

`ALLIANCE FRANCAISE
versus
ADRIEN ORFORD
and
LESLEY ORFORD
(T/A ALO ALO RESTAURANT)

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 21 May and 1 September 2009

Mr. Chikumbirike, for the applicant
Adv. Uriri, for the respondents

PATEL J: The background to this matter is as follows. On the 6th of February 2006, the parties herein entered into a lease agreement to run for a period of 36 months, from the 1st of January 2006 to the 31st of December 2008, in respect of certain premises situated in Harare. On the 30th of January 2007, the parties concluded an addendum to the main agreement, providing for an option to renew and other incidental matters.

At the beginning of 2008, the applicant prepared a fresh draft agreement requiring, *inter alia*, usage of the premises in a manner that would be complementary to the applicant's cultural activities. This draft was rejected by the respondents on the ground that it was an entirely different lease arrangement with more onerous obligations.

On the 27th of March 2008, the applicant's lawyers gave the respondents notice to vacate the premises on the 31st of December 2008, indicating that the applicant intended to utilise the premises for its own use.

In June 2008, the applicant proposed an increase in monthly rental from \$4 trillion to \$60 trillion. The respondents in turn consulted various estate agents and tendered \$25 trillion as being a fair and reasonable rental.

In July 2008, the applicant filed the present application seeking an order requiring the respondents to vacate the premises by the 31st of December 2008. The respondents resisted the application on the ground that the applicant did not want the premises for its own use but for some other ulterior purpose, viz. in order to lease the premises to another party and/or accrue higher rentals.

For reasons which are not clear from the record, the applicant's lawyers only applied in February 2009 for the matter to be set down for hearing. Moreover, they have not applied to amend the relief that was originally sought, viz. eviction of the respondents by the 31st of December 2008.

Duration of Lease

The original lease agreement of 2006 was filed of record as Annexure A to the applicant's founding affidavit. In terms of the Second Clause, the lease "shall continue to run for the term or period of 36 months on and up to 31st December 2008". The Third Clause stipulated the monthly rent for the first 12 months. Thereafter, the rent was to be reviewed "in line with current market trends" (as per the original typed wording) or "monthly in line with inflation" (as per the manually amended version).

At the hearing of this matter, *Mr. Chikumbirike* attempted to disown the latter version with the specious explanation that the manual amendment was in anticipation of what was to be incorporated in the revised draft agreement. However, given that the amended version was in fact filed by the applicant itself, and cited without any qualification in the founding affidavit as the governing lease agreement, it must be the version that must be adopted for the purposes of this application.

Under the common law, an essential ingredient of a contractual lease is that the amount of the rent payable by the lessee must be fixed or that some definite mode of fixing the rent

must be agreed upon. In other words, the rental must be in an ascertained or ascertainable amount. See *Totoyi v Ncuka* 1909 EDC 115. See also *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H) at 195, citing *Brown v Hicks* (1902) 19 SC 314 at 315 & 316:

“Until the rent, or some definite mode of fixing the rent, is agreed upon, there is no contract of letting and hiring of the house. The letting of services stands upon the same footing.”

In this context, an objective indicator determined by a public body would afford a definite mode of fixing an ascertainable rent. In the instant case, I am of the view that the stipulated review of the rental “monthly in line with inflation”, in accordance with the inflation index compiled and published by the Central Statistical Office, provides an objective indicator and definite mode for fixing the monthly rent. It follows that the duration of the contractual lease between the parties was a term of 36 months, expiring on the 31st of December 2008. Thereafter, inasmuch as the respondents did not exercise their option to renew the lease, the contractual lease lapsed and was converted into a statutory tenancy under Part IV of the Commercial Premises (Rent) Regulations 1983.

Termination of Lease

The next question is whether the contractual lease was terminable by notice given before the date of its expiry - as was done by the applicant in March 2008. The lease agreement itself, as read with the addendum of 2007, does not entitle the applicant to terminate the lease by notice or otherwise, except on the ground of material breach, at any time before the expiration of the fixed term of 36 months.

In this regard, *Mr. Chikumbirike* contends that at common law the lessor is entitled to give notice of termination to coincide with the date of expiration so long as he respects the fixed term of the lease. No authority was cited for this spurious proposition and I am unable to find any merit in it for the simple reason that a fixed term

lease terminates *ipso facto* upon the expiry of the fixed term, without the need for any notice of termination from either party. The giving of notice to terminate so as to coincide with the date of expiry of the lease is legally pointless and practically futile.

In the instant case, *Mr. Chikumbirike's* assertion is rendered even more untenable by dint of the option to renew granted to the respondents. In terms of the Fourth and Sixth Clauses of the lease agreement, as substituted by the addendum, the respondents had the option to renew the lease for a further period of 36 months by giving written notice of their intention to do so no later than 3 months prior to the 31st of December 2008. This option, subject only to the satisfactory performance by the respondents of their obligations in terms of the lease, further precluded the applicant from terminating the lease before the expiry of its fixed term.

It follows from the foregoing that, except for material breach of the lease agreement by the respondents, the contractual lease between the parties was not terminable by the applicant by notice given at any stage prior to the expiration of the fixed period of 36 months. It also follows that the purported notice of termination given by the applicant in March 2008 is a nullity with no legal force or effect insofar as concerns the duration of the lease *in casu*.

Statutory Tenancy

As I have already stated, the respondents did not duly exercise their option to renew the lease before the expiry of the contractual lease on the 31st of December 2008. Therefore, as from the 1st of January 2009, they became statutory tenants of the demised premises under Part IV of the Commercial Premises (Rent) Regulations 1983 (S.I. 676/1983), as amended.

Section 22 of the Regulations restricts the ejection of statutory tenants and provides as follows:

“(1) For the purposes of subsection (2), “rent due”, in relation to commercial premises, means—

(a) where the determination of a fair rent in terms of Part II is in force in respect of premises, the rent fixed thereby, as varied from time to time in terms of that Part; or

(b) in any other case, the rent due in terms of the lease.

(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.”

Section 23 sets out the rights and obligations of statutory tenants and governs the giving of notice by lessors and lessees as follows:

“A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving three months notice:

Provided that, notwithstanding anything contained in the contract of lease, a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee.”

Section 24 prohibits the unlawful removal of property or any obstruction in the use of leased premises and stipulates that:

“No lessor of commercial premises shall—

(a) without a lessee’s consent and without reasonable excuse, cause the removal from the premises of any property belonging to the lessee; or

(b) prevent a lessee from using or occupying the premises;

unless he has obtained an order of court for the removal of such property, if appropriate, or for the recovery of possession of the premises or the ejection of the lessee therefrom.”

Notice to Vacate

For present purposes, the overall effect of these provisions is that, subject to compliance with the terms of the expired lease agreement, the respondents are entitled to remain in occupation of the premises and use them without obstruction, unless and until they voluntarily vacate the premises or are lawfully removed therefrom in accordance with the Regulations. The applicant has now approached the Court seeking the eviction of the respondents from the leased premises. The question that arises is whether or not it is required to give the respondents, who are now statutory tenants, any notice to vacate the premises before seeking their ejection by the Court.

Section 23 of the Regulations is ambiguously unclear in this respect. While it might be correct to infer that no notice to vacate would be required where the lessee fails to observe the terms and condition of the contractual lease, the position where the lessee religiously complies with his lease obligations is not at all clear. The proviso to section 23, in its express terms, only absolves the lessor from having to give notice to vacate where he has already obtained an order for recovery of the premises or for the ejection of the lessee. The necessary implication, in the case of the good statutory tenant, is that the lessor is obliged to give him notice to vacate before approaching the Court for an eviction order. The period of such notice, again by implication, would be such notice as would have been required under the lease agreement or, if no notice would have been so required, a period of three months notice.

In the present case, as I have already stated, the purported notice of termination given by the applicant in March 2008 is a nullity insofar as concerns the duration of the lease. It follows that the applicant has not given the respondents any valid notice to

vacate. Therefore, if the position postulated above is correct, it also follows that the applicant is precluded from seeking the eviction of the respondents and that the present application is premature and should be dismissed on that ground alone. In any event, for the reasons that follow, I do not deem it necessary to definitively decide this point and am inclined to leave it open for present purposes.

Ejectment from Premises

The final issue for determination is whether or not the applicant has good and sufficient grounds for requiring the eviction of the respondents as envisaged in section 22(2) of the Regulations.

In *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (SC), it was held that it is proper to attach substantial weight to the fact that the owner reasonably requires the use of the premises for his business operations. However, it was left open as to whether the hardship the tenant will suffer as a result of eviction ought to be taken into account in determining the issue of good and sufficient grounds for eviction.

In *Mobil Oil Zimbabwe (Pvt) Ltd v Chisipite Service Station (Pvt) Ltd* 1991 (2) ZLR 82 (SC), it was held that where a landowner wishes to use the premises for his own purposes, the court enquires only as to his *bona fides* and not as to the reasons why he decided to use the premises for his own purposes. On the facts of that case, the decision by the appellant to use the premises for its own purposes was a legitimate and *bona fide* commercial decision which constituted good and sufficient cause for the purposes of the Regulations.

In *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H), the court adopted a robust approach in favour of the lessor's position. It was held that an order for the ejectment of a statutory lessee may be made once the lessor satisfies the court that it has good and sufficient grounds to require an order for ejectment. The needs of the lessee are irrelevant in this regard.

While ejectment may not be ordered if the lessor's grounds for requiring it are that the lessee has declined to accept an increase in rent or because the lessor wishes to lease the premises to another person, the fact that other grounds for requiring ejectment may be motivated by one of those factors is immaterial as long as the other grounds are genuine. It was further held that all that the lessor is required to do is assert his good faith and bring some small measure of evidence to demonstrate the genuineness of his assertion.

Turning to the instant case, the reasons proffered by the applicant for recovering possession of the premises are set out in the letter of the 27th of March 2008 from the applicant's lawyers to the respondents' lawyers. The letter refers to the revised draft agreement proposed by the applicant but rejected by the respondents. At page 2 of the letter, it is stated as follows:

"That being the position, my clients are of the view that since there does not appear to be any co-operation on the part of your client in relation to certain fundamental aspects, especially aspects that are covered in the preamble to the proposed lease agreement, in relation to the complimentary [sic] nature which they feel your client's restaurant must give in relation to the enhancement of the cultural perspectives which it exists for, my clients do hereby give your clients notice that at the expiry of the period that relates to the so called lease agreement, that is the 31st of December 2008, they intend to utilise the premises that your clients presently lease for own use.

..... Please note that the reason for wanting to terminate the statutory tenancy is not because my clients require an increase in rent, which however in respect of any business, is inevitable and in any event, is provided in terms of the invalid lease agreement but because of the failure to come to an agreement in respect of certain terms that relate to complimentary [sic] use of the premises by them in relation to their activities.

It is not intended that they be leased to any other party, but they will be exclusively used by them as provided for in terms of the Rent Regulations."

It is also necessary to consider the applicant's averments in its founding and answering affidavits. At page 4 of the founding affidavit, it is stated that:

"8. Consequently for Applicant to utilise the premises by the 31st of December 2008, and to carry out extensive renovations necessary for it to utilise the premises, Applicants [sic] seek a declarator, in terms of section 14 of the High Court Act, that the Lease Agreement between the parties be declared invalid for the reasons that appear in Annexure "C".

9. I must emphasise and reiterate that the decision to terminate the Agreement (statutory tenancy) is based on the sincere and bona fide desire by Applicant to use the premises for own use."

In the answering affidavit, the above averments are repeated as follows:

"3. The Applicant have [sic] contended that it requires the premises for its own use. It intends to renovate the place as well.

4. The Applicant therefore persists with its claim, reiterating that it requires the premises for its own use, and the desire to do so is not motivated by any of the grounds prohibited by the Rent regulations."

As averred in its affidavits, the applicant's unwavering assertion is that it requires the premises for its own use. However, neither in the affidavits nor in the letter of March 2008 does the applicant disclose the specific purpose for which it intends to utilise the premises. While this reticence does not necessarily preclude the relief that the applicant seeks, it does render very questionable the *bona fides* of its declared reason for evicting the respondents. More significantly, what the applicant asseverates in its affidavits is patently belied by the contents of the letter of March 2008. In particular, the principal and avowed reason for terminating the lease is *"because of the failure to come to an agreement in respect of certain terms that relate to complimentary [sic] use of the premises"*.

This, it would appear, is the real reason for seeking the ejection of the respondents. In the present context, this reason in

itself cannot constitute a good and sufficient ground for evicting the respondents inasmuch as the original lease agreement does not oblige the respondents either to provide the complementary cultural activities in question or to agree to provide such activities in terms of some future lease agreement. As statutory tenants, the respondents are merely bound to observe and adhere to the terms of the expired lease agreement. They cannot be compelled to assume or comply with obligations that they have not agreed to perform.

To conclude, therefore, the applicant has failed to demonstrate the genuineness of its assertion that it seeks to recover the premises for its own use. The *bona fides* of that assertion is negated by the contents of its own lawyer's letter. It follows that the applicant has failed to show that it has good and sufficient grounds for requiring the ejectment of the respondents from the leased premises. In the result, the application is dismissed with costs.

Chikumbirike & Associates, applicant's legal practitioners
Atherstone & Cook, respondents' legal practitioners