

RAINBOW CASH & CARRY (PVT) LTD
versus
FALCON FOODS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 17 May and 27 July 2022

TRIAL

H Nkomo, for the plaintiff
R Nyamutowa & F Nyakatsapa, for the defendant

NDLOVU J On 9 April 2021 the Plaintiff issued a summons out of this court claiming
(a) An order for payment in the sum of US\$ 135 931.36 or its ZWL\$ equivalent at the prevailing rate on the date of payment being arrear rentals owed to the Plaintiff by the Defendant.

(b) An order for the cancellation of the lease agreement between the parties.

(c) An order for ejectment of the Defendant and anyone claiming occupation through him.

(d) An order for holding over damages at the rate of USD\$ 433.00 per day starting from the 1st of May 2021 to the date of vacation and

(e) Costs of suit.

At the time of hearing claims (b) & (c) had been overtaken by events and claim (d) was not pursued leaving the court to adjudicate over claims (a) and (e) only.

BACKGROUND FACTS

The relationship and dispute between the parties is born out of a lease agreement entered into and signed by the parties' representatives mid 2016 over several Warehouses in Harare. For the purposes of the dispute between the parties, the critical parts of the agreement worthy repeating in this judgment are clauses 3(a) and (12) that read as follows;

“3. RENT PAYABLE

- a. For the period the Tenant shall pay the Lessor as rent the sum of US\$..... including all costs per month.

12. This Agreement comprises the whole contract between Rainbow Cash & Carry (Pvt) Ltd and Falcon Foods (Pvt) Ltd..... No variation of the terms of this Agreement shall be of force of (*sic*) effect unless recorded in writing executed by the Lessor and the Tenant.”

It is common cause that no variation was recorded in writing by the parties and the parties are therefore bound by this contract as is. The Defendant is not denying liability to pay, he however puts into issue the amount and currency in which it is liable to pay. In particular Defendant admits liability to the sum of ZWL\$ 98 216.91 while Plaintiff insists on being owed US\$ 147 030.78 less US\$11 099.42 which was not included in the summons.

PLAINTIFF’S CASE

Plaintiff’s argument is that the lease agreement that birthed the Lessor – Lessee relationship between the parties on 1 August 2016 and sustained to 2021 when it was terminated by an order of this court at all material times expressed the rent in United States of America Dollars. The Defendant did not pay rentals from February 2020 to June 2021 for Warehouse No.1 and to 30 October 2021 for the Office No.4. The arrear rent accrued after 19 February 2019 and therefore in terms of S 4(1)(e) of SI 33/19 can be rated in US\$ which was the currency of the rentals per the lease agreement. On 16 October 2020 the Plaintiff wrote to the Defendant indicating that the sum of US\$73 232.13 was due. Despite receiving the letter in question, the Defendant never disputed the debt nor the currency of the debt, and above all Defendant did not respond to the letter in question and therefore Defendant should be taken as having admitted the same. No rent arrears accrued or are claimed for warehouses 2 & 3 as those were fully paid for. Post February 2019, Plaintiff received the rent payments in the ZWL\$ equivalent per the terms of the Zimbabwean laws at the time, however the rent payable remained denominated in US\$. There was no time that the parties effected amendments to the Lease Agreement changing the currency of denomination from US\$ to ZWL\$ or vice versa.

As far as the Plaintiff is concerned, the due amount must be calculated as follows:

- a) Office No. 4: 01 November 2020 – 30 October 2021 = 12 months x \$1650.00
per month = 19 800.00
 - b) Warehouse No. 1: 01 February 2020 – June 2021 = 9 months x (1791m² X \$3.35 per
m²) = US\$53 998.65
- Balance as at 16 August 2020 = US\$ 73 232.13
Add – office 1 per (a) above = US\$ 19 800.00
Add – warehouse 1 per (b) above = +US\$ 53 998.65

TOTAL DUE	<u>US\$ 147 030.78</u>
Less	<u>- US\$ 11 099.42</u>
AMOUNT DUE	<u>US\$ 135 931.36</u>

DEFENDANT'S CASE

The Defendant's case is that it is true that it last paid rent in January 2020. Between February 2019 and January 2020, it paid in the local currency as directed by the government through SI 33/19. They vacated warehouse No.1 in June 2021 and the office in November 2021. Of critical importance in Defendant's case is the following:

Defendant told the court that the US\$ 73 232.13 mentioned in the letter of 16 October 2020 was not rent arrears but a Joint Venture (that never materialised) money, so it should be excluded in the computation of the rent arrears. It was Defendant's further evidence that for a period of 19 months (April 2020 to October 2021) he was using half of the office space i.e 243m² at \$3.19 per square metre. Defendant also testified that SI 33/19 altered the lease agreement base currency from US\$ to ZWL\$ and there was no reversion to the US\$ as the base currency of the lease agreement between him and the Plaintiff

Basing its calculations on the above evidence Defendant then comes with the following results:

1. Office No.4: February 2020 and March 2020 = 2 months @ \$3.19X 486m² =
ZWL 3100.68 Plus April 2020 – October 2021 = 19 months @ \$3.19 X283m² =
ZWL\$ 14 728.23
Sub-Total = ZWL\$17 828.91
 2. Warehouse No.1, February 2020 to March 2021 = 14 months @ 3.19m² x 1800m² =
ZWL\$ 80 388.00
- GRAND TOTAL** ZWL\$ 17 828.91 + 80 388.00
= **ZWL\$ 98 216.91**

ANALYSIS

Simple as it might appear to be on the face of it, this matter presents a number of challenges. The first challenge is that of lack of mathematical data in the contract. The lease contract is silent on the number of square metres being rented out, how big in square metres is a particular warehouse, and how much was being charged per square metre. As if that was not frustration enough, the signatories to the contract who were also witnesses to either party's case during trial did not fair better when they testified on the mathematical aspects of this case. That

aside, the case itself was pleaded with less than expected clarity as the case for either party, especially the Plaintiff's, clearly exhibited chameleonic features and tendencies at each and every turn.

When called upon to furnish the Defendant with further particulars of its claim in particular how the claimed arrear rentals were calculated and which period the arrear rentals accrued the Plaintiff was emphatic and clear that they related to 3 warehouses with the following details;

Warehouse 1 – 1791m² x US\$ 3.35 multiplied by 16 months beginning January 2020 to April 2021.

Warehouse 2 – 686m² x US\$ 3.35 multiplied by 6 months covering April 2020 to September 2020.

Warehouse 3 – 486m² x US\$3.35 multiplied by 16 months beginning January 2020 to April 2021.

The total from these figures is US\$ 135 835.80 and not US\$ 135 931.36 claimed by the Plaintiff. By the time the Plaintiff's representative testified, warehouses 2 & 3's rentals were not part of the claim, apparently the 2 warehouses were repossessed almost 2 years prior to the issuing of the summons. An office space measuring 486m² was now part of the mix at the trial with rent arrears having accrued in relation thereto. Warehouse 2 was now being said to be 1400m² in size and warehouse 3 was now 686m². The rent per m² was now \$3.18. It is always desirable that litigants know their story and never without good cause depart from it in their pleadings including their testimonies under oath.

UNIT RENT

Ultimately, the claim was in respect of warehouse 1 and an office space. Warehouse 1 was said to be measuring 1791 m² by the Plaintiff (although Defendant was putting it at 1800m²) and an office space measuring 486m². The period of rent default was February 2020 to June 2021 (17 months) in respect of warehouse 1 and February 2020 to October 2021 (21 months) in respect of the office space. Judging from the evidence of the 2 protagonist witnesses and the fact that the agreed rent per month was US\$ 12997.00 for 4086m², I find it proven to the adequate degree that the unit rent was USD\$3.18 per square metre.

16 OCTOBER 2020 NOTICE

The Defendant has said the amount therein indicated by the Plaintiff has nothing to do with the rent arrears but has something to do with a failed Joint Venture between the parties. The Plaintiff holds otherwise. Paragraph 3 of the letter (Exhibit 2) reads as follows:

“We therefore demand payment of the outstanding sums of USD 73 232.13 or equivalent arising from your obligations from the Joint Venture of the 31st of October 2016.....”

It is the Plaintiff who mentioned a Joint Venture of 31 October 2016 and not a lease agreement of 1 August 2016. Why talk of “...obligations from the Joint Venture ...” when the issue at hand is rent arrears and eviction? I do not believe the Plaintiff when he says US\$73232.13 was rent arrears. In any case the number of square metres rented from February 2020 to that date do not support that figure using either US\$3.35 or US\$ 3.18 as the charge per square metre. This figure of US\$73232.13 has nothing to do with rent arrears, so I conclude.

SHARING OF THE OFFICE

I turn now to the issue of the alleged sharing of the office space between the parties from April 2020 to October 2021. It is common cause that around April 2020 the Plaintiff put up an advertisement board in the office in question. There is controversy as to whether or not Plaintiff’s people occupied half the office. Plaintiff denies that allegation. I am not favoured with evidence to rely on to find in favour of the Defendant on this score. The banner was put there after an agreement to do so between the parties as Defendant was about to leave the premises. The parties seem to have been in cordial relations back then. Had Defendant not been happy with the sharing of the office probabilities favour a conclusion that he would have protested. I therefore find that the office was not shared.

APPLICABILITY OF S.I 33/19

SI 33/2019 both in s 4 (1) (d) and s 4 (1) (e) read as follows::

“Issuance and legal tender of RTGS Dollars and savings

4. (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations (“the effective date”)—

(d) that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and

(e) that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States dollar on a willing-seller willing-buyer basis;”

The contract between the 2 parties sounded in US\$ and remained so until its dissolution. What central Government regulated was the mode of settlement of obligations sounding in foreign currency in two periods of time, that is pre and post the effective date. The obligations under scrutiny were after the effective date and should be settled in USD\$. S.I 33/2019 did not purport to amend existing contracts between 2 contracting parties. S 4(1)(e) applies with the necessary force to the dispute in this matter.

FINDING

The following amounts are found owing to the Plaintiff by the Defendant.

WAREHOUSE No.1

Area 1791m²

Rent chargeable, US\$3.18/m²

Period 17 months (February 2020 -June 2021)

Therefore 1791m² X US\$3.18 = US\$ 5 695.38

US\$ 5695.38 x 17 months

= US\$ 96 821.46

OFFICE 4

Area 486m²

Rent chargeable = US\$ 3.18/m²

Period = 21 months. (February 2020 to October 2021)

Therefore 486 x 3.18 = US\$ 1545.48

US\$1545.48 x 21 months

= US\$ 32 455.08

TOTAL RENT ARREARS

US\$ 96821.46

+US\$32 455.08

=US\$129 276.54

DISPOSITION

I therefore order as follows:

IT IS HEREBY ORDERD THAT:

1. The Defendant shall pay the Plaintiff the sum of US\$ 129 276.54 (one hundred and twenty-nine thousand, two hundred and seventy-six United States Dollars and fifty-four cents), or the equivalent in RTGs\$ convertible at the interbank rate prevailing at the time of payment being arrear rentals owed to the Plaintiff by the Defendant.
2. Costs of suit.

Mhishi Nkomo Legal Practice., plaintiff's legal practitioners
T. Pfigu Attorneys, defendant's legal practitioners