

BOOTH MANUFACTURING PRIVATE LIMITED
versus
AG VENTURE PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 14 -15 March 2012 and 21 March 2012

Civil Trial

Chinawa. Dondo, for the plaintiff
Gapara, for the defendant

MTSHIYA J: On 30 March 2010 the plaintiff issued summons from this court against the defendant making the following claim(s):-

- “(a) An order ejecting the defendant and all persons claiming occupation through the defendant from 55 Coventry Road, Workington, Harare.
- (b) Payment of the sum of US\$12 900.00 being a sum of money owed by the defendant to plaintiff in respect of arrear rentals for the period February and March 2010 in respect of defendant’s occupation of plaintiff’s premise Known as 55 Coventry Road, Harare together with interest thereon at the rate of 5% per annum calculated from the first February 2010 to the date of payment.
- (c) Payment of holding over damages at the rate of US\$8 000.00 per month, being the monthly rental from 1 April 2010 to date of eviction arising from the defendant’s occupation of plaintiff’s premises known as 55 Coventry Road, Harare together with interest thereon at the rate of 5% per annum.
- (d) Payment of arrear utility bills in the sum of US\$5 590.00, and any such further bills accruing up to the date of defendant’s eviction.”

The background to the claim is that on 1 April 2004 the plaintiff leased its premises, namely 55 Coventry Road, Harare, to the defendant for the purposes of Light Manufacturing and Allied Trade. The lease agreement was extended on a number of times and the last ... extension was to the end of 30 September 2009. The applicable

monthly rental for the period ending 30 September 2009 was US\$4 050.00. There-after, I draft lease agreement, with a monthly rental of US\$8 000.00 commencing on 1 October 2009 to 31 December 2009, was drawn up but was never signed by the parties. Despite the essence of a signed lease agreement the defendant made payments on the basis of the new rental of US\$8 000.00 from 1 October 2009 up to 31 December 2009. The defendant made further payments as follows:-

1. January 2010	=	US\$8 000.00
2. February 2010	=	US\$8 000.00
3. October 2010	=	US\$8 000.00
4. November 2010	=	US\$8 000.00

The defendant said in January 2010 it discovered that its sub-tenant namely Zacro Services (Pvt) Ltd (ZACRO) was also paying \$2 000 per month. This was confirmed by the plaintiff. The defendant said the payments by Zacro made it change its mind on the rental payable. I then resorted to paying the applicable rate of US\$4 050 as at 30 September 2009 noting of an appeal was misplaced. In the main therefore, there is little that remains for determination by this court.

There was however, evidence that the defendant instead made seven payments at the rate of US\$8 000 between the period 1 October 2009 ad November 2010 as reflected above. There is also evidence that, although there was no formal lease agreement from 1 October 2009 the defendant accepted the new rental of US\$8 000 per month. There is, however, no evidence of a change to the payment of US\$4 050 that was applicable as at 30 September 2009. The defendant said it had unilaterally taken a decision to regard the payments of US\$8 000 as double payments per month of US\$4 050.00 spread over the period the noting of an appeal was misplaced. In the main therefore, there is little that remains for determination by this court. That is what brought about the dispute.

Each party called one witness and in the main their evidence only differed on whether or not the new rental of US\$8 000 with effect from 1 October 2009 was mutually agreed on.

In his submissions Mr Chinawa for the plaintiff stated that given the concessions with respect to breaches committed, the defendant had refused to consent to judgment only for the purposes of noting an appeal so as to delay eviction. To that end he applied to the court to ensure that its order would be executed notwithstanding an appeal to the Supreme Court.

Mr Gapara, for the defendant, confirmed the following concessions

- a) That in breach of the contract, utility bills were not paid; and
- b) That, in breach of the contract, the defendant had accumulated rental arrears.

The defendant said it would be improper for him, on a professional basis to deny the breaches. He, however, submitted that it remained a litigant's right to appeal against any decision of this court and therefore the submission that the decision of the court be executed despite the plaintiff claimed it was in arrears.

The defendant said such an arrangement would erase the plaintiff's claim for US\$126 000.00 for the period January 2010 to February 2012. The plaintiff's calculations showed that after deducting Zacro payments of US\$50 000 for the period, a balance of US\$126 000.00 remained for settlement by the defendant.

Let me hasten to say that at the common comment of this trial and following admissions made by both parties in the Joint Pretrial Conference minute, the only issue that remained for determination was rent payable. In brief the defendant admitted being in breach of the lease arrangements during the period of signed leases and also during the period when it became a statutory tenant, through failure to pay utility bills as admitted in the Joint pretrial Conference Minute. The defendant conceded that, that breach alone entitled the plaintiff to terminate the tenancy. Apart from that, I am convinced that the defendant accepted the new rental of US\$8 000.00 per month from 1 October 2009 to the date summons was issued. It then failed to pay rent at that rate amounting to a total of US\$126 000.00 as at February 2012 (See p72 of exhibit 1). Clearly that was further breach entitling the plaintiff to seek redress in the manner it has done.

During the hearing, the defendant's witness accepted the breaches and stated that he believed the matter could be settled amicably. That did not happen and hence this judgment.

In view of the foregoing and with particular reference to the concessions made by the defendant, the plaintiff is entitled to the grant of the relief it seeks. I believe the noting of an appeal in this case would have no merit at all.

I therefore order as follows:-

1. The defendant and all persons claiming occupation through it, shall vacate 55 Coventry Road, Workington, Harare, within 14 days from service of this order failing which the Deputy Sheriff is authorized to evict the defendant and all persons claiming occupation through it.
2. The defendant shall pay the plaintiff within 14 days from the date of service, the sum of US\$126 000-00 in respect of rental arrears, together with interest at the rate of 5% per annum calculated from 1 March 2010 to 28 February 2012.
3. The defendant shall pay holding over damages at the rate of US\$8 000 per month with interest thereon at the rate of 5% per annum from 1 March 2012 to the date of eviction.
4. The defendant shall pay US\$35 677.00 in respect of arrear utility bills and such other utility bills that shall accrue up to the date of eviction; and
5. The defendant shall pay costs of suit on an attorney-client scale.
6. This order shall be enforceable notwithstanding the noting of an appeal.

Kantor & Immerman, plaintiff's legal practitioners
Kanokanga & Partners, defendant's legal practitioners