

**REPORTABLE: (91)**

**ROLEN TRADING (PRIVATE) LIMITED**  
**v**  
**PARKSIDE HOLDINGS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**MAKARAU JA, GOWORA JA & BERE JA**  
**HARARE: FEBRUARY 4, 2020 & 25 OCTOBER 2022**

*T. Magwaliba*, for the appellant

*H. Mutasa*, for the respondent

**GOWORA JA:** This matter was heard on 4 February 2020. After hearing argument from counsel, the court reserved judgment. It was intended that judgment would be availed within a reasonable period thereafter. The departure of Bere JA who had been assigned the task of drafting the judgment has resulted in an inordinate delay in determining the appeal. The delay is regretted and the court sincerely apologises to the parties for the inconvenience.

On 24 July 2013, the High Court granted judgment in favour of the respondent herein. Consequent thereto, the court ordered that the appellant vacate premises known as Shops 1 and 2 Benhay Art House, situated at 120 Chinhoyi Street, Harare, and pay the sum of USD 22 730.99, being arrear rentals, and holding over damages in the sum of USD 5 000. 00, together with operating costs from 1 November 2011 to the date of eviction. The court ordered the appellant to pay interest on the above-stated sums at a rate that is 5 percent above the lending rate of commercial banks, and costs of suit at the ordinary rate.

The appellant was aggrieved and noted an appeal against the whole judgment. The respondent was equally unhappy with part of the judgment and noted a cross-appeal against the finding by the court that it was required to give the appellant fifteen (15) days' notice of cancellation of the lease in the event of failure by the appellant to pay rent on due date. In addition, the respondent particularly appealed against the finding by the court that the letter dated 26 September 2011 by the respondent did not constitute a cancellation of the agreement.

### **FACTUAL BACKGROUND**

The appellant and respondent are private limited companies duly registered as such under the laws of Zimbabwe and carrying on business as such within the country.

On or about 30 March 2010, the respondent and the appellant entered into a written agreement of lease in terms of which the former leased to the latter commercial property known as Shops 1 and 2 Benhay Art House, situated at 120 Chinhoyi Street, Harare. The agreement was initially for a period of six months and was terminable on 31 August 2010. Although the lease agreement suggests that it commenced on 30 March 2010, evidence from the appellant during the trial reveals that it first occupied the premises sometime in 2005. This fact is however of no moment as it was never disputed that there was a subsisting lease between the parties.

It is worth noting that, while there is no specific clause providing for the renewal of the lease, clauses in the agreement suggest that it was to endure beyond the stated period of six months. Indeed, when the dispute erupted, the appellant had been in occupation of the premises for over twelve months. After the lease period expired the parties continued with the lease on the same terms and conditions. This is because the accepted sum due as rental at that

stage was USD 5000, an amount far in excess of the USD 1000.00 stated in the original written lease. Moreover, from the manner in which the proceedings in the court below were conducted, it can be inferred that the lease was still subsisting.

The terms and conditions of the lease agreement are the bone of contention between the two. The terms of the agreement that are pertinent to the dispute are to be found in clauses 3 and 12 of the agreement and relate to the payment of rentals and operating costs. The parties agreed that the appellant would pay monthly rentals within the first seven days of each month, together with operating costs at agreed rates.

The respondent alleged that the appellant was in breach of a material term of the agreement by failing or neglecting to pay monthly rentals and operating costs within the time stipulated in the lease agreement. Due to the breach, the appellant allegedly incurred arrear rentals in the sum of US\$22 730.99. As a consequence of the breach, the respondent averred that it had cancelled the lease agreement, demanded vacant possession of the leased premises, and payment of the arrear rentals and operating costs. The respondent posits that it did so by letter dated 26 September 2011 from its legal practitioners to the appellant cancelling the said agreement.

On 12 October 2011, the respondent issued summons against the appellant in which it claimed the following relief:

- “(a) An order for the eviction of the defendant together with its tenants, assignees, invitees, and all other persons claiming occupation through it from the plaintiff’s premises known as Shops 1 and 2 Benhay Art House, located at 120 Chinhoyi Street, Harare.

- (b) Payment of the sum of USD 22, 730.99 in respect of arrear rentals.
- (c) Payment of holding over damages at a monthly rate of USD 5000.00, together with operating costs from 1 November 2011 to the date of eviction.
- (d) Payment of interest on the sums of money claimed herein at a rate which is 5 percent above the commercial bank minimum lending rate per month or part thereof calculated from due date to date of payment in full.
- (e) Payment of costs at the scale of legal practitioner and client.”

It is common cause that the parties thereafter attempted to enter into without prejudice negotiations. A deed of settlement was drafted which required the appellant to acknowledge its indebtedness in the sum of US\$16 980.00 and to discharge its indebtedness at the rate of US\$2 500.00 a month with effect from 1 November 2011. Further, the appellant was to continue to pay monthly rentals of US\$5 000.00 in accordance with the terms of the lease agreement. The respondent’s legal practitioners signed the draft deed of settlement. The appellant’s legal practitioners did not. As it had threatened, the respondent proceeded with the suit culminating in the holding of a pre-trial conference before a judge in chambers.

At the pre-trial conference, the matter was referred to trial on the following issues:

- 1.1 Whether or not the respondent properly cancelled the lease agreement in respect of Shops 1 and 2 Benhay Art House, No. 120 Chinhoyi Street, Harare.
- 2.1 Whether or not any agreement for the out of court settlement of this matter was concluded between the parties.
- 3.1 If so, what were the terms of the agreement?
- 4.1 Whether or not the respondent was entitled to an eviction order.

For the purposes of the trial, the court *a quo* formulated the issues that were before it for determination as:

1. Whether the respondent gave adequate notice of intention to cancel the lease agreement before the agreement was cancelled.
2. Whether there was a valid cancellation of the lease agreement between the parties.
3. Whether the parties entered into a separate agreement relating to the outstanding rent.

The court *a quo* found in favour of the respondent and issued the order referred to above. In arriving at its decision, the court *a quo* noted that clause 3.2 of the lease agreement stipulated that rent was to be paid monthly in advance, at the latest by the seventh day of the month. It also found that Clause 12 stipulated that if rent was not paid as agreed, or where the tenant breached any other condition of the agreement and remained in default for a period of fifteen days after being given notice in writing by the landlord, then the landlord could cancel the lease forthwith and retake possession of the premises without prejudice to any claim for damages.

The court also found that, in the light of these clauses, the letter dated 26 September 2011 did not effectively cancel the lease agreement. The court noted that, instead, the letter gave the appellant three days to rectify the breach and that this period was contrary to the agreement which allowed for a period of fifteen days to remedy a breach. The letter in question was delivered to the appellant on 27 September 2011. The court, therefore, found that that is when the fifteen days contemplated by clause 12 began to run. Consequently, the court concluded that the appellant had up to 12 October 2011 to remedy the breach. Accordingly, the court *a quo* found that by 12 October 2011, when the respondent issued summons, it did so in

compliance with the lease agreement as the fifteen days from the date the appellant received the letter had elapsed.

The court further found that the letter of 26 September 2011, by which the respondent said it cancelled the lease agreement, had the effect of placing the appellant in *mora*. Thereafter, the court reasoned, the appellant had fifteen days from the date of being placed in *mora* to remedy the breach, failing which the respondent had the right to cancel the agreement. The court further determined that there was no compromise agreement as, by the appellant's own admission, it failed to sign the deed of settlement. The court *a quo*, therefore, granted the respondent's claim in its entirety.

The appellant has noted the present appeal on the following grounds:

- “1. The court *a quo* erred in granting an order for the monetary claim as made out in the summons when it was apparent from the evidence that this money had been cleared.
2. The court *a quo* erred by extending the time of notice after it had made a finding that there was insufficient notice given.
3. The court *a quo* erred in finding, as it did, that notice though insufficient, was given when in actual fact, the respondent cancelled the agreement of lease without giving the notice required in terms of the agreement.
4. The court *a quo* misdirected itself as it made a finding that there was no compromise reached by the parties because the deed of settlement was not signed by the appellant, yet the deed was for proof purposes only as the agreement had already been reached.

5. The court *a quo* erred generally by ordering eviction after the compromise and when the arrears had been cleared.
6. The court *a quo* erred by making a finding that the appellant's witness was not credible when he gave straight forward evidence."

### **ISSUES FOR DETERMINATION**

In its heads of argument, the respondent has conceded that its cross-appeal was ill-founded. As a consequence, it was not proceeding to argue the same. The concession is proper. The cross-appeal sought to challenge findings of fact made by the court *a quo* without a corresponding prayer to alter the judgment itself. The concession leaves only the main appeal for determination.

In my view, the remaining issues for determination, therefore, are the following:

- Whether the lease was properly cancelled;
- Whether the court *a quo* should have ordered the eviction of the appellant from the premises;
- Whether the parties reached a compromise; and
- Whether the court *a quo* was correct to grant the monetary claim in its entirety.

### **WHETHER THE CANCELLATION OF THE LEASE WAS LAWFUL**

The appellant contends that the court *a quo* fell into error in three respects. The first, it argues, is that the court found that the respondent was required in terms of the agreement of lease to give notice to the appellant to rectify its breach and that the former did in fact give the notice aforesaid. The appellant argues that the respondent was obliged to give it fifteen days' notice before it could validly cancel the lease. Instead, the respondent only availed it

notice amounting to three days. As a consequence, there was no notice and the finding by the court *a quo* that there was notice and a valid cancellation consequent thereto was erroneous.

A lease comes into being once the landlord and the tenant have agreed on the formalities that form the basis of their contract. There must be a property available for lease and the rent in respect thereof must be settled. The lessor's obligation is to make the property's occupation, use, and enjoyment available. In fulfilling this obligation, he has to refrain from disturbing the lessee in the enjoyment of the property leased and he must maintain the property in the condition agreed upon. In addition, the property must be fit for the purpose for which it is being let. Further, he must warrant the lessee against eviction by a third party with better title.

The primary obligations of the lessee are to pay the rent and incidental costs and the charges incidental thereto at the proper time and place agreed in the agreement and at the time of termination of the lease, to restore the property in the same condition he would have found it.

In *casu*, it is not in dispute that the appellant fell behind in the payment of its rent and accumulated arrears. The breach is admitted. The accumulation of arrear rentals is the cause of the conflict between the parties. The respondent cancelled the lease after alleging a breach on the part of the appellant. Cancellation of a contract is a legal act that delineates the relationship between the parties to the contract at a specific moment. Not every breach entitles the injured party thereto to cancel the contract. The trite position is that, unless otherwise agreed, it is only that breach that goes to the root of the contract that can give rise to a right to

cancel. In other words, it is a breach that goes to the root of the contract that entitles the aggrieved party to cancel.

The court *a quo* agreed with the appellant on the question of notice. It found however, that that the respondent had given notice to the appellant to rectify its breach when summons was issued for the eviction of the appellant and its assignees. The court reasoned as follows:

“In my view, the letter of 23 September 2011, did not effectively or adequately cancel the lease agreement. It gave the defendant 3 days within which to rectify its breach. Clause 3.2 as read with clause 12.2 of the lease agreement clearly stipulates that fifteen days be given to the defendant, within which to rectify the breach. That letter was delivered to the defendant, on 27 September 2011. That is when the fifteen day period began to run. The defendant had up to 12 October 2011 to remedy the breach. Letters were exchanged between the parties, on a without prejudice basis in settlement negotiations.

On 3 November 2011, well after 12 October 2011 when the defendant was legally obliged to remedy its breach, the plaintiff indicated that the defendant should sign the draft deed of settlement. The defendant did not do so, by its own admission. It is my view that by 12 October 2011, when the plaintiff issued summons for eviction and for recovery of arrear rentals, it did so in compliance with the provisions of the lease agreement. The stipulated period within which the defendant ought to have remedied its breach had lapsed. After 12 October 2011, the plaintiff became entitled to cancel the lease agreement, and to re-enter its premises. By coincidence, summons for eviction was issued on 12 October 2011, which I accept constituted notification of intention to cancel the lease agreement, at common law.”

Although the respondent has not persisted with the cross-appeal, it does not support the finding by the court that notice was required before the contract could be cancelled. It persists with the contention that the lease was validly cancelled. The respondent contends that the lease did not require such notice.

The manner of cancellation was the cause of contention between them, the critical issue being whether or not the respondent was obliged to give the appellant fifteen days' notice to rectify its admitted breach and pay the arrears before the lease could lawfully be cancelled.

Where the parties to a contract have settled a procedure for the termination of the agreement, they are bound by that procedure. This was the dictum in *Minister of Public Construction v Zescon (Pvt) Ltd* 1989(2) ZLR 311(S), wherein this Court said:<sup>1</sup>

“I do not understand the above quotation to mean that the appellant was not entitled to terminate the contract. The appellant may well have been entitled to do so, but where parties to a contract have agreed upon procedures for terminating an agreement, they are bound by the provisions spelling out those procedures as if they had been imposed upon them by law, and a departure from the agreement procedures will not result in an effective termination of the contract. All that was required of the appellant was if there was justification for terminating the contracts, to terminate them in compliance with the procedures spelt out in clause 20(a).”

There is ample authority for the proposition that, in the absence of an agreement to the contrary, a party who wishes to exercise his right to cancel a contract must convey such decision to the other party before the cancellation can become effective. There is also authority to the effect that this applies equally to a notice calling upon the defaulting party to purge his default. The *ratio* for the proposition is that termination of a contract has significant and overreaching consequences upon the reciprocal rights and duties of the parties to the contract. In *Swart v Vosloo* 1965(1) SA 100(A), HOLMES JA said the following:

“.....it must be taken as settled that in the absence of agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party, and cancellation does not take place until that happens.”

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<sup>1</sup> At p 316H-317A.

Generally, as in this case, the payment of rent for leased premises must be effected within a stipulated time frame. Where the parties have fixed a time for performance, and the debtor does not perform accordingly, the debtor is *in mora*. In this scenario, the creditor does not need to demand performance from the debtor. In legal terms, this is said to be *in mora ex re*, that is, *mora* from the transaction itself. Reliance for this proposition may be found in a paragraph to that effect by the learned authors Hutchinson, Van Heerden, Visser & Van Der Merwe in their book *Willes Principles of South African Law* to the following effect:<sup>2</sup>

“If the time for performance has been fixed, performance must be made by the time agreed upon. If the debtor has culpably failed to perform his obligations by such time, he is automatically in default or *in mora (debitoris)*. *Mora*, in this case, is known as *mora ex re* for no notice to the debtor is necessary, the rule being *dies interpellatio pro homine*. Where the time for performance has not been fixed by the contract, the general rule applies; namely, that performance may be demanded immediately or within a reasonable time depending on the nature of the obligation and the surrounding circumstances, provided, of course, that the party making the demand is himself able and willing to perform his own obligations. Although the performance may be due and claimable forthwith, the debtor need not perform until he is called upon by the creditor to do so. Only when a specific time for performance has been set can the debtor’s default possibly constitute a breach of contract. Thus the creditor must make a demand calling upon the debtor to perform by a date reasonable in the circumstances, and if the debtor fails to comply with the demand by the specified date, he will fall into *mora*.

This form of *mora* is known as *mora in persona*, since it arises as a result of the personal intervention of the creditor. The demand or *interpellatio* may be made either judicially, that is, by means of a summons, or extra-judicially, by means of a letter of demand. But no formal demand is required, and it may be made orally, ..... ”<sup>3</sup>

The principle of law related above was discussed in the South African case of *Legagote Development Co v Delta Trust & Finance Co* 1970 (1) 584 T.P.D, wherein VILJOEN J opined at p 587C-E:

“In my view, this was an unnecessary *onus* which the plaintiff assumed. The plaintiff relied on a term of the agreement in which a date for performance had been fixed, and it would have been sufficient to allege that the defendant had not performed before or on

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<sup>2</sup> 8 ed at p476-7

<sup>3</sup> See *Noel v Cloete* 1972(2) SA 150;

that day and that the plaintiff suffered damages as a result. In expressing this view, I have not lost sight of the statement by Wessels, *Law of Contract*, 2nd ed., para. 2858, that, before there can be *mora*, the failure or delay must have been due to the *culpa* of the debtor, but Steyn, *Mora Debitoris* (to whom Wessels refers) makes it clear at p. 42 what type of *culpa* he postulates, namely, that the debtor must or should have been aware of his obligation to perform timeously and of the nature of the performance. (See also *Victoria Falls Power Co. Ltd v Consolidated Langlaagte Mines Ltd.*, 1915 AD 1 at p. 31. *West Rand Estates Ltd v New Zealand Insurance Co. Ltd.*, 1926 AD 173 at p.195).”

It is settled therefore that where the contract itself does not fix the time for performance, a creditor may fix the time for performance by making demand for the due performance of the obligation by the debtor by a certain date, the demand in this particular instance being *interpellatio*. If the debtor fails to perform once demand has been made, the debtor is *in mora*, justifying cancellation.

Whether or not a party to a contract has the right to cancel based on a breach depends on the agreement between the parties as to what entitles the aggrieved party to exercise the right to cancel and if the right has been exercised properly. The parties' intention expressed in the contract is at the heart of the decision to exercise the right. In his book *The Law of Contract in South Africa 3ed*, the learned author R H Christie says the following:<sup>4</sup>

“It is undoubtedly correct that if the contract contains an express forfeiture clause permitting cancellation for a specified breach, the court will not investigate the materiality of the breach but will give effect to the clause however hard the result. But the flaw in Greenberg J’s reasoning seems to be a misapplication of the concept of a tacit term. The question the officious bystander ought to be asking is not “Do you both intend there should be forfeiture for any breach of this term however trivial?” to which he would probably receive conflicting answers, but “Do you both intend there should be forfeiture for such a breach of this term as to strike at the root of the contract?” which would almost certainly result in his dismissal with a common “Oh, of course.””

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<sup>4</sup> At p 570

The appellant contends that the agreement required the respondent to place it *in mora* before it could lawfully cancel the lease. It argues that the notice required in the contract was fifteen days.. The appellant contends that the lease provided for such notice and that the cancellation was invalid absent such notice. It posits that the respondent, in complete defiance of the terms of the lease, gave it, the appellant, three days to remedy the breach. It contends further that the respondent paid no regard to the terms of the lease agreement and proceeded to exercise a right that the agreement did not provide for. Further, the appellant suggests that the termination of the lease by the respondent was summary and not permissible in law. It further suggests that the lease agreement in the present matter provided for a notice period and that the demand or notice could not have been made by means of a summons as posited by the respondent. It argues that the court should find the cancellation was invalid in this scenario.

My considered view is that as evinced in the agreement, the parties' intention guides the court. On a consideration of the principles set out above, it is evident that the correctness of the finding by the court *a quo* that the lease was cancelled lawfully can only be considered by construing the clause relating to the payment of rent against the one dealing with breach. The clause that delineates breach is clause 12, which reads as follows:

“12 Breach

If

- 12.1 any rent is not paid on due date; or
  - 12.2 the tenant commits any breach or fails to observe or perform any of the terms and conditions of this agreement and remains in default for a period of fifteen (15) days after the giving of notice in writing by the landlord drawing attention to the breach or omission requiring it to be remedied;
- the landlord may forthwith cancel this lease and re-enter upon and take possession of the premises without due prejudice to any claim for damages which the landlord any have against the tenant for any breach of the lease by the tenant.”

In turn, the clause providing for rent reads as follows:

“3. Rent

- 3.1 The rental for the remaining period of this lease shall be the sum of USD 1 000 per month. Any other market-related figure may be agreed between the parties from time to time in writing.

- 3.2 The rental shall be paid monthly, in advance, within the first seven (7) days of the month, free of bank charges whatsoever on or before the first day of the month throughout the period of this lease and any renewal and extension thereof.
- 3.3 Any overdue rent or any other monies, including operating costs, which the tenant fails to pay on time shall attract interest calculated at 5 percent (five percent) above the commercial bank minimum lending rates per month or part thereof from due date until payment in full.”

Thus, the critical consideration is whether the finding by the court *a quo* that the respondent was required to give notice to the lessee and, in fact, gave the requisite fifteen days’ notice to remedy its *mora* was the correct finding in light of the terms of the contract and the surrounding circumstances. The clause relating to breach is in two parts. The critical issue for consideration is whether the construction placed on the clause by the court *a quo* can pass scrutiny.

In *casu*, the contract of lease provided that if rent was not paid on due date as agreed, or if the tenant did not rectify any breach after fifteen days’ notice to do so, then the landlord was entitled to cancel the lease immediately and take possession of the premises. The issue in contention is whether, in the present case, the breach by the appellant of its obligations entitled the landlord to cancel the agreement immediately upon failure to pay the rent...

I find that the court's construction *a quo* of the clause on breach was incorrect. It went against established principle. The clause is in two parts with ‘or’ joining the parts. The word ‘or’ is the determining factor in the construction of the clause.

The first part provides for failure to pay rent, with the second providing for breaches in general. The latter part relating to general breaches is the one calling for notice to be given to the lessee to rectify the breach within fifteen days from the date of issuance of the

notice by the lessor. What was at issue *in casu* did not relate to general breaches. It was concerned with the sole failure to pay rent, a material breach going to the root of the contract.

The clause should be construed in a manner that gives effect and meaning to “or” such that the two parts are read to be disjunctive as opposed to conjunctive. Within this jurisdiction, the meaning to place on the word ‘or’ has been determined in the case of *S v Ncube & Ors* 1987(2) ZLR 246. At p 264E, GUBBAY CJ, commenting on the word ‘or’ had this to say:

“In the first place, the word “or” is usually treated as disjunctive unless there is a compelling indication that in its context, it means “and”. See *Colonial Treasurer v Eastern Collieries Ltd* 1904 TS 716 at 719; *Hayward, Young and Co (Pty) Ltd v Port Elizabeth Municipality* 1965 (2) SA 825 (AD) at 829B; *Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors* 1982 (4) SA 427 (AD) at 444C-D.”

In turn, in *Greyling & Erasmus (supra)*, the court opined that:

“That conclusion rests on an interpretation of s 15 (2) (a) with which I cannot agree, *viz* that paras (i),(ii), (iii), and (iv) of s 15 (2) (a) are to be read conjunctively. No glaring absurdity or other compelling reason for disregarding the ordinary meaning of language suggests itself for construing 'or' conjunctively in the several places where it occurs in s 15 (2) (a). On the contrary, there are weighty considerations which, in my view, point to an intention to attribute to the word 'or' its normal meaning rather than an intention to treat 'and' as a substitute for 'or.' The first consideration is that a conjunctive interpretation would necessarily require proof of paras (ii) and (iv) in every case whereas these paragraphs concern issues which may often be irrelevant. The second consideration is this: in contra-distinction to the use of 'or' between paras (i) - (iv), the word 'and' links paras (i) - (iv) with para (v) - a clear indication that the Legislature had no intention of deviating from the ordinary meaning of two words which are in daily use.”

The Oxford Dictionary defines ‘or’ as a disjunctive that connects two or more alternatives. It also connects words, phrases, or clauses with the same grammatical meaning.

It was therefore imperative that the court *a quo* interpret the whole clause as it was duty bound to do in order to give meaning to the word “or” in the clause. A perusal of the judgment leaves one with the impression that the court *a quo* paid scant or no attention to clause 12.1. Instead, the court focused on clause 12.2. The court, to that extent, did not interpret the whole clause. Instead, it placed attention on the clause relating to default in general. The critical clause on rent remained untouched, and, as a result, the decision was reached based on an erroneous reading of the clause.

In *Aucamp v Morton* 1949(3) SA 611(A), the Appellate Division said:<sup>5</sup>

“Various criteria have been suggested in our cases for the purpose of determining whether or not a particular breach of contract by one party entitles the other to treat the contract as terminated by such breach and regard himself as discharged from further performance of his obligations under it, and there must be much learning on the subject in text books. It is not possible to find in them a simple general principle which can be applied as a test in all cases. This is not surprising because contracts and breaches of contract take many forms.

.....There are two statements of the principle which are frequently quoted, one by FLETCHER MOULTON, L.J...in the case of *Wallis v Pratt and Hughes*(1910(2), K.B. 1003at p 1012) and one by LORD BLACKBURN in *Mersey Steel and Iron Co v Naylor* (9 A.C 434 at p443). They are as follows:

‘A party to a contract who has performed, or, is ready and willing to perform his obligations under the contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words are so essential to its very nature that their non-performance may fairly be considered as a substantial failure to perform the contract at all.’

The rule of law as I always understood it, is that where there is a contract in which there are two parties, each side having to do something.....if you see that the failure to perform one part goes to the foundation of the whole, it is a good defence to say, I am not going to perform my part of it when that which is the root of the whole and substantial consideration for my performance is defeated by your misconduct.”

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<sup>5</sup> At 619-620

It is axiomatic that the primary obligation of a tenant in a lease agreement is to pay the stipulated rent at the stipulated time and the place provided for in the lease. Failure to do so constitutes a breach of a material term of the lease agreement. That the appellant breached the agreement was never in dispute. The court *a quo* found as such and there is no appeal against that finding

The appellant did not address its mind to the implications of the clause relating to breach. Had it done so, it would have been aware of the distinct treatment of the two parts of clause on breach. It would also have realised the implications of the word ‘or’ in the clause. In motivating its position that the cancellation was invalid on the alleged failure to give it the notice required in Clause 12.2, the appellant placed reliance on *Asharia v Patel & Ors* 1991(2) ZLR 276(S), where the court said at 279G-280D:

“The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.

Where a debtor has fallen into the *mora ex persona* after demand, the creditor can acquire a right to cancel the contract by serving notice of rescission in which a second reasonable time limit is stipulated, making time of the essence. Both demand and notice of rescission are necessary in order to allow for cancellation for non-performance. The two may be, and commonly are, contained in the same notice. Such notice will then fulfil a double function: It will fix a time for performance after which the debtor will be *in mora*, and create a right in the creditor to rescind the contract on account of that *mora*. See *Nel v Cloete* 1972 (2) SA 150 (A) at 163E; *Flugel v Swart* 1979 (4) SA 493 (FCD) at 502E-H; and generally *Joubert* General Principles of the Law of Contract at pp 202-203; *Kerr* The Principles of the Law of Contract 4 ed at pp 461-462; *de Vos Mora Debitoris* and Rescission (1970) 87 SALJ at pp 310-311.”

I find that the reliance by the appellant on the above authority was misplaced. The court in that case was considering *mora ex persona*, as it found that notice and demand were required before the contract could be validly cancelled. My reading of the above authority leads me to conclude that the parties in that case had not settled on a time for the due performance of its obligation by the debtor. As a consequence, before cancelling the contract on the premise of an alleged breach from the debtor, the court found that creditor had to give the debtor notice to remedy the breach. The demand by the creditor served a twofold purpose. First, it fixed a time for performance and placed the debtor *in mora* if performance was not made according to the demand. The notice to the debtor also resulted in the creditor acquiring the right to terminate in the event of the debtor failing to purge the default once he was placed *in mora* as the failure to adhere to the notice was the trigger that fixed the time for performance. Despite the appellant placing reliance on the authority, it is clearly distinguishable from the dispute in *casu*. It does not assist the appellant in any way as the facts are disparate.

Cancellation of the lease agreement *in casu* was effected by a letter from the respondent's legal practitioners. The portion relating to notice and cancellation read thus:

“In breach of the terms and conditions of the lease agreement mentioned herein, you have failed and/or neglected to pay your monthly rentals accumulating arrears thereby in the sum of USD 16 980.99 as at 16 September 2011. As a result of your said breach, our client has instructed us to cancel the lease agreement which we hereby do.

We demand that you vacate our client's premises and pay arrear rentals within three (3) days of this letter failing which legal proceedings for your eviction will be commenced without giving you further notice.”

The parties hereto agreed that the rent was to be paid on the first day of each month, in advance, but at the latest by no later than the seventh day of each month. The appellant was supposed to pay USD 5 000 every month. It admitted to being in arrears in an amount in excess of USD 16 000. Given that the time for performance, namely, the seventh of each month, was

fixed in the agreement, the appellant was *in mora ex re*. Thus, the clause providing for cancellation must be construed in the light of the principle that *mora ex re* entitles the creditor to cancel the lease without making demand for rectification of the breach.

Having due regard to the authorities cited above and the definition to be placed on the word 'or' in the clause on breach, I find that the court *a quo* was in error in its construction of the clause. The clause on breach had two disjunctive parts. Yet, the construction by the court *a quo* made the parts conjunctive even in the face of the existence of clause 12.1 and its significance as to the respective rights of the parties under the agreement. On a proper construction of the entire clause, it is clear that the clause providing for the cancellation on failure to pay rent did not require the lessor to give the lessee fifteen days' notice to rectify its breach. It was never the case for the respondent that it was required to give notice and did in fact give notice. The letter in terms of which cancellation was effected did not call upon the appellant to rectify its failure to pay rentals within fifteen days. Instead, it called upon the appellant to vacate the premises and pay the outstanding rentals within three days, failing which it faced eviction.

The view I take is that the agreement did not require that the lessor give the tenant notice to rectify the failure to pay rent. Unlike the position prevailing in *Asharia (supra)*, the parties in the dispute at hand had expressly provided a time for the rent payment in their contract of lease. Based on the authorities, the position is that the lessee would have been *in mora ex re* due to the failure to pay its rentals on time. Such breach, being *mora ex re*, entitled the lessor to cancel the lease immediately without giving notice to the appellant.

In view of this, it is unnecessary to determine the issues of the credibility or lack thereof of the parties' respective witnesses. The agreement speaks for itself. Thus, the respondent was entitled to an order evicting the appellant from the leased premises.

However, given the contention that the parties had reached a compromise, it becomes necessary to consider whether the court erred in ordering eviction in the face of a compromise, as is contended by the appellant.

### **WHETHER THE PARTIES REACHED A COMPROMISE**

Subsequent to the letter of 26 September 2011, which had the effect of cancelling the contract, the appellant, through its legal practitioners, addressed a letter to the respondent's legal practitioners proposing to settle the arrears in rent by the payment of an additional sum of USD 2500 over and above the monthly rental. While the appellant posits that a compromise was reached, the respondent's attitude is to the contrary. The respondent places reliance on two letters for its position. The first is a letter dated 3 November 2011, and the paragraph relied on is set out as follows:

“We have therefore prepared a Deed of Settlement copy of which is attached hereto for your consideration. If your client is agreeable to the terms contained in the Deed of Settlement, we request that urgent arrangements be made for the same to be signed without further delay. We will be grateful to hear from you in near course. (*Sic*)”

There was no response to the letter, and on 7 December 2011, the appellant was served with a summons. It reacted, and, on 8 December, its legal practitioners addressed a letter to the respondent's which reads as follows:

“Our client was served with the summons. They are paying in terms of the agreement reached. The reason why signing was delayed was that we wanted to ascertain the exact amount outstanding. Our client is still committed to resolving this matter out of court.”

The response from the respondent was unequivocal. On 14 December 2011, in a letter from its legal practitioners, the respondent threatened to apply for summary judgment if it did not receive a signed copy of the Deed of Settlement by close of business on 16 December 2011. The response from the appellant was cryptic. In a terse letter dated 20 December 2011, its legal practitioners stated:

“We refer to your letter dated 14 December 2011. Please bear with us while finalise our part with client.” (*Sic*)

There was no further correspondence on the matter. The respondent placed the appellant on terms to respond to the summons and declaration, and the parties proceeded to file pleadings in terms of the rules. There is no evidence on record that, apart from the letters referred to above, the parties met to discuss a compromise.

The letters speak for themselves. The respondent was unwilling to compromise its position without a commitment from the appellant in writing that it was willing to abide by the terms of the Deed of Settlement. Over and above the payment of arrear rentals, the respondent sought an agreement from the appellant that, if the latter defaulted in settling the arrears and paying rentals as proposed, then in that event, the full amount outstanding would become due and payable and the respondent would be entitled to obtain judgment on the unopposed roll. It goes without saying that none of the letters exchanged between the parties spoke to anything other than the payment of rentals and reduction of the arrears. The other issues raised in the draft deed of settlement were never related to in the letters. The appellant has not drawn the court's attention to any evidence that would counter the assertion by the respondent that it did not enter into any compromise on any terms that differed from those set out in the draft Deed of Settlement. The appellant refused to sign the same. I, therefore, find that no compromise agreement was reached.

The court *a quo* was correct to order the eviction of the appellant and its assignees from its premises.

### **WHETHER THE COURT WAS CORRECT IN ISSUING THE MONETARY AWARD**

I turn to consider the issue of the monetary award. It is not in dispute that there were no arrear rentals outstanding by the date of trial. Therefore, the award by the court *a quo* of the monetary claim for arrear rentals was erroneous and must be set aside. However, in view of the fact that the appellant remained in occupation after the cancellation of the agreement, it stands to reason that holding over damages would be due for payment. *Mr. Magwaliba* suggested that there was no evidence adduced as to what such holding over damages should be. I am constrained to agree.

The claim in respect of holding over damages was not proved. The respondent did not lead any evidence establishing how much the holding over damages were. Indeed, in his oral address, counsel for the respondent accepted that the entire monetary claim should be set aside. The concession is well made.

### **COSTS**

The appellant prays for the costs of the appeal. However, the respondent has left the decision to the court's discretion.

Each of the parties has achieved some success. In its heads of argument, the respondent conceded that both the cross-appeal and the monetary claims were not sustainable. In light of the concession, the only contentious issues were the validity of the cancellation of

the lease, the consequential eviction, and the alleged compromise. The respondent has prevailed on these issues. I believe this measure of success entitles it to an award of costs.

In clause 19.2, the agreement provides that “all legal costs and expenses including any VAT on services, collection commission, disbursements and legal practitioner/client charges which the landlord may reasonably incur in consequence of any default by the tenant in the due payment of rent for the premises or of any other breach.....shall be payable by the tenant on demand.....”

For this additional reason, the appellant cannot escape an order for costs. When the respondent issued summons, the appellant was in arrears in its rental obligations. The default was admitted and the evidence on record is that the last instalment on the arrears was paid on 9 July 2012. Thus the summons claiming arrear rentals was justified. I see no reason for not awarding the respondent its costs.

Even though the written agreement provides for such, the respondent has not sought an award of costs on the higher scale. It would seem that it is content with an award on the ordinary scale. It is therefore awarded the same.

## **DISPOSITION**

The appellant failed to pay rentals for the premises it was occupying in terms of a lease agreement. It was in arrears for a substantial sum. Thus it was in breach of its primary obligation under the contract of lease. The interpretation by the appellant that it was in *mora ex persona* and that, consequent thereto under the agreement, the respondent was obliged to furnish it with notice to rectify its breach by paying arrear rentals is faulty, as it has no

foundation in the circumstances prevailing herein. Failure to pay rent within the period stipulated in a lease agreement constitutes *mora ex re*, justifying cancellation of the lease without notice or demand. To the extent that the court *a quo* found that the agreement called for notice of fifteen days, such finding was clearly erroneous. There was no requirement for such. It follows therefore that the court *a quo* had to find that the appellant was *in mora ex re* and, further, that no notice to remedy the breach was required to be given by the respondent before it could exercise its right to cancel the contract of lease. The contract was validly cancelled. The appeal against eviction based on the cancellation of the lease must fail.

The judgment in respect of the monetary claim has not been supported and the appeal against that part of the judgment succeeds.

Accordingly, it is ordered that:

1. The appeal succeeds in part.
2. The appeal against the order for the eviction of the appellant, its assignees, sub-tenants, and invitees from the respondent's premises, namely shops 1 and 2 Benhay Art House situated at 120 Chinhoyi Street in Harare, is dismissed.
3. The appeal against the order by the court for the payment by the appellant of the following amounts-USD 22 730 in respect of arrear rentals, USD 5000 monthly as holding over damages together with interest on the said sums succeeds and the judgment by the court *a quo* is set aside and in its place is substituted the following:  

“The plaintiff's claims for arrear rentals, operational costs and holding over damages together with interest on the said sums be and are hereby dismissed.”
4. The cross-appeal is dismissed.
5. The appellant shall pay the respondent's costs of appeal.

**MAKARAU JA:** I agree

**BERE JA:** (no longer in office)

*Bvekwa Legal Practice*, appellant's legal practitioners

*Gill Godlonton and Gerranns*, respondent's legal practitioners