KILNER PARK INVESTMENTS (PVT) LTD

Versus

MEKASONIC GENERAL TRADING (PVT) LTD

And

CHARLES UCHENNA NNAM

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 16, 17 MAY, 25, 26 JUNE, 12 JULY AND 20 FEBRUARY 2025

Application for Absolution from the Instance

N. Mazibuko, for the plaintiff
M. Ndlovu, for the defendants

KABASA J: The plaintiff sued out summons against the defendants in which was claimed:-

"a) Payment of arrear rentals from the defendants totalling US$150 480 by reason of a lease agreement entered into between the plaintiff and the defendants in respect of premises known as No. 87 A J.M.N Nkomo street/8th Avenue, Bulawayo.

b) Payment of the sum of US$41 534, 60 being arrear rates and legal costs paid by the plaintiff in respect of the leased property to the City of Bulawayo and its legal practitioners.

c) Payment of the sum of US$32 567, 52 being further arrear rates as at 31 January 2019.

d) Payment of the sum of US$2 912 being insurance charges as at 31 January 2019.

e) Payment of further rates and supplementary charges in respect of the leased property calculated from 1 February 2019 to date of eviction.

f) Interest on the mentioned amounts from date of issue of summons to date of full payment, together with costs of suit."

The claim was based on a lease agreement which saw the defendants leasing the plaintiff's property sometime in 2009. On 10 November 2010 it was agreed that the defendants would pay US4 000 per month as rentals with effect from 1 January 2011. The

defendants were to pay all operating costs including municipal charges, inclusive of rates, taxes, water, refuse, sewerage and all supplementary charges in respect of the leased property.

The defendants were also supposed to pay for electricity, security and telephone charges and keep the premises in good condition.

Failure to adhere to these terms the plaintiff reserved the right to terminate the lease. In September 2013 the rent was reduced to US$1 600 per month by way of a Rent Board order.

The defendant accrued arrears in the total amount of US$150 480 and the other charges as shown.

The defendants entered an appearance to defend and pleaded that a lease was entered into with one Hetnesh S. Patel in 2010 which was to expire in February 2012 at rentals of US$800 per month. The rentals of US$4 000 were never agreed on and no lease was ever concluded between the plaintiff and the defendants. The premises were in a dilapidated state necessitating renovation. The defendants renovated the premises and the costs incurred should be offset against the rentals.

The defendants did not neglect to pay rentals but awaited communication from new management after John Pocock who had assumed agency as administrators of the property terminated its agency.

The matter was subsequently referred to trial on the following issues:-

1. Whether the plaintiff and defendants entered into a valid lease agreement.
2. Whether the plaintiff and second defendant agreed on rentals in the sum of US$4 000.
3. Whether or not the defendants are indebted to the plaintiff in the amounts claimed.
4. Whether the plaintiff is entitled to an order of eviction against the defendants.

The plaintiff led evidence from three witnesses. The first witness, a Mr Vinan Doolabh testified to the effect that he was asked to manage the property and a lease

agreement was handed to him by the plaintiff together with minutes of a meeting which had been held between the plaintiff and the tenants. The 2nd defendant took these documents promising to revert to him but never did. Rentals were not being paid. As a result the witness drafted a payment schedule to off-set the arrears. The payments were to be at US$3 000 per week which were paid until September 2012. A bulk payment was also made to the plaintiff by the 2nd defendant's wife, whose total wasUS$9 000. Thereafter the plaintiff's parents came to Zimbabwe from Australia and the witness advised them of the rent arrears. The property was then handed over to John Pocock who were to administer it, ending the witness's involvement.

The second witness was Adele Farquhar. She worked for John Pocock as their Commercial Letting Manager at the time the plaintiff engaged John Pocock to administer the property. The company subsequently received a Rent Board determination on what was the fair rental for the property. A draft lease was drafted but the defendants never signed it.

The defendant subsequently introduced Mr Patel who confirmed that a lease agreement had been entered between him and the defendants but such lease agreement was not produced. After the Rent Board set a fair rental the defendants did not pay anything. The defendants subsequently gave calculations of rentals paid. The witness then resigned from John Pocock but continued to deal with the matter at Banknote Enterprises (Pvt) Ltd where she had moved to. John Pocock's agency was terminated. When Banknote ceased operations she continued to work with the plaintiff. The defendants were not paying rentals or any of the other charges thereby accruing rates arrears. The plaintiff was forced to pay the rates arrears to save the property from being sold. All the payments made by the plaintiff to counsel for the City Council and to the Bulawayo City Council were supposed to have been paid by the defendants.

The defendants never paid any amount to the witness and have no right to be in occupation of the premises.

The last witness was Dharmesh Kewalram, a Director and shareholder in the plaintiff. His evidence was to the effect that the premises in question are owned by the plaintiff and when he left the country he appointed Mr Patel to manage the property. However Mr Patel had let the premises out for a low rental. The witness was away from 2002 and on his return in 2010 he took over management of the property. He engaged the 2nd defendant and they

agreed on a fair rental based on what he had been given as fair rental for the premises by estate agents. On 10 November 2010 they agreed on US$4 000 per month and also agreed on the arrears and how they were to be paid. The agreement was reduced to writing but the 2nd defendant never signed it. He also did not sign the lease agreement, although he signed on the minutes where they agreed on what the rentals were to be and the arrears. Some payments were subsequently made but no formal lease agreement was ever signed. In December 2010 the witness left Zimbabwe and appointed the first witness to manage the property. Payments were made to the first witness for a period of about 2 years. The payments stopped in 2013 and the first witness eventually relinquished management of the premised to John Pocock. The 2nd defendant subsequently engaged the Rent Board and a rental figure was fixed but it was never paid. The witness had to pay over US$20 000 in order to save the property from being sold due to rates and taxes owed to the City Council. The total amount owed is as per the summons and the US$4 500 holding over damages were arrived at based on a rental of US$4 500 per month which was a rate obtained as the market value of the property.

The amounts owed as claimed in the summons should be paid and whatever else accrues up to the defendants' eviction.

Whatever agreement the defendants had with Mr Patel was not binding on him as Patel had no mandate to deal with the property. The mandate was with the first and second witnesses.

The property was meant to sustain the family but the family has had to incur expenses in order to maintain the property. This property was owned by the witness's parents but they sold it to the plaintiff company, a company owned by the family.

The plaintiff's case was closed after this witness's evidence. The defendants then applied for absolution from the instance arguing that the plaintiff had failed to establish a *prima facie* case, there is no evidence upon which the court might find for the plaintiff, the evidence is insufficient and inadequate to establish an essential claim of the case as the exact quantum of damages and rentals claimed are approximate and not based on any source documents. There is no existing lease with the defendants.

Defendants' Argument

Counsel for the defendants contends that since the last witness who professes to be the plaintiff's representative is one of five directors, he had no authority to act on behalf of the company and so whatever agreement he purportedly entered into with the defendants is a nullity and nothing can stand on it. (*Macfoy* v *United Africa Co Ltd* (1961) AA ER 1169). Without authority to so act no agreement ensued (*Nyamwino* v *Gwafa & Anor* HH 179-18).

The lease agreement which exists is that which was between the first defendant and Hetnesh Patel, signed on 1 March 2010. The rental agreed was US$800 and the fall out among the directors of plaintiff cannot invalidate such lease. That lease is still valid until cancelled. No lease apart from this one was ever subsequently signed by the 1st defendant.

As regards the claim for damages there was no evidence to substantiate it. He who alleges must prove. (*Tredcor Zimbabwe Pvt Ltd* v *Marecha* HH 558-22). There was no primary document to prove the rentals agreement and reliance on ancillary documents in the form of minutes cannot suffice (*Chamisa* v *Mnangagwa & Ors* CCZ 42-18). The figures claimed as damages are based on "approximate" amounts, falling short of proof regarding how they were arrived at.

With no source documents the plaintiff's case is limping making it unnecessary to proceed beyond the plaintiff's case. (*National Railways of Zimbabwe Contributory Pension Fund* v *Mugadza Trading & Transport t/a Chase Water Service & 2 Ors* HB 182-18). Basing rentals on market values when there was a determination by the Rent Board of the fair rental weakens the plaintiff's case.

There is therefore no sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff (*Gascoyne* v *Paul & Hunter* 1917 TPD 170, *Supreme Service Station (Pvt)* (1969) v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR)

The claims also sound in US$ which is contrary to law (*Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R Baber (Pvt) Ltd* SC 3-20).

The second defendant was not a surety in the lease agreement and therefore he ought not to have been cited. In any event ZWD140 000 was paid after the Rent Board determination and given the rental of US$1 600 per the Board determination and the law as per SI 133/2016, that amount covers whatever rent was due, leaving no arrears to talk about.

The foregoing is in essence the defendants' basis for seeking absolution from the instance.

Plaintiff's Argument

In opposing the application for absolution counsel for the plaintiff articulated the law regarding what the court considers in an application for absolution. The court should be slow to grant such an application. (*Katerere* v *Standard Chartered Bank Zimbabwe Limited* HB 51-08, *Manyange* v *Mpofu & Ors* 2011 (2) ZLR 87 (H), *Bakari* v *Total Zimbabwe (Pvt) Ltd* SC 21/19, *Competition and Tariff Commission* v *Iway Africa Zimbabwe (Pvt) Ltd* SC 58-19).

The defendants are in occupation of the premises and the property is owned by the plaintiff. The minutes of a meeting between the second defendant and the third witness shows that the parties agreed to a rental of US$4 000 from 1 November 2010 to 31 October 2012 and ancillary charges. The second defendant signed the minutes and such minutes' authority has not been challenged. The third witness is a director of the plaintiff. Following the meeting between the third witness and the second defendant, the second defendant's wife paid US$9 000. When there was a change from Mr Doolabh to John Pocock as administrators of the property, the defendants were advised and the defendants thereafter sought a determination of a fair rental from the Rent Board. The plaintiffs had to pay arrear rates and ancillary charges to the City Council to save the property from being sold in execution, monies which were supposed to be paid by the defendants as occupiers of the premises. Such payments are not disputed. Even after the Rent Board determined fair rentals, the defendants never paid rent prompting cancellation of the lease and issuance of summons.

The defendants remain in occupation of the property without paying rentals. A case has therefore been made justifying proceeding to hear from the defendants.

Analysis of Arguments

It is important to state what the correct approach is in an application for absolution from the instance. The court is indebted to both counsel who referred to a plethora of cases which deal with this issue.

In *Chiswanda* (in his capacity as father and guardian of Chidochashe Chiswanda) v *OK Zimbabwe Limited* SC 84-20 GOWORA JA (as she then was) had this to say:-

> "Crucially the test to be applied is not whether or not the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. The evidence required at this stage is whether or not the plaintiff has made out a *prima facie* case to prove the claim. The correct approach to an application for absolution from the instance was set out in *Gordon Lloyd Page & Associates* v *Rivera* 2001 (1) SA 99 at pp. 92-93 by HARMS JA. He stated:-
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> "The test for absolution to be applied by a trial court at the end of a plaintiff's case…. Is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should), nor ought to find for the plaintiff."

I have already looked at the evidence led in plaintiff's case. The issue really is on the defendants' tenancy of a property which belongs to the plaintiff. A tenant – landlord relationship invariably involves the payment of rent by the tenant to the landlord and whatever other charges the parties agree on. After the agreement with Mr Patel which set the rent at US$800 a director of the plaintiff was not happy with the low rental and there was engagement between him and the second defendant. Payments were subsequently made following such engagement. The Rent Board also made a determination of the fair rent to be paid for the premises. That determination by the Rent Board was at the instigation of the second defendant.

The plaintiff had to pay arrear rates and charges in order to save the property from being sold in execution. The defendants were supposed to pay for the rates and charges but failed to do so. Can it therefore be said at the close of the plaintiff's case no evidence was adduced upon which a court, reasonably applying its mind to such evidence, might find for the plaintiff? To say so is tantamount to stating that there is nothing there to even consider that the court may make a reasonable mistake and give judgment for the plaintiff.

In *Bakari* v *Total Zimbabwe (Pvt)* Ltd SC 21-19 the test was put as follows:-

> "Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff…?"

The court must be wary of dismissing the evidence led without hearing what the defendant has to say on the matter.

In the *Bakari* case (supra) the court said:-

> "The court should be extremely chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special

considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim."

The defendants have raised legal issues regarding the third witness's authority to act on behalf of the plaintiff, the sounding of the claim in US dollars and the absence of a written lease signed by the defendants post the one signed between Mr Patel and the second defendant.

Sight must not be lost of the fact that second defendant had a meeting with the third witness and signed the minutes, signifying the correctness of what was agreed on. A payment was subsequently made although it did not extinguish the arrears agreed on. Why were such payments made if the defendants believed the rentals were US$800 as per the lease signed with Mr Patel? Why was it necessary for the second defendant to approach the Rent Board for a determination of a fair rental if the valid lease which governed the defendants' occupancy of the plaintiff's property was the one signed between them and Mr Patel?

The defendants are in occupation of the premises as tenants of the plaintiff but the plaintiff has adduced evidence from the three witnesses that no rent is being paid. Under these circumstances, can one say the plaintiff's claim is hopeless and must end at the close of its case?

In *Beta Holdings* v *Rio Zim (Pvt) Ltd* HH 397-17 the court had this to say regarding the grant of an order for absolution from the instance:-

"The order should be granted when the plaintiff's claim is hopeless at the close of the plaintiff's case."

I am not persuaded to hold that the plaintiff's claim is hopeless.

The defendants are still in occupation of premises which the plaintiff is paying for yet it is the owner of the premises. Surely the defendants must show the basis of such occupation. This is not a case where the court can end at the close of the plaintiff's case without hearing all the evidence. The defendants had a fair rental order granted by the Rent Board but such rent is not being paid. In essence the defendants are occupying these premises without paying anything towards such occupancy. The argument is that renovations were

done to the property as it was in a dilapidated state. How much, if anything, is to be offset from the rent arrears based on the defendants' acknowledgement that rent ought to be paid for these premises. What became of the USD$1600 fair rental stipulated by the Rent Board? Is this a matter where absolution should be granted, given the evidence led?

I am not persuaded to grant the application for absolution from the instance. The defendants ought to answer to these claims more so as they are still in occupation of the plaintiff's premises.

As regards costs, the trial is yet to be concluded. I find no reason to justify awarding costs in a matter which is yet to be concluded. The issue of costs will be addressed at the conclusion of the matter.

That said, I make the following order:-

1. The application for absolution from the instance be and is hereby dismissed.
2. Costs shall be in the cause.

Calderwood, Bryce Hendrie and partners, plaintiff's legal practitioners
Mlweli Ndlovu and Associates, defendant's legal practitioners