LOCAL AUTHORITIES PENSION FUND (PVT LTD
versus
MOONLIGHT PROVIDENT ASSOCIATES (PVT) LTD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 1 June & 14 July 2020

T. Nleya, for the applicant
GC Chikumbirike, for the respondent

Opposed Application

HUNGWE J: Applicant and respondent entered into three lease agreements in terms of which the applicant leased to the respondent its premises located at 4th to 7th floors LAPF Centre, at corner Chinhoyi Street and Jason Moyo Avenue, Harare. The first of these agreements was concluded on 9 November 2004. In terms of that lease the applicant leased to the respondent the 4th and 6th floors of LAPF Centre. In December 2004, the parties concluded another lease in respect of the 5th and 7th floors in the same building. The final agreement was concluded in October 2006 and was in respect of portions of the 5th floor of the said building. The three lease agreements are part of the papers.

The pertinent provisions of the lease agreements can be summarised as follows. Clause 3.1 provided that the respondent would pay rent monthly in advance on or before the first day of each month. By clause 4 of the agreement, the respondent would pay to the applicant a *pro rata* share of operating costs calculated in accordance with the lettable space occupied by the respondent. By clause 20.3 the respondent undertook to pay the applicant's costs on a legal practitioner and client scale should the applicant incur legal costs arising from the respondent's default on the lease agreements. Although the lease agreements expired the above provisions were saved by clause 2.3.

Applicant claims that from February 2009 to date, respondent has not paid any rent for the above premises nor has it paid operating costs amounting to US$82 443.25. On 6 February 2009, the respondent, through its then legal practitioners, offered to pay US$9 000,00 per month as rent. This offer was accepted by the applicant claims that despite its undertakings the respondent has failed to settle its indebtedness to the applicant.

Respondent opposes the application.

It raises one major point which is that the alleged agreement that rent be fixed at US$9 000-00 was later qualified by a subsequent letter from the respondent's legal practitioners in which a claim for overpayment in Zimbabwe dollars was made. This overpayment must necessarily lead to the debatemant of the accounts relied upon by the applicant. Further, by letter dated 27 May 2009, the respondent surrendered the whole of the 5th floor and part of the 6th floor, therefore, so the argument goes, the claim for arrear rentals from that date at US$9 000-00 is unsustainable. The agreement to pay US$9000-00 is denied.

Respondent further claims that there are triable issues which led to the withdrawal of the initial court action brought by the applicant under HC 407/09 which remain extant.

In its answering affidavit, the applicant denies that any overpayment was ever made to it for rent as rent was always paid per month. Due to the hyper-inflationary environment which prevailed in the economy then, had any suggestion for pre-payment been made, it would have been rejected. Applicant states that the withdrawal of the court action was prompted by other considerations than those raised in the opposing affidavit or the admission that there was a defence to its claim. Applicant states that the reason for the withdrawal was that the action did not specify the period for which arrear rentals arose. In that regard they agreed with the legal practitioners who raised this issue but did not agree with the rest of the issues raised. As evidence in rebuttal the applicant relies on a letter addressed to it by the respondent's legal practitioners which letter accompanied the so-called overpayment. The letter is dated 7 January 2009 and states;

> "The above matter refers.
> Find attached rentals for the month of December 2008 deposited into your CB Richard Ellis's Standard Chartered account.
> Let us know if there is any prospect for us to have a round table conference".

Applicant said that the same legal practitioners were to write on 6 February 2009:

> "We refer to your latter dated 27 July 2008 contents which we have noted.
> Meanwhile our client is hereby tendering the sum of US$9 000-00 as rentals for February 2009. Let us have the Foreign Currency Account to enable us to effect transfer".

They were duly furnished with the FCA account but no payment was made. By 27 May 2009 the respondent's Finance Manager was still acknowledging that the rent for the four floors was US$9 000-00 but offering to move out of the 5th floor with adjustments being made to the rentals.

It seems to me that no real dispute of fact arises in this matter.

First, the respondent avers that there was no agreement as to rentals after the written lease agreement expired. If this is the case one wonders why the respondent suggested a figure of US$9 000-00 as being fair rental. I am not persuaded to accept as, Mr *Chikumbirike* urged me to, that the matter must be considered on the basis that there was no lease because the rentals were not fixed by the clause that saved all other provisions to the agreement. The fact if this matter is that the respondent itself suggested an amount of money which in its financial wisdom it deemed to be fair rental. This amount was accepted by the applicant as the agreed rental. To suggest therefore that no lease agreement existed will be to destroy the agreement of the parties themselves.

Second, the claim that the legal practitioners who acknowledged the outstanding arrear rentals had no authority to do so cannot be seriously made in the absence of such an admission by the concerned legal practitioners. An affidavit to this effect could have easily been obtained if it was true that they had no authority to make the admissions they made. Thus in my view the respondent freely admitted its indebtedness to the applicant in the sums now claimed.

Third, its own financial manager acknowledged the applicant's indebtedness in writing.

Fourth, the suggestion of overpayment of rental of Zimbabwe dollars is not made in good faith. Had the respondent made an overpayment or a payment in advance of its rentals to the applicant, common sense tells us that this would have been raised at the earliest opportunity which is the months following the overpayment or payment in advance. Subsequent communication between the parties would certainly have reflected this claim of advance payment. Nowhere is this suggestion made till the matter is handed over to legal practitioners. Curiously, there is no explanation why this advance payment issue was never raised when the applicant demanded its rentals. It is clear that this is merely being raised now for the purpose of delay.

Had the respondents not themselves suggested the rentals of US$9 000-00, it may be within their rights to argue that no rentals were fixed after the adoption of the multi-currency economic regime. It is the respondent who offered to pay this sum as rentals and the applicant accepted the offer. To my mind rentals were from February 2009 fixed at that sum. The suggestion that the applicants were over-paid when the December 2008 were made is simply ridiculous as no suggestion was made at the time of payment. It cannot arise now. Respondents failed to pay rent and other related charges in the form of operating costs. In my view the

respondents have no defence to the claim and have raised these merely for the purposes of delay.

In the result the application for summary judgment succeeds with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Chikumbirike & Associates, respondent's legal practitioners