

TELONE (PVT) LTD
versus
DENFARM PROPERTIES

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 11 October 2011, 12 October 2011,
26 October 2011, 3 November 2011,
8 November 2011 and 14 February 2012

Civil Trial

J. Dondo, for the plaintiff
S. Simango, for the defendant

MTSHIYA J: On 7 March 2010 the plaintiff issued summons against the plaintiff claiming:-

- a. “An order for the cancellation of the Lease Agreement made and entered into by and between the parties on 1 March 2008;
- b. An order for the ejectment of the defendant from 1st Floor, Runhare House North Wing, 107 Kwame Nkrumah Avenue, Harare together with all person(s) claiming title through the defendant;
- c. An order for payment of an amount of US\$22 941.40 in respect of arrear rentals and operating costs as at February 2010;
- d. Payment of holding over damages calculated at the rate of US\$58.40 per day calculated from 1 March 2010 to the date of ejectment;
- e. An order for payment of operating costs apportioned on the leased premises calculated from 1 March 2010 the date of ejectment;
- f. Interest on the amounts claimed at the prescribed rate calculated from the date of summons to the date of payment; and
- g. Costs of suit.”

The defendant denied the claims which, briefly, were based on the following facts:

On March 2008 the plaintiff and the defendant entered into a lease agreement. The plaintiff leased to the defendant 584 square metres of the 1st floor of Runhare House, Harare. The plaintiff and Communications and Allied Industries Pension Fund are owners of stand number 14940 Salisbury Township, which houses the leased premises (ie 584 square metres of the 1st floor of Runhare House, Harare.) Initially the defendant was paying rent in Zimbabwe dollars. The position changed in February 2009 when a multi-currency regime was ushered in by Government. Accordingly as at 1 February 2009 the rent payable was \$1.75 per square metre and given the rented area that translates to \$1 022.00 per month. That amount does not, however, include operating costs which were indicated separately on a monthly basis. The defendant made erratic rental payments resulting in a default payment of US\$22 941.40 in respect of both rent and operating costs as at February 2010.

Apart from the default in the payment of rent and operating costs, the plaintiff also alleged that the defendant, without its consent, sublet the leased premises. Failure to pay rent and subletting was, according to the plaintiff, in breach of the contract and hence the relief sought and quoted at p 1 of this judgment.

The defendant denied the plaintiff's allegations and rejected the plaintiff's claims.

Upon handing in its bundle of documents as exh 1, the plaintiff then called one witness only, namely Grace Murenzvi (Murenzvi).

Murenzvi said she was employed by the plaintiff as the Estates and Administration Officer. She said the lease agreement appearing at pp 1-16 of exh 1 was signed between the parties before the introduction of multi-currency in February 2009. She said the lease agreement did not allow the defendant to sublet any part of the area leased to it.

Murenzvi said that in February 2009 the plaintiff introduced new rentals in United States dollars. The agreed monthly rental, including value added tax of 15%, was US\$1.75 per square metre for the 584 square metres occupied by the defendant. She said although there were further increases in June 2009 and June 2010, the plaintiff's claim was based on the original rate of US\$1.75 per square metre which the defendant accepted

in February 2009. She said, on the basis of that agreed rental, the defendant had, in March 2009, paid US\$1 022.00. She said although further part payments had later been made, the defendant had, however, not made any payments for several months as shown in the schedules under exhibit 1.

She went on to say the defendant was also not paying operating costs to cover electricity, water, security and other services in the building. Furthermore, she went on, the defendant had, without the plaintiff's consent, proceeded to sublet part of the area allocated to it.

Murenzvi said the outstanding rental amount, including operating costs, as at end of February 2010 was US\$22 941.40. She said on the basis of US\$1.75 per square metre, the rental arrears as at March 2010 was US\$45 047.80. She said of that amount, the defendant had paid US\$7 154.00 in October 2011 and thus leaving a balance of US\$37 893.80 for the period of March 2010 to September 2011 which the plaintiff was now claiming.

The defendant also called one witness only. It called Miss Nancy Majome (Majome).

Majome told the court that she is an Estate Agent operating under the defendant's name. She said she was one of the owners of the company (the defendant) and was a tenant of the plaintiff. She said in 2009 the plaintiff wanted to raise rent and as a result she had approached the Rent Board. The rent Board had not dealt with the matter pointing out that the plaintiff had already taken the matter to the High Court. Majome agreed that a lease agreement existed between the two parties but said there were disputes relating to payment for electricity, repairs and general maintenance. She said between 2008 and November 2010 the defendant had engaged its own general hands to clean the offices – including toilets. She said the general hands were provided by Sacing fire Security whom she had paid between US\$200 and US\$220 in January 2010.

On the issue of rent, she confidently stated:-

“We thought we were to pay US\$1 022.”

She said at the pre-trial conference the High Court had also told them to continue paying that amount. Majome said tenants were prepared to pay US\$1.75 per square metre but the plaintiff had continuously hiked the rentals.

It must be noted though that the plaintiff is not claiming more than US\$1.75 per square metre from the defendant.

Majome said the defendant did not sublet any of the rented space as such but was given sub tenants by the plaintiff's members of staff. That situation had resulted in defendant occupying only 220 square metres of the contractually agreed 584 square metres. That being the case, she argued, the defendant was supposed to pay the said US\$1.75 per square metre towards the said area of 220 square metres. She said her own audit indicated that rather than owing the plaintiff US\$22 941.40 in rental arrears and operating costs, the defendant was instead owed US\$637 by the plaintiff. Majome said the plaintiff had no *bona fide* reason to evict the defendant because it was up to date with its rental payments for the 220 square metres it occupied.

In his submissions, Mr Dondo, for the plaintiff, submitted that the evidence adduced confirmed that the defendant had;

- a) Breached the terms of the lease agreement produced in exh 1 by failing to pay agreed rentals and operating costs in terms of the lease agreement; and
- b) Sublet the premises without the plaintiff's authority contrary to the provisions of the lease agreement.

He said, as indicated at pp 21-23 of exh 1 the defendant had failed or refused to pay rentals in terms of clause 3.3 of the lease agreement. Furthermore, where rent was paid, it was either insufficient or erratic and thus leading to a total of US\$22 941-40 in respect of arrear rentals and operating costs as at February 2010. He said, calculated at US\$1.75 per square metre, the defendant owed the plaintiff a total of US\$ 37 893-80 for the period March 2010 to September 2011.

Mr Dondo also submitted that the plaintiff had also proved that the defendant was subletting the premises to at least three different companies without its authority. He said

the defendant had dismally failed to rebut the plaintiff's case. The plaintiff, he said, had proved its case on a balance of probabilities and was therefore entitled to the relief it sought. That being the case, he argued, the plaintiff had thus demonstrated justification for the cancellation of the lease and demanding the eviction of the defendant from the premises.

Mr Simango for the defendant submitted that the evidence adduced showed that the parties had never reached agreement on the rent payable. He said that was the reason why the parties had approached the Rent Board. He went on to submit that the plaintiff had merely imposed the rent payable on the defendant.

Mr Simango argued that although the defendant acknowledged rental arrears, the quantum thereof was not known and furthermore the plaintiff had waived its right to sue for breach of contract when it accepted the defendant's apology for rental arrears.

Notwithstanding the fact that Majome, the defendant's witness, admitted that the lease in exh 1 was the one that regulated the relationship between the parties, Mr Simango submitted, surprisingly, that there was no lease agreement upon which the plaintiff could base its claim. He said there was no addendum to the lease agreement in exh 1 to show that after the introduction of multi-currency, the parties had agreed to the rental of US\$1.75 per square metre. Furthermore, he went on to say the plaintiff had never communicated to the defendant its intention to cancel the lease agreement.

On the issue of subletting, Mr Simango submitted that the plaintiff itself had brought in a subtenant and some of the subtenant were employees of the plaintiff. He also submitted that the plaintiff was using part of the 584 square metres let to the defendant. The plaintiff had not acceded to the defendant's request for an inspection *in loco*. I must, however, point out that there was never any formal application for any inspection *in loco*.

Mr Simango said the plaintiff was obliged to pay the defendant for the 220 square metres that it was using in the leased premises. He prayed for the dismissal of the plaintiff's claim.

In terms of the Joint Pre-trial conference Minute filed on 24 September 2010 the issues for determination are listed as follows:-

- “1. Whether or not plaintiff refused to accept rentals due?
2. Whether defendant is in breach of the Lease Agreement made and entered into by and between the parties?
3. Whether defendant owes to plaintiff in respect of outstanding rentals and operating costs as claimed?
4. Whether plaintiff was entitled to unilaterally alter the terms of the Lease Agreement to start charging rental in foreign currency?
5. Quantum of holding over damages calculated from 1 March 2010?
6. What amount should defendant pay in respect of operating costs on a *pro-rata* basis from 1 March 2010?”

This, in my view is a straight forward case wherein through Majome, the defendant's witness, the non-payment of rent was admitted on the basis that there was no agreed amount of rent payable and hence the approach to the Rent Board. However, in para 6 of its plea the defendant states as follows:-

“There was no conclusion regarding the quantum of rent to be paid by the defendant. The defendant's position is that rental should stand at \$1 022.00 per month while plaintiff is claiming \$1 750.00 which is not in accordance with the lease agreement signed by both parties which the plaintiff has deliberately concealed.”

Given the above one would then ask:- So where is the dispute on rent?

I believe the starting point is to establish that there was indeed a lease agreement. The defendant's witness admitted that the lease agreement in exh 1 governed the relationship between the parties. There was therefore a valid lease agreement between the parties. Majome, under cross-examination, also agreed that after the introduction of multi-currency the rent payable was US\$1.75 per square metre. That is the rate accepted in the plea as shown above. The witness, further agreed that payments were erratic and were not paid in terms of the lease agreement. To me those admissions, sealed the plaintiff's case. It is clear to me that as from February 2009 the new rental was US\$1.75 per square metre and in June 2009 the plaintiff made an attempt to increase the rental to US\$3.00 per square metre. On 2 June 2009 the plaintiff wrote to the defendant in the following terms:-

“Following our discussion on 1 June 2009 concerning above, please be advised that your rent will be US\$3.00 per square metre excluding value added tax with effect from 1st of June 2009. This is a modest increase which has been influenced by market movements that are taking place within the economy. We request that you make your rental remittance on the basis of the new rates at the earliest and clear all arrears by 5 June 2009 without fail. Thank you in advance for your cooperation in this matter we remain.”

It is interesting to note that on 4 June 2009 the defendant responded to the above proposals in terms that even suggested a rental amount above the US\$1.75 per square metre that the plaintiff has insisted on in these proceedings. The defendant wrote:-

“Thank you for your letter dated 2 June 2009 concerning the above. The tenants have indicated that the rental figure of US\$3 per square metre which you suggested is still on the high side, and they have requested us to plead for its review. As a compromise, the tenants offer a figure of US\$2.30 per square metre. Kindly let us know your attitude to this compromise.”

It is clear to me that the proposed figure of US\$2.30 was based on existing rental as at 31 May 2009. That rental according to evidence was US\$1.75 per square metre and plaintiff admitted that at the pre-trial conference GOWORA J had recommended that it continued paying that rent. The defendant did not heed the advice but instead went on to effect insufficient erratic payments.

Indeed, some of the erratic payments made were based on the figure of US\$1.75 per square metre. There can therefore be no doubt that as from February 2009 to 31 May 2009 the agreed rental was US\$1.75 per square metre. The plaintiff testified that it abandoned proposals for increases and hence its claim is based on that level of rental. I also believe that when the defendant sought the indulgence of the plaintiff, it was focusing on a rental figure of US\$1.75 per square metre. That is the rental it had been paying and that is the rental the court had advised it to continue paying.

On 17 July 2009 the defendant wrote to the plaintiff in the following terms:-

“We thank you so much for understanding with us and with your supportive attitude. Please accept our apologies of the rentals arrears. We are still waiting

for our funds from abroad which are still in transit. Please may you extend grace period up to 28 July 2009 for us to settle the arrears.”

Clearly both letters from the plaintiff confirm the existence of an agreed position. Furthermore, if indeed the space occupied by the defendant had been reduced, both letters from the defendant quoted herein would have said so. Majome confirmed that the issue was never raised. The issue only emerged when the plaintiff decided to take action against the defendant for non-payment of rent and subletting.

All in all the foregoing clearly shows that as from February 2009 to date the plaintiff was supposed to be paying rent at the rate of US\$1.75 per square metre for the 584 square metres it occupied. The defendant, in support of the schedules produced by the plaintiff (particularly annexure B of plaintiff’s further particulars), admitted that at times no rent was paid and when ever erratically paid it was insufficient. P 21 of the schedule shows the erratic and insufficient payments. The letter of 17 July 2009 confirms the rental arrears and indeed the breach of clause 3.3 of the lease agreement. That breach alone entitles the plaintiff to the action it took in cancelling the lease agreement and demanding the eviction of the defendant from the premises. Clause 3.3 of the lease provides as follows:-

“The rent shall be paid to the place of payment monthly in advance, free of exchange and bank charges and without deduction whatsoever on or before the first day of the month throughout the period of this Lease and renewal and extension thereof.”

Furthermore clauses 4.0 of the lease agreement provides as follows:-

- “ 4.1 The tenant shall meet the cost of
 - 4.1.1 municipal rates and service charges and taxes, fees, levies or charges payable to the local Municipality or any other responsible authority. These costs will be apportioned according to total floor space occupied by the tenant.
 - 4.1.2 cleaning
 - 4.1.3 security
 - 4.1.4 maintenance and repair
 - 4.1.5 maintenance and running costs in respect of air-conditioning, electrical

- installation, standby equipment, pumps, lifts, escalators and other mechanical, security or fire extinguishing equipment;
- 4.1.6 electricity, water, gas, oil or other fuel used in the Building, and the property including surcharges and any penalties;
- 4.1.7 all insurance premiums including public liability in respect of the building and the property;
- 4.1.8 building amenity including towel and other toilet services and the costs of maintaining indoor and outdoor gardens and plants;
- 4.1.9 any personnel employed by the Landlord to operate and maintain the building or property including wages, salaries or remuneration of any nature, contributions to an unemployment insurance fund, provident fund or medical aid scheme;”

In Supline Investments P/L v forestry Commission Company of Zimbabwe, HH 76/07, MAKARAU JP, a she then was, had this to say:

“A tenant has an undisputed obligation to pay rentals for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord’s property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rentals is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentions as to what constitutes fair rentals are validated.”

I am in full agreement with the above with respect to a tenant’s obligations as to the payment of rent.

For the period in question the defendant did not deny its failure to pay operating costs. Its witness could only claim that it (the defendant) had hired its own general hands to clear and sweep toilets. The witness also said the leased premises had no electricity and no specific amount had been indicated for water charges. However, a clause look at the schedules in exh 1 (particularly p 21-26) reveals that the applicable operating costs were always indicated – either as arrear totals or actual figures for each month. These, as per admission by the defendant, were never paid. I therefore want to believe that when, on 20 July 2009, the plaintiff warned the defendant that failure to pay outstanding rental

arrears would lead to eviction without further notice, it had placed before the defendant figures representing both rent and operating costs.

The defendant does not deny that there was subletting. Instead it argues that subtenants were imposed on it by the plaintiff. The pleadings do not say so. I did not find sufficient rebuttal of the plaintiff's averment in para 4 of its declaration that there was indeed subletting.

My finding, on a balance of probabilities, is that the defendant was in breach of the lease agreement through failure to pay rent and operating costs and also through subletting. This finding disposes of issues 1-4 listed under the Joint Pre-trial Conference Minute and also the purported counterclaim by the defendant. I must point out that there was no counterclaim filed by the defendant and there is no reference to a counter-claim in the agreed issues for determination. The issue was only brought through Majome's evidence and defendant's closing submissions.

As for issues 5 and 6 on the Joint Pre-Trial Conference Minute, the plaintiff claim to same has not been challenged. The claims in respect of both issues are clearly spelt out in paras d-f of its claim. The defendant has not objected to the manner in which operating costs should be calculated.

In view of the foregoing, the plaintiff's claims are upheld and I order as follows:-

It is ordered that:

- a. The cancellation of the Lease Agreement made and entered into by and between the parties on 1 March 2008; be and is hereby cancelled;
- b. The defendant together with all person(s) claiming title through it; be and are hereby evicted from 1st floor, Runhare House, North Wing, 107 Kwame Nkrumah Avenue, Harare, and such eviction shall take place within 14 days of service of this order.
- c. The defendant shall pay the plaintiff the sum of US\$22 941.40 in respect of arrear rentals and operating costs as at February 2010;
- d. The defendant shall pay holding over damages calculated at the rate of US\$58.40 per day calculated from 1 March 2010 to the date of eviction;
- e. The defendant shall pay operating costs apportioned to it on the leased premises calculated from 1 March 2010 to the date of eviction;

- f. The defendant shall pay interest on the amounts claimed at the prescribed rate calculated from the date of summons to the date of payment; and
- g. The defendant shall pay costs of suit.

Chinamasa Mudima & Dondo, plaintiff's legal practitioners
WOM Simango & Associates, defendant's legal practitioners