

CHERIMA MARKETING SERVICES
versus
VOEDSEL ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 17,18 October & 1 November 2022

CIVIL TRIAL

T Zenda, for the Plaintiff
S Mahuni, for the Defendant

MANZUNZU J

PRELIMINARY

At the conclusion of the trial on 18 October 2022, counsels agreed to file written heads of argument. Mr Zenda undertook to file heads on behalf of the plaintiff by 24 October 2022 and he complied with his undertaking. Mr Mahuni undertook to file heads on behalf of the defendant by 28 October 2022. At the time of writing this judgment on 1 November 2022 no such heads were filed neither was there any explanation for such failure from Mr Mahuni. The court can only express its displeasure at such failure but nevertheless proceed to prepare its judgment.

INTRODUCTION

The plaintiff sues the defendant for the recovery of arrear rentals in the sum of US\$9 000.00 with 5% interest per annum from date of summons and holding over damages of US\$1 500.00 per month from September 2020. Costs are claimed at a higher scale. The defendant has denied liability and alleged the plaintiff breached the lease agreement by its failure to give the defendant vacant possession of the leased property. As a result, the defendant has counter claimed for the cancellation of the lease agreement and the refund of US\$3 000.00 with costs on a higher scale.

BACKGROUND

The following facts are common cause:

1. That the parties signed a lease agreement on 18 January 2020 with the plaintiff as the lessor and the defendant as lessee.
2. Rent was agreed at US\$1 500.00 per month to be paid in advance not later than the 5th day of each succeeding month.
3. Duration of the lease was set at 3 years.
4. The lease was in respect of the plaintiff's immovable property at No. 52 Detroit Crescent, Marondera.
5. Despite the signing of the lease agreement, the defendant never took occupation of the leased property.
6. The defendant paid a security deposit of US\$1 500.00.

The plaintiff alleged the defendant never paid any rentals hence its claim for arrear rentals and holding over damages. The defendant alleged the plaintiff breached the lease agreement by its failure to give vacant possession of the premises to the defendant hence its prayer for the cancellation of the agreement and refund of US\$3 000.00 allegedly paid to the plaintiff as good tenancy deposit (US\$1 500.00) and advance rent (US\$1 500.00).

ISSUES

There are only three issues agreed to for this trial. These are:

- a) Whether or not the plaintiff breached the contract by not delivering the property to the defendant?
- b) Whether or not the defendant is liable to pay rentals to the plaintiff. If so how much?
- c) Whether or not the defendant is entitled to a refund of amounts paid to the plaintiff? If so quantum thereof.

ANALYSIS OF EVIDENCE

At the beginning of the trial the defendant withdrew its counterclaim. This means the third issue also falls away.

The plaintiff led evidence from Stuart Mapuranga, its managing director, while the defendant relied on the evidence of Sydney Siriro its business development director. These two witnesses are the ones who negotiated and signed the lease agreement on behalf of the parties.

a) *Whether the plaintiff failed to give defendant vacant possession of the property?*

Mapuranga's evidence was that following the signing of the agreement they waited for the defendant to come and take possession of the property. He said the defendant despite several invitations failed to take possession of the property. The defendant also failed to pay rentals as per agreement. On the other hand Siriro said plaintiff remained in occupation of the premises and failed to give them vacant possession as the plaintiff came up with new demands outside the agreement. Some of the demands were that defendant should assist the plaintiff with transport for relocation. He said no keys were handed over to them. However the two witnesses were in agreement in that the defendant found an alternative premises which was bigger and more conducive to its business operations. The new place was found with the assistance of Mapuranga. Siriro said this alternative premises had nothing to do with the lease agreement between the parties.

While Siriro persisted that the defendant was not given vacant possession of the premises that cannot be true. He proved to be economic with the truth as shall later be shown in this judgment.

Following the signing of the agreement on 18 January 2020 there were constant discussions between the parties. Whatsapp chats were produced. Such communication is clear that the plaintiff was offering vacant possession of the premises to the defendant. On 28 January 2020 Mapuranga asked Siriro, "*However we want to know the dates you want to move in so that we prepare our things to move out.*" The reply was "*Noted baba, I will get back to you.*" Despite this promise Siriro could not show that he did get back to Mapuranga. All we hear from Siriro was that he did by telephone within two days. That cannot possibly be true because on the 4th February 2020 Mapuranga send a concerned message asking why the defendant had gone quiet.

Siriro's evidence was that he verbally terminated the agreement in March 2020. That too could not be proved. In any event the agreement has no provision for a verbal termination. Clause 1:2 of the lease agreement states that:

"During the currency of the lease agreement, either party may terminate the contract of lease giving the other party one calendar month's notice in writing." (emphasis is mine)

He said following his verbal termination the parties met with a view to settle the matter. At that meeting he said he then paid the plaintiff US\$3 000.00 for what he considered was the

defendant's liability for two months (18 January to 18 February and 18 February to 18 March 2020) before verbal termination. This we were hearing for the first time. It cannot be the truth for five reasons; firstly it was not pleaded, secondly it is incongruent with the pleaded facts, thirdly no details were given on how the money was paid i.e. where, in whose presence, fourthly no proof of such payment was produced and fifthly Mapuranga vehemently denied the assertion. Siriro was asked in cross examination why he did not insist on being issued with a receipt given indications that the matter will flow into the courts. No reasonable explanation was given. And this is coming from a business development director who in my view is expected to insist on good business practices. The only probable thing is that there was no US\$3000.00 given to the plaintiff in the spirit of a settlement apart from a proposed cancellation token which he said was rejected by the plaintiff. The only amount paid was the admitted US\$1500.00 as good tenancy deposit. This explains why the defendant also withdrew its counter claim with no explanation given.

The court finds it as a matter of proven fact that the defendant was not denied vacant possession. Mapuranga was able to truthfully explain the plaintiff's partial occupation of the premises in that the occupation of the offices was a means of securing the premises against vandalism before defendant occupies the premises. At no time did the defendant get to the premises and say they wanted to occupy and were denied.

b) How much is defendant liable to pay.

Plaintiff's evidence is that the defendant never paid any rent. Siriro's evidence was that they paid two months' rent only which I have already dismissed as a lie. In an apparent conflict in his evidence he said there was no valid agreement so there should not be any arrear rentals to talk about. Apparent conflict in the sense that he said he paid rent as per agreement and then he says there was no agreement. In many respects he did not impress the court as a credible witness.

The defendant kept the plaintiff guessing whether or not they were taking occupation. On the other hand the plaintiff treated the defendant as a potential tenant with a seasonal financial base, it being in the tobacco auctioning business, with the capacity to pay even arrear rentals. But in March 2020 plaintiff was uncertain of the defendant's position. This is why on reading the whatsapp communication by Mapuranga he kept on saying the defendant must terminate the agreement in writing if such was the intention. In the mean while the defendant was

reluctant to do so as Siriro expressed in his evidence that they felt written termination could entrap them in the face of a threat for court action by Mapuranga.

It cannot be disputed that the parties entered into a legally binding agreement. The defendant failed to pay the agreed rentals. Mapuranga said the defendant must pay the rent for 24 months up to February 2022 when they found another tenant. The total amount due, he said is US\$36 000.00.

Mapuranga was put to lengthy cross examination. He said they did not put in another tenant early enough because they wanted to see how the court case was going. Clause 14:3 of the agreement was drawn to his attention. It deals with the rights of the lessor in the event of a breach of the agreement by the lessee. It reads;

“In the event that the dispute goes to court or to the Rent Board, during the period of dispute resolution and pending the finalisation of any pending court case, possession of the rented premises shall be under the lessor and whatever business operation by the lessee shall cease in the interim.”

Mapuranga was asked if the plaintiff, given the circumstances of this case that defendant never took occupation, did not consider that it had possession of its property and the answer was in the positive. The question was, *“You were in possession of your property from the date of issuing summons?”* The answer was, *“Correct”* He was then asked as to the period of the plaintiff’s claim and he said 18 January 2020 to 19 August 2020 the date on which the summons were issued.

Even in the absence of admission by the plaintiff as to the period of claim the plaintiff was nevertheless to mitigate its loss. By August 2020 it must have been clear to the plaintiff that the defendant was not coming to take occupation. This is why the plaintiff issued summons and the defendant had not paid rent not even for one month with the plaintiff persisting on written termination of the agreement. The defendant’s liability to pay rent can only run up to August 2020 a period of seven months which amounts to US\$10 500.00 less US\$1 500.00 which was paid as security deposit. Thereafter the plaintiff had a duty to mitigate its loss.

While it was argued on behalf of the plaintiff that the holding over damages must run up to February 2022, that will be contrary to the evidence of the plaintiff’s witness who agreed the property was at their disposal at the time summons were issued.

It has become fashionable for litigants to claim costs on a punitive scale, presumably on the advice of their lawyers, in circumstances where it is not justified like the present case.

DISPOSITION

IT IS ORDERED THAT:

1. The defendant shall pay to the plaintiff arrear rentals in the sum of US\$9 000.00 or its equivalent in ZWL\$ at the prevailing interbank rate on the date of payment plus 5% interest per annum calculated from the date of summons to the date of payment in full.
2. The defendant shall pay costs of suit.

Hungwe and Partners, plaintiff's legal practitioners

Mahuni and Mutatu attorneys at law, defendant's legal practitioners