

OLD MUTUAL PROPERTY
INVESTMENT CORPORATION (PRIVATE) LIMITED
versus
METRO INTERNATIONAL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 31 January and 18 June 2008

Opposed Application

Mr Fitches, for the applicant
Mr Phillips, for the respondent

BHUNU J: On 14 November, 1995 the parties concluded a written lease agreement in terms of which the respondent leased the applicant's premises at stand number 1642 Bluff Hill situate at Westgate Shopping Centre. The lease was to ensure for a period of ten years with effect from 1 April, 1997 expiring on 31 March 2007.

Clause 32.3 of the written contract precluded the respondent from altering its shareholding without the applicant's prior written consent. It reads:

"If the tenant is a company whose shares are not listed on a recognized stock exchange no shares therein shall be transferred from the shareholders nor may any shares be allotted to any person other than such shareholders without the landlord's prior written consent, which in the case of an allotment or transfer of shares which will still leave control of the tenant with the present shareholders or of a transfer of shares to a deceased shareholder's heirs shall not be unreasonably withheld." (my emphasis)

It is common cause that in breach of clause 32.3 the respondent altered its shareholding without obtaining the lessor's prior written approval. The original shareholding structure was altered in such a way that the new shareholder Alphavic (Private) Limited now holds 90% of the shares leaving the original majority shareholder with only 10% of the shares.

In its opposing papers the respondent admits breaching the contract in this respect but seeks to avoid liability on the basis that failure to notify and obtain written approval of the change of shareholding structure was an oversight. Thus in his opposing affidavit Mr Christopher Peech a shareholder and former director of the respondent had this to say:

- “10.5. Having already obtained the applicant’s written approval to sublet the premises to a majority shareholder, the respondent assumed that there would be no objection to the new partners. Failure to obtain written approval from the applicant was an oversight, but it was an oversight of which the applicant was aware. No objection was raised in terms of clause 32.3 of the lease agreement to the new shareholding structure for approximately two years. Rentals were even negotiated and agreed directly with the new shareholders (and not the old ones) in February 2007, on the understanding that these would be reviewed after three months. (my emphasis)”
- 10.6. In the premises I am highly surprised that the chairman of the applicant invited the respondent’s majority shareholder to apply for a new lease and no objection was raised at this meeting as to the shareholding of the respondent company. Clearly, this was a *mala fide* attempt by the respondent to divert the respondent’s attention from the already existing lease in order to dig up the issue of shareholding when it became expedient and necessary to form a basis upon which to evict the respondent.
- 10.7 The objection to shareholding was only raised in the letters of 3 and 23 July, 2007. It is highly prejudicial for the applicant to suddenly raise the issue of shareholding because it has become convenient to do so in order to evict the respondent from the premises. It is submitted that to do so in the circumstances I have described above will grossly be unjust.”

In the event of breach of contract clause 31 of the lease agreement authorized the applicant to cancel the contract upon giving ten days written notice without the respondent remedying the breach. Relying upon that provision the applicant wrote to the respondent on 3 July 2007 in the following terms:

“WESTGATE SPAR

We note with concern that there has been a transfer of shareholding in Metro International (Private) Limited without our consent. This is in breach of our clause 32.3 of the existing lease agreement.

We have been advised that the new shareholders in Metro International (Private) Limited wish to trade as Alphavic Supermarket with the brand name Victory. We are not prepared to accept the proposal to trade as Victory. Alphavic Management Consultants (Private) Limited does not currently have a lease agreement with Old Mutual. Old Mutual cannot allow the shop to trade as any other brand without a lease agreement to that effect.

We therefore request Metro International to instruct Alphaviv Supermarket to immediately remove the Victory signage that has been put up at the shop failure of which we will be left with no option but to remove it.

In light of the breach and developments at hand, and whilst we reserve our rights in terms of clause 31 of the lease agreement with respect to breach, we wish to advise that we will not be in a position to extend the lease beyond the extension given up to 30 September 2007. Therefore take this as notice to vacate our premises on or before 30 September 2007.

We look forward to your cooperation.” (my emphasis)

It is clear to me that in consequence of the breach the applicant gave the required notice in terms of the lease agreement and elected to cancel the lease agreement with effect from the date of expiry being 30 September 2007. The contract having been cancelled with effect from that date it was no longer capable of being renewed or extension.

Even if I were to assume that the respondent became a statutory tenant at the expiry of the lease in terms of the Commercial Rent Regulations SI 676 of 1983 that will still not assist the respondent because it continues to be in breach of the terms of the original lease agreement. Section 22(2) places an obligation on the statutory tenant to scrupulously observe all the terms of the expired lease agreement. It provides as follows:

“(2) No order for the recovery of possession of commercial premises or for the ejection of a lessee there from which is based on the fact of the lease having expired or, either by the efflux ion 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 the 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 an order other than that:

- (i) the lease has declined to agree to an increase in rent; or
- (ii) the lease wishes to lease the premises to some other person.”

Our courts in interpreting the above statutory provisions have held that a statutory tenant who fails to comply with the terms and conditions of the expired lease forfeits any protection under s 22 of the Commercial Premises Rent Regulations. See *Guthrie Holdings (Pvt) Ltd* 1986 (2) ZLR 148 (SC).

It is self evident that the respondent is in breach of its contractual obligation under clause 32.3 of the written lease agreement not to alter its shareholding without the applicant's prior written consent. Thus while the respondent continues to pay rentals in terms of the regulations it has fallen foul of subparagraph (ii) in that it continues to be in breach of the expired if not cancelled lease agreement despite having received written notice to purge the breach. For that reason it cannot find solace or protection in its status as a statutory tenant. That being the case the application can only succeed. It is accordingly ordered:

1. That the application be and is hereby granted.
2. That the respondent be and is hereby ordered to vacate the applicant's leased premises comprising of a shop and offices at Westgate Shopping Centre, Harare within forty eight hours of being served with a copy of this order failing of which the Deputy Sheriff is hereby ordered and authorized to eject the respondent from the applicant's premises.
3. The respondent shall pay costs of suit.

Scanlen & Holderness, applicant's legal practitioners
Gallop & Blank, respondent's legal practitioners