

ROTAZOM INVESTMENTS (PVT) LTD
versus
BYCO (PVT) LTD
and
LOGRY TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 27 October 2021 & 20 April 2022

G OChieng, for the plaintiff
E Mubayiwa with *T Nyahuma*, for the 1st defendant
No appearance for the 2nd defendant

Absolution from the instance

MUZOFA J: This is an application for absolution from the instance at the close of the plaintiff's case.

The plaintiff's claim as amended is for eviction of the second defendant and all those claiming occupation through it from premises known as 33 Watts Road, Ardbennie Harare 'the property', US\$255 860.00 being rentals and utilities from March 2015 to May 2017, holding over damages of US\$9 200.00 per month from 31 June 2017 to the date of final eviction and interest at the prescribed rate on both amounts claimed.

The first defendant filed its plea in April 2008. In August 2019, it filed an amended plea through an order of this court. The problem with the amended plea is that it does not indicate what exactly is being amended. It is expected that an amendment clearly sets out the nature of the amendments. In this case in the absence of any indication of specific amendments I will assume the first defendant completely abandoned its plea filed in April 2008.

The plea as amended raised a number of defences to the claim for eviction, that the lease was not cancelled it remains valid, that the first defendant has a lien over the property and that its equipment is attached to the property such that it cannot be removed without causing damage to the equipment. It denied owing any arrear rentals. For holding over damages, the first defendant denied that such damages are due since the lease was not terminated. In respect

of utilities, the first defendant pleaded that there is a dispute on the pro rata computation and the issue must be referred to arbitration in terms of the lease agreement.

The first defendant also filed a claim in reconvention for payment of US\$453 217.33 being damages incurred due to an unlawful electricity connection by the plaintiff and interest at the prescribed rate.

In respect of the claim in reconvention the plaintiff denied the claim in its totality and averred that the claim must be made against the second defendant which unlawfully connected the electricity.

Although the second defendant filed its plea denying ever connecting electricity as alleged, it did not thereafter file further pleadings. On the date of trial there was no appearance on its behalf.

The joint pre-trial conference minute held between the plaintiff and the first defendant captured the issues for trial as follows:

1. Whether the 1st defendant is indebted to the plaintiff in respect of arrear rentals and utilities for the period March 2019 to September 2020 in the sum of US\$154 797.24
2. Whether the 1st defendant is liable for holding over damages of US\$9 200. 00 per month from October 2020 to the date of final eviction.
3. Whether the plaintiff is entitled to an order for the eviction of the 1st defendant and any person claiming title or interest through it?
4. Whether the 1st defendant's claim in reconvention has prescribed?
5. Whether the plaintiff colluded with the 2nd defendant to unlawfully abstract or divert electricity current from the 1st defendant's electricity metre to its own premises
6. Whether the corporate veil between plaintiff and 2nd defendant should be lifted
7. Whether the plaintiff is jointly liable with the 2nd defendant for payment of the sum of USD 453 217.

Two witnesses gave evidence to buttress the plaintiff's case. Shah Prashant 'Shah' was the first to give evidence. His evidence was straight forward. He said the plaintiff entered into a three-year lease agreement with the first defendant from 2014 to 2017 at a monthly rental of US\$8000 and a pro rata payment of utilities which was about 50% of the City of Harare charges and electricity. The first defendant failed to pay the rentals in terms of the agreement. In February 2017 the plaintiff served the first defendant with a notice to terminate the lease at the end of May 2017. The termination was due to effluxion of time; it was not based on breach of

contract. Despite such termination of contract and demand to vacate from the property, the first defendant did not give the plaintiff vacant possession. He denied that the first defendant's equipment is permanently fixed to the property. According to him it can be removed. He also denied that the plaintiff unlawfully connected electricity as alleged by the first respondent. As such the plaintiff is not indebted to the first defendant arising from the purported unlawful connections. In short, the first defendant has no lien over the property.

The second witness was Abigail Kawodza 'Abigail', an accountant at the plaintiff. The purpose of her evidence was to establish the amounts due to the plaintiff in respect of the arrear rentals and holding over damages. I will revert to her evidence later in the judgment. The plaintiff then closed its case.

The first defendant applied for absolution from the instance at the close of the plaintiff's case. Both parties in this case properly articulated the applicable law in such an application. The test at this stage is one that has stood the test of time as stated in *Gascoyne v Paul and Hunter* 1972 TPD170 at p 173, as follows:

"At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'Is there such evidence upon which the court.... ought to give judgment in favour of the plaintiff?'"

The plaintiff must establish a *prima facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution, otherwise no court might find for the plaintiff. The evidence must establish a cause of action pleaded and all the elements of such cause of action. See *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 at 343 B, *De Klerk v ABSA* 2003 (4) SA 315 (SCA) at 323. Courts usually lean in favour of the case continuing so that it decides the matter on all the evidence. However, where the plaintiff has failed to establish a *prima facie* case, absolution must be granted, no case should be allowed to continue to bolster the plaintiff's case.

I address the claims separately

Eviction

In seeking absolution from the instance in respect of eviction, the first defendant submitted that the claim is based on a letter which is a notice to terminate. The plaintiff did not subsequently terminate the lease which is the juridical act required for cancellation. For all

intents and purposes, the lease agreement remains valid. For this assertion the first defendant relied on the authority of *Shamuyarira v Makonese* HH401/18.

In response the plaintiff argued that the termination did not require a juridical act of cancellation. The lease agreement provided for termination of the lease of agreement by effluxion of time. The lease could only continue in the event the plaintiff did not take action to terminate. In this case the plaintiff took action to prevent the lease from continuing. The agreement was not terminated as a result of breach, but it terminated by effluxion of time and the plaintiff did all that was required to bring the lease to an end.

In my view both parties took a narrow view to the claim for eviction and focused on the notice of termination only, yet it is apparent that the claim for eviction is resisted on two further grounds. Firstly, that the first defendant has an enrichment lien over the property and therefore cannot be evicted until the plaintiff has paid the amount due. A lien is a valid defence to a claim of eviction. Secondly that the first defendant's equipment is affixed to the property such that it cannot be removed without causing damage to the equipment.

The question whether the letter dated 27 February 2017 was a notice to terminate the lease agreement is a matter of interpretation. There is no dispute that the first defendant was served with the letter and that it was aware of its contents. The court's task is to determine whether that was a valid cancellation considering the whole lease agreement. At this stage the court is satisfied that the plaintiff has shown that it served the first defendant with the letter. What that letter turns out to be is a question of interpretation and that can only be decided at the end of the trial. The *Shamuyarira* case (*supra*) relied upon by the plaintiff is distinguishable from the circumstances of the case. In this case there was no invitation for further engagements in respect of the lease agreement.

The issue on whether the equipment is fixed to the property and the question of the lien cast the onus of proof on the first defendant. An application for absolution from the instance would be a premature instance to debate the points before the first defendant has placed evidence before the court. These issues must be considered at the end of the evidence. In my view the circumstances of the case require that the matter proceeds. The application for absolution from the instance is without merit since the defendant must discharge its onus.

Arrear Rentals

In seeking absolution in respect of arrear rentals, the first defendant submitted that the claim is in an illegal currency, and it cannot stand. On the illegality of the claim in United States dollars the court was referred to the case of *Zizhou v The Taxing Officer & Anor* SC 7 /20 where a bill of tax was made in United States dollars. The court held that the bill was denominated in United States dollars in contravention of the law. In addition, it was submitted that the claim was not even established.

In response, the plaintiff averred that the currency of claim is lawful in that this is a claim for damages and not a claim arising from a 'transaction' as contemplated by Statutory Instrument 142 of 2019. The court is at large to award damages in foreign currency in order to give meaningful compensation for the plaintiff's loss. The court was referred to the case of *Chiriseri v Commissioner General of Police & Others* HH450/20 for the submission.

Although the plaintiff's claim was initially for US\$255 860.00 it is not in dispute that the first defendant made some payments towards rent arrears for the period March 2015 to February 2019 after an order by consent under HC1888/18 was issued. It is on that basis that, the parties agreed to refer to trial the question in respect of US\$ 154 797.24 in rent arrears. In his submissions Mr *Mubaiwa* indicated that the plaintiff insisted on the initial amount claimed. The submission was factually incorrect since the amount had reduced substantially.

The plaintiff produced a schedule showing the purported arrear rentals from March 2019 to September 2020. Obviously the schedule did not prove arrear rentals. Arrear rentals simply refer to those outstanding amounts for rentals that accrued during the currency of the lease but were not paid. To prove the arrear rentals the plaintiff was enjoined to show that, before the alleged termination of the lease agreement, the first defendant failed to comply with its obligations. Since the plaintiff alleged that it cancelled the lease agreement in May 2017 one would expect proof of non-payment for periods falling prior to the date of termination. If the court were to accept the evidence as prove of arrear rentals, it casts a doubt on the plaintiff's averment that it cancelled the contract in May 2017. It leaves the question as to when the contract was cancelled and from what date the holding over damages begin to run unclear. The evidence placed before the court from March 2019 does not fall within the tenets of arrear rentals. The plaintiff confused rent arrears and holding over damages. The two are different.

Abigail also referred to a schedule for the period March 2015 to February 2019 with a total of ZW\$488 790.03. She did not explain what the schedule was supposed to prove. The amounts

are in the local currency, yet the claim is in United States dollars. There was no explanation how that evidence relates to the US\$ 154 797.24 referred to trial. The time frame includes both the pre termination and the post termination period. The document is a mixed bag of what could be the rent arrears and holding over damages. In the absence of clarity as to the relevance of the schedule, the schedule remains meaningless and cannot pass for evidence to prove the plaintiff's claim.

It would appear the plaintiff conceded that no arrear rentals are still owing. I quote verbatim the plaintiff's submissions on paragraph 8,

'The arrears were claimed together with damages for holding over after the lease had terminated and the first defendant wrongfully retained the premises. When changes in currency made it advantageous for it to do so, the first defendant *settled the arrears* and the portion of holding over damages that had accrued and become a liquid debt as at February 2019. The dispute therefore relates to ending its wrongful occupation of the premises and *recovering damages for the holding* since March 2019.' (italics for my emphasis)

From the submissions it is apparent that the plaintiff no longer pursues its claim for arrear rentals. The arrear rentals were paid including part of the holding over damages. The claim must have been withdrawn instead of persisting with it.

The updated rental statement for the first defendant relied upon by the plaintiff shows that payments were made. In essence there is no evidence before the court upon which a finding might be made for the plaintiff in respect of the rent arrears in the sum of US\$154 797,24.

In the absence of evidence, there is no need to even consider the validity of the currency issue.

Absolution must be granted in respect of the claim for arrear rentals.

Holding over damages

In seeking absolution, the first defendant raised the currency issue, that holding over damages are not due since the lease agreement is still valid and that the quantum of the holding over damages was not established. There was no valuation evidence of the market value of the property from a real estate in terms of s2 of the Estates Agent Act. The plaintiff relied on a value of occupation as agreed by the parties in the lease agreement. This was an agreed value borne out of negotiation and not the market value.

In response, the plaintiff submitted that the value of occupation was proved. Evidence was led to establish that the plaintiff has two identical buildings at the same location. One is occupied by a lawful tenant and the other is illegally occupied by the first defendant. The claim for holding over damages mirrors the rental the plaintiff is receiving from the lawful tenant. The evidence was not challenged.

A claim for holding over damages is based on a breach of the contractual obligation to give vacant possession of the property on termination as required by the relevant clause in the lease agreement. Kerr in the *Law of Sale and Lease* (3rd ed. 2004) at p 421; states that under contract, the breach is the failure to restore possession on termination and the remedy of ordinary damages for holding over (i.e. market related rental) arises by reason of the landlord being deprived of the use and enjoyment of the property because the erstwhile tenant has remained in occupation. See also Lillcrap, *Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 347 (A) at 496 I – 597 C. The claim for damages resulting from holding over is thus founded in breach of contract.

In this case the plaintiff alleged that it cancelled the lease agreement in May 2017 and the first defendant has failed to give vacant possession despite demand. Whether the lease agreement was terminated is yet to be decided. Despite that, at this stage the plaintiff is required to show how the claim for US\$9 200 .00 holding over damages is quantified. The value must be a market value.

That the first defendant is liable to pay rentals is beyond question. No tenant may occupy premises except in return for the payment of rent. In this case the rentals are in the form of holding over damages. Damages are a function of evidence, there must be evidence to prove the amount claimed. It is trite that a court nor anyone else cannot pluck a figure from the air.

The two witnesses who gave evidence for the plaintiff did not explain how the figure of US\$9 200 was arrived at. The plaintiff's submissions state that evidence was placed before the court that the computation was based on the rentals paid by a tenant occupying an almost similar space on the property is incorrect. A flirting reference was made to the other tenant in relation to the arrear rentals. No evidence was placed before the court showing how much the tenant is paying to prove the holding over damages. It is trite that evidence cannot be placed before the court by way of submissions.

The plaintiff produced the first defendant's updated rental statement for the period March 2015 to September 2021. The period includes October 2020 the date from which the holding over damages are said to commence. The rentals are quoted as \$7000.00. In addition to that amount are the City of Harare charges of ZW\$ 2 794.66 and VAT of 1015.00 bringing the total due to US\$ 8333.00. Even if the court were to accept that computation, it does not establish the claim for US\$9 200.00 claimed by the plaintiff.

Even if the quantum is based on the expired lease or the rentals paid by the said legitimate tenant the amount is a result of agreement. It does not necessarily represent the market value of the property. In my view there was no evidence of the real market value of the property to confirm the figure of US\$9 200.00 as holding over damages.

From the foregoing, the plaintiff has failed to place before the court evidence upon which a finding might be made in its favour in respect of the rent arrears and holding over damages. The plaintiff has managed to establish a *prima case* in respect of the claim for eviction.

Accordingly, the following order is made.

IT IS ORDERED THAT:

1. Application for absolution from the instance is dismissed in respect of the claim for eviction.
2. The application for absolution from the instance is granted in respect of the claim for arrear rentals and holding over damages with costs.
3. The parties are directed to liaise with the Registrar Chinhoyi High Court for the continuation of the case.

Atherstone & Cook, plaintiff's legal practitioners.
S Nyahuma's Law, first defendant, legal practitioners.