NATIONAL SOCIAL SECURITY AUTHORITY
versus
ALEC RYALS AND SKOTRIL (PRIVATE) LIMITED
and
ALEC KAGURU

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 23 September 2010, & 27 October 2010

**Opposed Application**
**CAV**

*T. Pasirayi,* for the applicant
*S.K. Chivizhe*, for the respondents

MUTEMA J: The applicant is the lessor of premises known as Rear Room, Chesterton House, 42 Sam Nujoma Street, Harare. On 31 August, 2009, through its agents CB Richard Ellis, it entered into a written lease agreement in respect of the premises with the first respondent. The first respondent was represented by its director, the second respondent as surety and co-principal debtor. The period of the lease was to run for two years from 1 February, 2009 to 31 January, 2011. The basic rent was pegged at US$150 per month from 1 February, 2009 to 30 June, 2009 and was subject to review on subsequent review dates.

The applicant contends that the respondents have breached the lease agreement by failing to pay rent as agreed upon hence this application for, *inter alia:*

1. an order to confirm the cancellation of the lease agreement;
2. an order for the ejectment forthwith of the first respondent together with its sub-tenants, assignees, invitees and any other persons claiming rights of occupation through first respondent from the leased premises; and
3. an order compelling respondents jointly and severally, one paying the other to be absolved, to pay applicant US$1 813,04 being arrear rentals accrued by first respondent from February, 2009 to date.

The respondents' opposition to the application is premised on four main planks.

They are these:

1. The amount of arrear rentals quoted of US$1 813-04 is incorrect because annexure 'B' (Tenant Transactions – January 2009 – December, 2009) "shows

that we made payments on 22 May 2009, 15 July, 2009, 28 August, 2009 and 30 September, 2009".

2. "The balance of the alleged arrears should be set off against an amount of US$4 291-00 which we spent on renovations and refurbishments of the premises and which costs should have been paid by the applicant".
3. The cancellation of the lease agreement is invalid for want of compliance with clause 20.1.2. of the lease agreement which provides that failure to rectify breach within 14 days of written notice having been given by the landlord to the tenant, the landlord may then cancel the lease. *In casu*, after the alleged failure to pay rent on time, the first to come was annexure 'C' – the letter of cancellation of the lease. No written notice was ever given to rectify breach within 14 days. In the event the cancellation was invalid so the lease agreement remains binding till properly cancelled;
4. The matter cannot be resolved on the papers in view of the material disputes of facts regarding whether or not the repairs done by the respondents were authorised by the applicant's agents. A trial is required to hear evidence on whether or not Mujati who authorised the repairs had no such authority.

I will proceed to deal with these defences in their chronological order

WHETHER THE ARREAR RENTALS OF US$1 813-04 ARE CORRECT IN VIEW OF THE PAYMENTS ALLEGEDLY MADE

The accuracy or other wise of the arrear rentals quoted is neither here nor there. What is relevant and material is whether the first respondent incurred arrears in rentals. If is did, this would constitute breach of lease in terms of clause 20.1.1 as read with 20.1.3. of the lease agreement (annexure 'A'). Clause 20 reads as follows:-

"20. <u>BREACH OF LEASE</u>

20.1 In the event of:

20.1.1 non – payment of rent or any portion thereof on due date; or

20.1.2 ……; or

20.1.3 ……; the landlord shall have the right to cancel this lease and obtain possession of the leased premises and the contents thereof provided that such action by the landlord shall not prejudice any claim that the landlord may have against the Tenant for rent already due or for damages or breach of contract or otherwise".

A perusal of annexure 'B' which is the tenant transactions pertaining to first respondent for the period January, 2009 to December, 2009 clearly shows that first respondent only made four payments during that period as follows:-

| | |
|---|---|
| 22 May, 2009 | $172-50 |
| 15 July, 2009 | $ 30-00 |
| 28 August, 2009 | $150-00 |
| 30 September, 2009 | $100-00 |

All these payments were deducted from the balances brought forward leaving a balance carried forward of $1 813-04.

In view of the foregoing, it goes without quarrel that first respondent did breach clause 20.1.1 as read with clause 20.1.3 of the lease agreement. In fact, the papers show that the respondents never disputed this breach. Annexure 'C' is a letter written by applicant's legal practitioners on 7 December, 2009 addressed to the second respondent. In the letter, both the breach and the amount of the arrears, *inter alia*, were brought to second respondent's attention. In his response dated the same date, the second respondent in paragraph 2 of his letter clearly admitted being in arrears. He wrote:-

> "2. Payment Plan for Outstanding Rental and Operating Costs (02/06/2009):
>
> > We advise you refer to the payment plan we offered your client so as to settle outstanding bills accruing to Alec Ryals & Skotril. As of 15th July, 2009, after making the offer on (02/06/2009), we have been religiously adhering to our settlement obligations, in respect of the Agreement of Lease….. However, if the payment plan agreed to, as of then (02/06/2009) has since lapsed due to some reason, unbeknown to Alec Ryals & Skotril, we request that we meet and negotiate amicable solutions to settle these issues without causing unnecessary prejudice to each other"

In the heads of argument the respondents argued that "….. even assuming that there are arrear rentals, which is denied, the applicant waived its right to cancel the lease agreement by accepting subsequent payments". To buttress this proposition they relied on *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998(1) ZLR 409(H).

The ratio in the Parkview Properties case supra is premised on the ratio in *Masukusa v Tafa* 1978 RLR 167(A). The issue in these authorities was whether a landlord could successfully invoke a non-waiver and non-variation clause where the landlord had previously accepted late payments of rental without reservation and had not made his election to cancel

the lease within a reasonable time and at the latest when the next payment is tendered. The answer was found to be in the negative. In other words, an attempt by a landlord to go back in time to previous months' defaults after acceptance of subsequent timeous payments enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord, notwithstanding the provisions of a non-waiver and non-variation clause in the lease agreement.

However, the Parkview case supra is distinguishable from the present case. What was held therein does not detract from the operation of the non-waiver and non-variation clauses for where the lessee again makes late payment the following month and the lessor cancels within that month or before any remedy of the breach is done, the lessee cannot, because of these clauses, be heard to argue that previous late payments have been accepted in circumstances amounting to waiver or estoppel. To hold other wise would definitely yield iniquitous results.

In the instant case the first respondent's last late payment of rentals was on 30 September, 2009, having made only three other late payments from March, 2009. By the time the letter of cancellation was effected on 7 December, 2009 no rentals had been paid from September, 2009. The facts are therefore not on all fours with those in the Parkview Properties case *supra*. In the event the notion of waiver is not applicable *in casu*. The landlord was accordingly perfectly entitled to invoke the non-waiver and non-variation clauses in the lease agreement.

In the event I have no difficulty in finding that the first respondent breached the terms of the lease agreement alluded to above, thereby entitling the applicant to cancel the lease and retake possession of the leased premises amongst a whole range of other rights it is entitle to. The respondents simply have no legal defence to the breach.

> THAT THE BALANCE OF THE ARREARS BE SET OFF AGAINST THE AMOUNT SPENT ON RENOVATIONS AND REFURBISHMENT OF THE PREMISES

In support of this contention, the second respondent in para 4 of his letter dated 7 December, 2009 alluded to above stated as follows:-

> "4. Recoupment of Water and Sewerage Plumbing costs, Construction and tiling of 29.4 square metres of premises floors, Re-building of Caretaker's room adjacent to ARS offices, Windows Replacement, Glazing and Painting of all offices interior walls, fitting three (3) Doors & Keys to offices.

> Having been threatened with closure of offices by Harare City Council's licensing inspectorate as our offices were not meeting the basic hygienic standards required for business office registration, ARS in formed CBRE about the plight but NSSA had no funds to commit to those improvements
>
> ARS refurbished the premises to their current status. We requested CBRE to make their independent evaluations, and deduct incurred costs from ARS account bills.
> The evaluation has not been done until now, but however ARS has continued to service its account with CBRE.
> Kindly clarify your client's position on this issue".

Respondents also attached receipts and invoices as annexures 'A1' to 'A10' to their notice of opposition seeking to prove the cost of the renovations.

Further, the second respondent in his opposing affidavit averred that in January, 2009 they asked CBRE to effect the renovations in terms of clause 15 of the lease agreement. The assistant property manager, one Darlington Mujati advised them verbally to renovate the premises at their own cost and the applicant would reimburse the costs or set them off against their rentals. Given the verbal undertaking the renovations commenced towards end of January, 2009 and were completed in September, 2009. When they signed the lease agreement on 31 August, 2009, it did not incorporate the issue of set off which had been agreed upon. On taking up the issue with McDonald Chinyoka, the applicant's property manager he promised to rectify the anomaly but he never did.

Clause 15 of the lease agreement alluded to above by the second respondent and sought to be relied upon does not assist the respondents in view of the repairs that were effected. That clause vests responsibility upon the applicant for "maintenance, fair wear and tear excepted, of the exterior of the premises excluding all signs, window panels, doors and plate glass attaching to the premises which shall be the Tenant's responsibility…" (my emphasis).

Further to the aforegoing clause, clause 9.3 of the lease agreement is so unambiguously worded as to brusquely require no splitting of hairs. It provides:

"9.3 The Tenant shall clean, maintain and pay all costs and charges relating to the maintenance, repair and renovation of the interiors of the leased premises including doors, windows, plate and other glass…. fittings, equipment and cables" (my emphasis).

Clause 9.4 is also opposite. It says:-

> "9.4 The Tenant shall maintain and repair the sanitary and plumbing services fixtures and fittings within the leased premises, keep drains and traps free of blockages and comply with all rules and regulations concerning the use of water and the disposal of effluent and other waste materials".

Clause 9.5 provides that the tenant shall not alter or change any locks etc without prior written consent of the landlord and where such consent is given, the alterations or repairs shall be by contractors approved by the landlord at the tenant's cost.

And clause 9.7 says that the tenant shall not make nay additions or alterations to the leased premises without the prior written consent of the landlord and all such additions or alterations shall be carried out at the tenant's cost and expense by contractors approved by the landlord.

Clause 16.3 outlaws withholding/deferring payment of rental by the tenant under any circumstances.

Second respondent, in his letter of 7 December, 2009, stated the nature of the repairs effected, water and sewerage plumbing costs construction and tiling of the office floors, windows and door replacement, glazing and painting offices' interior walls were, in terms of clauses 9.3 and 9.4 cited above, the first respondent's responsibility at its cost. In terms of clause 9.5, the alteration of locks was at tenant's cost. The rebuilding of the caretaker's room was not the first respondent's obligation but that of the applicant in terms of clause 15.

The totality of the foregoing means that all the repairs or renovations effected by first respondent to the premises were its contractual obligations and at its cost save for rebuilding of the caretaker's room. In the event, the applicant does not owe the respondents anything that can be said to amount to a reciprocal debt grounding a set-off. The rebuilding of the caretaker's room was not the tenant's legal obligation. The tenant embarked on it at its own risk

As long back as 1926, the doctrine of set-off was defined by INNES CJ in the case of *Schierhout v Union Government* 1926 AD 286 at 289-290 in these words:-

> The doctrine of set-off with us it not derived from statute and regulated by rule of court, as in England. It is a recognised principle of common law. When two parties are mutually indebted to each other both debts being liquidated and fully due then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the Court - as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together".

*In casu* the claim of compensation by the respondents against the applicant has not been established. In fact it does not exist in view of the exclusionary clauses in the lease agreement cited above. In the event, it cannot be said that the parties are mutually indebted to each other.

It is idle for the respondents to dig in the ashes by claiming that Darlington Mujati verbally authorised the renovations by the respondents to be reimbursed later or that McDonald Chinyoka verbally promised to rectify the issue of set-off that had been omitted to be incorporated in the lease agreement when the same was signed on 31 August, 2009. The insurmountable difficulty besetting the respondents' argument is clause 28 the lease agreement. It provides that the agreement of lease signed constituted the whole agreement between the parties and no warranties or representations, whether express or implied not stated herein shall be binding on the parties and that any variations of the terms and conditions of the lease must be in writing and signed by both. Mere verbal allegations by the respondents regarding variation of terms of the written lease agreement are clearly ousted by this clause in tandem with the parole evidence rule, not to mention the caveat subscriptor rule.

It is also pertinent to note that para 4 of second respondent's letter of 7 December, 2009 makes no reference to anyone on behalf of the applicant guaranteeing a set-off, contrary to the second respondent's contention in his opposing affidavit in which set-off is alleged for the first time in March, 2010. This I find to be a clear afterthought in a vain attempt to escape responsibility.

THAT THE CANCELLATION OF THE LEASE AGREEMENT IS INVALID FOR WANT OF COMPLIANCE WITH CLAUSE 20.1.2 OF THE LEASE AGREEMENT

This argument should not detain me. The argument thus raised was as a result of a misreading of clause 20.1 of the lease agreement. The respondents, so it seems to me, read clause 20.1.2 in isolation. Clause 20 deals with breach of lease. It is worded in this vein:-

"20.1 In the event of:

20.1.1 non payment of rent or any portion thereof on due date; or

20.1.2 failure to rectify a breach of any condition of this lease within a period of 14 days of written notice having been given by the landlord to the Tenant requiring such breach to be remedied; or

20.1.3 the Tenant absconding, deserting or vacating the leased premises without giving proper notice; the landlord shall have the right to cancel this lease and obtain possession of the leased premises and the contents thereof…."

The wording relating to the landlord's recourse to cancel the lease is so clear that only its ordinary grammatical meaning ought to be given. There are spelt out three separate types/modes of breach entitling the landlord to cancel the lease. Due to the use of the disjunctive word "or" between the types of breaches, the landlord is entitled to cancel the lease if any one of those breaches is committed. *In casu* the breach committed was non-payment of rent on due date and the landlord properly invoked it as the sole one exitant. The landlord was not obliged to forego the existing breach and opt to first give 14 days written notice to have the respondents remedy the non-payment of the rent. It is only a confused landlord who would opt for that kind of delay given the clear wording of the clause in question. The applicant, in the event, was not obliged to give the alleged 14 days notice let alone any notice at all before cancelling the lease agreement. The argument raised in this connection does not hold water and does not apply. The cancellation of the lease for non-payment of rent on due date via annexure 'C' the letter dated 7 December, 2009 was accordingly valid.

ALLEGED MATERIAL DISPUTES OF FACT NOT MAKING THE MATTER CAPABLE OR RESOLUTION ON THE PAPERS

The alleged disputes of fact raised in this connection are whether Mujati who allegedly authorised the repairs had or had not such authority. This dispute of fact, so the argument went, can only be resolved by hearing evidence in a trial. The second alleged dispute of fact is that relating to the amount spent on the renovation of the premises. Given that some of the receipts pertaining thereto are missing, so it was argued, it is only desirable that a trial be held and full testimony be heard. In support of this contention, reliance was placed on the case of *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982(1) SA 398 (AD) and *Masukusa v National Foods Ltd and Another* 1983(1) ZLR 232(HC) at 235.

I am unable to subscribe to the respondents' contention that there are disputes of fact not capable of being resolved on the papers to warrant referral of the matter to trial. The two cases cited in this connection do not assist the respondents' cause at all. In those cases the Court found that there were material conflicting disputes of facts which were foreseeable hence proceedings were brought by way of application at the applicants' peril.

It is trite that in motion proceedings a court will take a robust and common sense approach in endeavouring to resolve the matter on the papers. In the instant case, the alleged disputes of facts are not only not material to warrant the hearing of evidence on them but also irrelevant. They have already been implicitly disposed of while dealing with the issue of set-

off *supra*, wherein I found that the written lease agreement constituted the entire agreement and the renovations that were effected were, in terms of the quoted clauses, to the first respondent's cost and in terms of the parole evidence rule, no extrinsic evidence is admissible outside the four corners of the written lease agreement.

In the result, judgment is entered for the applicant in terms of the Draft Order.

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*Wintertons*, respondents' legal practitioners