

TUNATEMORE PRINTERS (PVT) LIMITED
versus
ORAGPLATE (PVT) LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 25, 26, 27 November 2009, 1 December 2009 and 25 May 2011

Civil Trial

S. Sadomba, for plaintiff
Defendant represented by its Managing Director

BERE J: The plaintiff and the defendant entered into a verbal lease agreement and pursuant to that lease agreement the plaintiff has sought the eviction of the defendant on the ground that the defendant is in breach of that lease agreement having failed to pay rentals as agreed by the parties.

It was the plaintiff's position that it terminated the lease agreement on 17 December 2009 but the defendant refused to give vacant possession of the leased property hence the instant proceedings.

The plaintiff has basically sought an order confirming the defendant's eviction and other ancillary relief associated with the defendant's breach of the lease agreement. The defendant sought to resist the eviction on two grounds viz, that it has not defaulted in the payment of its rentals and that it remains in occupation of the premises as lien for the improvements it allegedly made on the leased property.

Apart from this the defendant also filed a counter claim seeking to recover the value of the improvements it allegedly made on the property.

The plaintiff denied ever consenting to the improvements in question which in any event were made in complete violation of the City of Harare as the Local Government Authority. It argued that such improvements were of no value to it and that the defendant was at liberty to remove such improvements.

At the pre-trial conference conducted on 27 July 2009 the following issues were referred to trial.

- “1.1. whether or not defendant has paid rent due to plaintiff’s for the period from the 1st of May 2008 to date.
- 1.2. Is defendant entitled to remain in occupation of the plaintiff’s property by reason of a lien thereupon?
- 1.3.1 What improvements, if any did the defendant effect to the plaintiff’s property?
- 1.3.2. If so were these authorised by the plaintiff?
- 1.3.3. Were the improvements, in any event approved by the Harare Municipality?
- 1.3.4. The value of such improvements.
- 1.3.5. Is defendant entitled to compensation in respect of these improvements?”

OTHER SALIENT FEATURES OF THIS CASE

The onus and duty to begin was thrust upon the defendant on all the agreed issues.

Secondly, it is also pertinent to note that at the pre-trial conference the plaintiff sought and was granted the right to amend the amount of claim of the rent arrears from Z\$160 trillion to US6 800-00 and the rent value of the plaintiff’s property was amended from Z\$20 trillion per month to US850-00 per month.

THE AMENDMENT OF THE ARREAR RENTALS

Whilst the amendment of the arrear rentals was made by consent with no issue being taken by the parties on such amendment it occurs to me that such an approach inevitably triggered another legal issue, viz, currency nominalism.

I have no doubt in my mind that the amendment of the figure of arrear rentals was prompted by the debasement of the Zimbabwean dollar. Arrear rentals in this case are clearly a debt owed to the plaintiff by the defendant and in my view it was not competent for the plaintiff to have amended its debt from Zimbabwe dollars to the United States dollars. It is clear to me that the sole motive was to circumvent the principle of nominalism of currency which underlines the fact that “a debt sounding in money has to be paid in terms of its nominal value in respective of any fluctuation in the purchasing power of the currency”.

On this point of law I can do no better than to refer with respect to the statement of law expounded by E.M. GROSSKOPF JA when he stated:-

“ Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuation in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation...”¹

It is clear to me that even if the plaintiff had been able to lead evidence to show that the defendant had not paid the rentals, the plaintiff would not have been able to recover the amount in United States dollars but in Zimbabwe dollars.

However, fortunately in this case, the defendant’s representative was able to demonstrate that his company was not in arrears. The plaintiff’s counsel conceded this point.

Despite this I am of the firm view that for the holding, over damages, different considerations would apply particularly given the fact that the amount of claim under this heading involves unpaid rentals at a time when the Zimbabwe dollar despite it remaining legal tender had literally been elbowed out of circulation by the introduction of foreign currency. Besides, the concept of unjust enrichment as expounded in the case of *Reza v Nyangani*² would seem to favour this approach. I will come back later in this judgment to explore this point. To avoid confusion I prefer to deal with the issues as raised by the parties at the pre-trial conference.

IS THE PLAINTIFF OWED ARREARS RENTALS

I do not wish to revisit this issue. Suffice it to say that the defendant’s representative was able to demonstrate to the satisfaction of the plaintiff’s representative and consequently the court that the defendant did not owe the arrear rentals claimed in the summons.

The defendant’s representative’s uncontroverted evidence was that the defendant’s rentals were paid up to February 2009 and that it paid nothing after that date. It goes without saying that the defendant did not pay any rentals from March 2009 to date.

The question that has exercised my mind is “How much rentals was defendant supposed to pay from March 2009?”

¹ SA Eagle Insurance Co. Ltd vs Hartley 1990 SA (4) 833 at 839

² 2000 (1) ZLR 398 (H)

The defendant's position was that it was never advised how much rentals were supposed to be paid. This position is understandable given the plaintiff's mistaken position that the defendant was in default when in fact the defendant had paid rentals up to February 2009. The thrust appeared to have been on evicting the defendant and there was nothing in the form of evidence showing that the defendant was asked to pay US\$850-00 in form of rentals from the agreed cut off date of March 2009.

It is even more confusing if one considers that the valuation report (exh 14) was only compiled in June 2009. The situation is further compounded by the fact that Innocent Muronzi who gave evidence on the report itself on behalf of the plaintiff is not the one who compiled that report. The report was compiled by R.F. Mangwiro who for some unexplained reasons was not called to give evidence.

In his closing submissions on the issue of holding over damages counsel for the plaintiff argued that the court must accept that the figure of US\$850-00 is reasonable as monthly rentals. The question that comes to my mind is "from which period should that figure be computed?" Could one say these rentals were from March 2009 or from June 2009 when the valuation was allegedly computed?

Commenting on holding over damages the defendant's representative's position was that whatever rentals his company has to pay must take into account the fact that the plaintiff itself is using part of the leased property to store its office furniture and stationery. This positioned was confirmed by one of the key witnesses for the plaintiff, Sharon Samushonga who said she was keeping some keys to one of the rooms which form part of the leased property. The bottom line is there is no agreement between the parties on the monthly rentals. Issues of rentals must be easily ascertainable and the exact amount of rentals due to the plaintiff must never be a subject of conjecture and speculation.

As highlighted earlier on, there is not the slightest indication as to when the defendant was required to have paid any agreed rentals as between the parties.

There is yet another dimension to this case. If one accept that the original amount for rentals was Z\$20 trillion per month which was subsequently amended to US\$850 per month would it not have been prudent for the plaintiff to lead evidence to try and explain the amendment? As it stands there was no evidence tabled in this court to show how the amendment came about. If it is true that the conversion of Z\$20 trillion to US\$ is US\$850-

00, then there is a yawning gap in the plaintiff's case to explain how this conversion came about. Figures cannot just be slotted from the air. There must be a basis upon which the amendment was made.

Whilst the court acknowledges that there are holding over damages, the court is not able to ascertain the exact figure. This is because of the poor manner in which the evidence has been presented in this case.

IS THE DEFENDANT ENTITLED TO CLAIM *ius retentionis* IN THIS CASE?

What runs through the defendant's plea and counter claim in this case is its mistaken belief that until such time it is paid the amount it claims for improvements it is entitled to stay on the leased property.

Authorities are in agreement on the legal position in this matter. The position is eloquently expressed by GILLESPIE J in the case of *Ormashah v Karasa*³ in the following:-

"The effect of this law is unequivocally that a lessee, and consequently the defendant, has no right of retention of occupation of leased property after the termination of the lease as a lien against compensation for improvements."

See also *Bangure v Gweru City Council*,⁴ *Derby Farm (Pvt) Ltd v Stewart Musonza and B Chirunga*⁵.

In essence the defendant has no defence to the eviction in this case even if he were able to demonstrate that it effected appropriate repairs on the plaintiff's property.

WHAT IMPROVEMENTS WERE CARRIED OUT BY THE DEFENDANT

In his well researched and quite detailed closing submissions, the plaintiff's counsel expressed the view that as long as the defendant remained in occupation of the leased property the court is precluded from determining its claim for compensation for the alleged improvements. I am unable to share this view although I hold the view that such a claim cannot be used as a shield against eviction.

I believe that once the defendant has properly filed its claim like in the instant case, the court is enjoined to determine the validity or otherwise of such a claim and I proceed to do so.

³ 1996 (1) ZLR 584 (H) at p. 589 F

⁴ 1998 (2) ZLR 396 (H) at p. 399 B-C

⁵ HH 82-2007

It is the accepted legal position that a leasee is entitled to compensation for necessary and useful improvements provided such improvements are made with the consent of the lessor, See *Reza v Nyangani and Derby Farms (Pvt) Ltd (supra)*.

The defendant's representative gave evidence to the effect that it made numerous improvements on the leased property, both on the existing structures and by the construction of the additional structures which the witness constantly referred to as "illegal structures".

It will be remembered that at the pre-trial conference it was agreed by the parties that the onus to prove this claim lay on the defendant. The defendant's representative took the court through the various renovations and repairs the defendant company embarked on upon occupation of the leased property to make it usable. He also advised the court that his company with the consent of the lessor constructed a completely new structure on the leased premises. Exhibits 1, 9 and 10 were tendered to try and confirm the alleged improvements and construction work done on the leased premises. It is quite significant that none of the plaintiff's representatives who directly dealt with the defendant's representatives at the time of the defendant's entry onto the leased property were called to try and rebut the defendant's claims.

The plaintiff accepted that some improvements were made on the leased premises but denied that the other improvements alleged by the defendant's representative had been carried out. Through Sharon Samushonga the plaintiff denied ever consenting to the construction of the new structure which the defendant claimed to have constructed. Sharon put herself in the most unenviable situation of having to testify on issues that allegedly happened long before she came into the picture. The accepted evidence is that the defendant took occupation of the leased property in 2002 and that Sharon joined the plaintiff as its chief operations officer in June 2008. The improvements and construction of the new structures on the leased property took place long before Sharon joined the plaintiff and naturally her evidence on the claimed improvements and construction work by the defendant natural limitations. Her evidence was poor and unhelpful to the plaintiff's case as she was not in a position to rebut the defendant's representative's position.

The court accepts that certain improvements were made by the defendant and that some construction work was carried out by the defendant. I believe the turning point really

was not whether or not improvements had been made. The decisive point was the value of such improvements and the alleged construction of the new structures.

As stated exhibits 1, 9 and 10 were produced in court to try and assist the court in appreciating the value of the construction work and the improvements made. A builder (Paul Machimbike) and not a valuer was called by the defendant to try and give some value on the improvements.

The court did not lose sight of the fact that the improvements carried out as well as the construction itself were carried out long before dollarization but the claim itself was computed in United States dollars with no clue at all in the form of evidence to show how the conversion itself was done.

To compound the defendant's position its representative conceded that the construction made was done without city council approval and that it was indeed an illegal structure. There was no sufficient evidence led to show how such an illegal structure built during the Zimbabwe dollar era would assume a value in United States dollars let alone assume any value at all.

In my well considered view the cumulative effect of the evidence tendered before the court was insufficient to enable the court to grant judgment in favour of the defendant. The evidence fell short of what was expected and the claim suffered the same fate suffered by the plaintiff's claim. All the pieces of evidence tendered by the defendant's representative were most unhelpful in assisting the court in the computation of the exact value of the improvements and construction work carried out.

Consequently I order as follows:-

1. The cancellation of lease agreement between the defendant and the plaintiff is hereby confirmed.
2. The defendant is to vacate the leased premises before close of business on 14 July 2011 failing which the Deputy Sheriff shall be instructed to carry out the eviction.
3. The defendant shall pay the costs relating to his eviction on the ordinary scale.
4. Absolution from the instance is granted in favour of the defendant as regards the claim for holding over damages.

5. Absolution from the instance is granted in favour of the plaintiff for the defendant's counter claim.

Gill, Godlonton and Gerrans, plaintiff's legal practitioners
No legal representation for the defendant