them fair rental for the premises the defendant was renting from it.

In the result I find that the relationship between the plaintiff and the defendant continues, to be governed by the lease agreement. The defendant is therefore not a statutory tenant.

Notice to vacate

A finding that the lease between the parties is still valid brings into question the validity of the plaintiff's notice to the defendant to vacate the premises. In the case of *Mungadze v Murambiwa* 1997 (2) ZLR 44 (S) at page 46 D to E GUBBAY CJ said;

“Insofar 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 becomes necessary for that purpose. Even in that situation, the lessee would ordinarily be permitted to resume occupation upon completion of repairs. See *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (S) at 153 A-F”

It is therefore not possible for the lessor to give notice of the termination of a lease agreement other than for breach of the lease agreement. In this case the plaintiff gave the defendant notice to vacate because the plaintiff wanted to use the premises for its own operations. The notice does not therefore refer to any breach which would justify termination. It is an invalid notice as it was given during the currency of the lease, and for a reason other than breach of the lease agreement by the defendant.

In the result the lease agreement was not interrupted by the notice. The defendant is, in the absence of any breach for which he can be given notice to vacate, entitled to lease the premises until the period agreed to in the lease has lapsed. The issue of whether or not the plaintiff needs the premises for its own use does not arise.

The plaintiff's claim is therefore dismissed with costs.

Wintertons, plaintiff's legal practitioners.
Debwe and Partners, defendant's legal practitioners.