

QUICK TRAVEL CARRIERS P/L

versus

BRANCO'S PANEL BEATERS P/L

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 20 March 2007 & 27 February 2008

Civil trial

Advocate Matinenga, for plaintiff

Advocate Mandizha, for the defendant

CHATUKUTA J: The following facts are common cause. The plaintiff is the owner of business premises situated at defendant No 18 Shepperton Road, Graniteside, Harare. On 16 December, 2002, the company entered into a lease agreement with the defendant whereby the defendant leased from the plaintiff a portion of the business premises. The lease agreement was renewable annually. In 2005, the parties agreed to renew the agreement every four months and would agree on the monthly rental for the four months. In December 2005 the rental was \$40 million. It was a term of the agreement that rent was payable on or before the first day of each month.

Sometime in December, before the expiry of the lease, the plaintiff prepared a draft lease agreement which was given to the defendant. The plaintiff was proposing that the monthly rental be increased to \$120 million. The defendant was of the view that the rental was too high. This was communicated to the plaintiff on 15 January 2006. The defendant offered to pay \$60 million. This was not acceptable to the plaintiff. On 24 January 2006 the plaintiff, through its lawyers, demanded from the defendant payment of the January rental of \$120 million. The defendant was given seven days within which to remedy its alleged breach failing which the contract would be cancelled "forthwith". On 1 February 2006, the defendant, through its lawyers, tendered a payment of \$80 million being rent in the sum of \$60 million and good tenancy fee in sum of \$20 million. On 6

February 2006, the defendant tendered payment of the \$60 million as rent for February 2006. On 9 February 2006, the plaintiff, through its lawyers, wrote to the defendant purportedly cancelling the lease agreement which the defendant did not sign. It cited the defendant's failure to pay rent timeously as the basis for the cancellation for breach of agreement. On 6 March 2006, the plaintiff instituted the present proceedings claiming:

- (a) the ejectment of the defendant from the premises;
- (b) cancellation of the lease agreement entered into by the parties between 16 December 2002 and periodically renewed up to 31 December 2005;
- (c) payment of rentals due for January to February 2006 in the sum of \$240 million;
- (d) holding over damages in the sum of \$4 million per day for the period 1 March 2006 to date of ejectment;
- (e) interest at the prescribed rate from the date of issue of summons to date of payment;
- (f) collection commission calculated in accordance with By-Law 70 of the Law society of Zimbabwe By-Laws, 1982; and
- (g) costs on the legal practitioner scale.

The plaintiff abandoned the claim for rentals for the months of January to February 2006.

The plaintiff submitted that the contract prepared in December 2005, which was refused by the defendant is the basis of the claim against defendant. It is its contention therefore that the defendant was not a statutory tenant because there was an agreement between the parties. I failed to see the logic of these submissions. It is not disputed that the last lease agreement agreed upon by the parties ended on 31 December 2006. The agreement purportedly cancelled was a mere draft agreement. The parties did not agree to the terms of that agreement. A statutory tenancy of commercial premises is one which comes into being upon expiration of the lease either by effluxion of time or in consequence of notice duly given by the lessor and the lessee remains in personal occupation by virtue of the provisions of section 22(2) of Commercial Premises (Rent) Regulations, 1983, SI676 of 1983 (the Regulations)¹. It is therefore my view that the defendant was as statutory tenant. This meant that by operation of law, the original

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Mungadze v Murambiwa 1997 (2) ZLR 44 (SC) A p45 D-E

agreement together with all its terms and conditions continued in force after 31 December 2005.

Having said so, I perceive the real issue for determination as whether or not the defendant was entitled to protection offered for statutory tenants in terms of section 22(2) of the Regulations. Section 22(2) provides that:

"No order for the recovery of possession of commercial premises or for the ejection 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 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."

Therefore statutory protection is only granted to a person who complies with paragraphs (a) and (b)².

The plaintiff submitted that the defendant failed to comply with the requirements of section 22(2). In terms of the expired agreement, the defendant was required to pay rent for the month of January 2006 on or before the first of the month and within seven days of the due date. Mr Mario de Sousa Moura, the plaintiff's director, testified that the defendant did not pay the rent for January 2006 on time. The defendant purported to make a payment in February 2006. The defendant tendered \$60 million which was not the rent that he had been paying in terms of the expired agreement. The counter-offer offer of \$60 million did not transform itself into the statutory rent of \$40 million. He declined to receive the \$60 million as this would have been misconstrued as an acceptance of the defendant's counter offer of \$120 million.

The defendant submitted that the payment of \$60 million entitled it to the protection of the law. Mr Reggie Nazare, the defendant's managing director, testified that he knew from Mr Moura's attitude that the latter would not accept \$40 million particularly when he was refusing a counter-offer of \$60 million. It was his testimony that Mr Moura precluded him from making a payment of \$40 million when he indicated that he was taking up the matter with plaintiff's lawyers.

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Guthrie Holdings (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (SC) at 191A

It is my view that the defendant did not place before the court evidence that Mr Moura precluded the defendant from paying the statutory rent. The discussion between the parties on the proposed lease agreement only took place on or about 15 January, fourteen days after the due date. As of that date it is not disputed that the defendant had not paid or tendered to pay any statutory rental for the month of January 2006 by the due date. It was also not disputed that the agreement between the parties enjoined the defendant to pay rent on or before the first of the month. This was in fact confirmed by *Mr Mpame*, the defendant’s legal practitioner, in his evidence in favour of the defendant. In fact, no payment was made within the additional seven days grace period granted to a statutory tenant under the Regulations. In such a situation, it is my view that the defendant was not only breaching a term of the contract. It was failing to comply with a statutory provision³. In *Bay Homes (Pty) Ltd v Smith* (supra) FRIEDMAN J considered section 32 of the Rent Control Act 80 of 1976 (a similar provision to our section 22(2)). At he stated that⁴-

“The argument on appeal on behalf of appellant was that respondent was a statutory tenant and that he had failed to pay his rental within seven days after the due date or even within the further extended period of seven days provided for in s 28 of the Rent Control Act 80 of 1976 (hereinafter referred to as "the Act") and that he was accordingly no longer entitled to the protection of the Act. It is common cause that the rental was not paid within the time provided by s 28 of the Act. The sole issue therefore is whether the magistrate was correct in applying s 32 of the Act and on that ground refusing to issue an order for respondent's ejection.

Section 32 of the Act reads as follows:

"If a lessee of any dwelling, garage or parking space does not comply with any condition of any lease which in the opinion of a court -
 (a) is of a trivial nature;
 (b) does not fundamentally violate the interests of the lessor concerned; and
 (c) does not constitute any situation referred to in s 28 (b), (c) or (d),
 such court shall not issue an order for the ejection of such lessee from such dwelling, garage or parking space."

.....

I turn now to the question whether s 32 of the Act affords a ground for refusing an order of ejection based on respondent's admitted breach of the lease. In my judgment the section does not assist respondent for two reasons. Firstly, that section has no application

³ *Bay Homes (Pty) Ltd v Smith* 1984 (3) SA 807 (C)
⁴ At 810D-813F

to the case of a statutory tenant who fails to pay his rental within the time specified in s 28 of the Act. Section 32 is concerned with a failure to a "comply with any condition of any lease". The obligation which rests upon a statutory tenant to pay his rental is not solely a condition of the lease; it is a statutory obligation placed upon a tenant in terms of s 28 of the Act. The date fixed by the lease for the payment of rental does not determine when the rental must be paid. Section 28 provides that the rental must be paid within seven days of the due date "or such extended period not exceeding a further seven days as the court may allow on good cause shown and in exceptional circumstances". Thus even if it were a condition of the lease that the rental should be paid on the first day of the month and no period of grace be allowed under the lease, the obligation resting upon the tenant could be to pay his rental within seven days of the first day of the month, or within the extended period assuming he could satisfy the requirements of the section. Having specifically provided in s 28 for the time within which the rental was to be paid and having given the court a discretion, in the same section, to extend that period by a further seven days, the Legislature could not have intended to confer yet a further discretion upon the court in terms of s 32 to condone a late payment of rental. (Cf Steyn *Die Uitleg van Wette* 5th ed at 49.) Thus if a statutory tenant fails to pay his rental within the periods specified in s 28, there is no way in which the court is empowered to come to his assistance in terms of s 32.

.....

Turning to the facts of the present case, the condition which has been breached by the respondent is clause 3 of the lease in terms of which the monthly rental shall be payable in advance on the first day of each and every month. A condition such as E clause 2, which requires the rental to be paid on a specified date, cannot be described as being "of a trivial nature" and accordingly s 32 does not apply.

The Court is naturally not without sympathy for the respondent. However, the fact of the matter is that he failed to pay his rental on due date or even within the extended period allowed by s 28 of the Act. Although respondent's failure to comply F with such an important obligation timeously was occasioned by a "momentary lapse", as he himself described it, I am unable to find that s 32, properly interpreted, empowers the Court to condone or rectify the position. Respondent's position is not dissimilar to that in which the respondent found himself in *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) in G which an order of ejection was granted where proceedings were instituted the day after the last day for payment stipulated in the lease."

It appears to me that the obligation to pay rent timeously and within the extended period of seven days is a statutory obligation imposed by section 22(2) of the Regulations. As in *Bay Homes (Pty) Ltd v Smith* (supra), I am of the view that the defendant does not deserve the sympathy of the court. After the defendant had become a statutory tenant, it had failed to pay the rent timeously and had ceased to be a statutory tenant. It had, by virtue of that breach, disentitled itself to the protection normally afforded to a statutory tenant by s 22(2) of the Regulations. On this basis, the defendant was no longer entitled to remain on the premises.

The defendant attempted to go around this problem by alleging that the plaintiff waived its right to rent when it gave the defendant seven days within which to pay the rental of \$120 million. As rightly, submitted by the plaintiff, the evidence of the plaintiff seem to indicate the contrary. A landlord must elect within reasonable time whether or not to cancel contract⁵. The plaintiff instituted these proceedings soon after the stalemate, that is on 6 March 2006. I am of the view that this was a reasonable time within which the plaintiff asserted its rights and is not consistent with a party waiving its rights.

Turning to the question of holding over damages, the plaintiff led evidence from one Anorld Hove, a Commercial Letting Manager with Gabriel Real Estate. He testified that the a fair of \$66 500 per day or \$1.5 million per month was fair rental for the premises in issue. The witness was not cross examined hence his evidence remained unchallenged. In the result, I do not see a basis to deny the plaintiff the damages claimed.

Regarding the claim for cost on a higher scale, the plaintiff did not claim such costs in its evidence, neither did *Advocate Matinega* persist with the claim in the closing submissions. I therefore do not have a legal basis for ordering costs on higher scale.

Accordingly it is ordered as follows:

1. The defendant be and is hereby ordered to vacate the leased premises at No 18 Shepperton Road, Graniteside, Harare, within fourteen days of the date of service of this order on the defendant.
2. The defendant be and is hereby ordered to pay holding over damages in the sum of \$66 500 per day from the 1st March 2006 to the date of ejectment.
3. The defendant be and is hereby ordered to pay interest at the prescribed rate on the holding over damages calculated from the date of issue of summons up to the date of payment.
4. The defendant be and is hereby ordered to pay collection commission calculated in accordance with By-Law 70 of the Law society of Zimbabwe By-Laws, 1982.
5. The defendant be and is hereby ordered to pay costs of suit.

⁵ *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (HC)

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners.

Baera & Company, defendant's legal practitioner