HB 252/17
HC 1299/11

NATIONAL RAILWAYS OF ZIMBABWE CONTRIBUTORY PENSION FUND

Versus

ART & BEAUTIE HAIR SALON

And

BRUNO ANTONIO CARSOLLA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 NOVEMBER 2016 & 10 AUGUST 2017

Civil Trial

Mrs J. Magosvongwe for the plaintiff
P. Ngulube for the 2nd defendant
No appearance for the 1st defendant

TAKUVA J: Plaintiff and defendants entered into a lease agreement in January 2009 whereby plaintiff leased to defendants shop 1 Africa House, Fife Street/10th Avenue, Bulawayo. Defendants were supposed to pay US$450,00 per month as rent exclusive of VAT. Defendants were also supposed to pay valued added tax at 15% of the net rental. Further, it was agreed that if the plaintiff cancelled the lease agreement and defendant disputed plaintiff's right to do so and remained in occupation of the premises then defendant would be obliged to pay rental and all other costs of the premises. Also in terms of the lease agreement, defendant is precluded from withholding or deferring payment of any rent by reason of the premises being defective or any other reason whatsoever. Plaintiff would have the right to forthwith cancel the lease and resume possession of the premises without prejudice to its claim of arrear rentals or any other amounts owing in the event of the defendant failing to pay rental on due date or commits any other breach of the terms and conditions of the lease agreement.

In breach of the lease agreement the defendants have refused, failed and or neglected to pay to plaintiff rentals in terms of the lease agreement. As at 5 April 2011, the defendants were US$8 117,51 in rental arrears. Plaintiff issued summons claiming the following relief:

(a) Cancellation of the lease agreement entered into between plaintiff and defendant on 30 April 2010 and subsequent addendums due to breach by defendants.
(b) Eviction of defendants and all those who claim title through them from shop 1 Africa House, Fife Street/10th Avenue, Bulawayo.
(c) Payment of the sum of US$8 117,51 as arrear rentals and operational expenses by the defendants.
(d) Payment of holding over damages of US$450,00 per month from 1 June 2011 to date of full payment.
(e) Costs of suit on a legal practitioner and client scale."

The defendants entered appearance to defend on 23rd day of May 2011. They subsequently filed their plea on 13 July 2011 with the 2nd defendant filing a counter claim for payment of the sum of US$10 475,44 together with interest thereon *a tempore morae* and costs of suit. The basis of the counter claim is that it was an implied term of the lease agreement that plaintiff would be responsible for repairing all damage caused by fair wear and tear at the property and repair all electrical faults and installations. He further alleged that during the currency of the lease agreement plaintiff failed to carry out necessary repairs to the property amounting to US$10 475,44 which he carried out for and on behalf of plaintiff. Consequently, the 2nd defendant prayed for a refund of this amount.

Plaintiff filed a plea in reconvention in which it denied the existence of an implied term that plaintiff would be responsible for repairing any damage caused by fair wear and tear at the property. It also argued that in terms of clause 6 of the lease agreement all works of repair must expressly be agreed between parties and a written consent must be prepared by the plaintiff. On that basis, plaintiff prayed for the dismissal of the 2nd defendant's counter claim with costs.

The joint pre-trial conference memorandum shows that only two issues were referred to trial. These are:

"1. Whether defendants are entitled to offset rentals with repairs effected.

2. Whether there was breach of the lease agreement. If so whether the plaintiff is entitled to cancellation."

Trial commenced after 2nd defendant had put up a spirited fight to postpone it. He used every trick in the book in order to stall the progress. When it eventually started 2nd defendant voluntarily excluded himself claiming that he was mentally unstable. His legal practitioner was present and I directed that the trial proceeds since the record is awash with letters of assumption and renunciation of agency by different lawyers. Between November 2016 and July 2017 the matter had been postponed three times at the instance of 2nd defendant. On 18 July 2017 he produced a letter from a Dr J Nganunu to the effect that he was "being followed up for diabetic ulcer of the fourth finger (right hand)". I reluctantly postponed the matter to the 20th of July 2017. On that date, 2nd defendant through his legal practitioner produced an unsigned photocopy of a letter purportedly written by a Dr H.T. Sadomba at Ingutsheni Hospital. In terms of the letter, 2nd defendant's diagnosis is put as – "1. Early Dimentia;

2. Diabetes;

3. Hypertension".

The rest of the letter states:

> "This is to confirm that the above named patient has been under my care since 3 years ago. Patient has improved but he still needs my medical attention. Regularly he needs 30 days off for recovery."

Having concluded that this was just but one of 2nd defendant's discredited ploys to buy more time in the shop, I ordered that the trial proceeds the following day (the 21st July 2017). I directed that his legal practitioner informs him of the decision.

Plaintiff opened its case by calling Mr Simon Moyo a partner at Knight Frank responsible for plaintiff's affairs with its tenants, the defendants included. His testimony was that in January 2009, the parties entered into a lease agreement. Instead of paying the US$450,00 per month exclusive of VAT, defendants did not pay the full amount arguing that the amount was inclusive of VAT. He thereafter did not pay rent in full and timeously, choosing instead to pay whatever

he felt like paying. Defendant approached the Rent Board which issued an order setting the rent at US$570,00 excluding VAT per month with effect from January 2010.

Mr Moyo produced a schedule of payments for the period January 2009 to July 2017. In terms of this schedule, defendants failed to pay the stipulated rental leading to a massive accumulation of arrears in respect of both VAT and rent. Three years later, the parties agreed on a monthly rental of US$600,00 from January 2013. Despite this agreement, defendants continued to default in their payments right up to July 2017. For these reasons, plaintiff is now seeking the cancellation of the lease agreement. According to Mr Moyo, the defendants, in terms of clauses 8.5 and 8.6 of the lease agreement, are not supposed to withhold rentals for any reason. As regards maintenance and repairs, the lease is littered with clauses dealing with such issues. In terms of clause 20 for example, the obligation for the sort of repairs defendants carried out are not the plaintiff's obligation. The witness also referred to clauses 14, 15, 16, 18, 28 and 33.

In view of these provisions of the lease, Mr Moyo said the 2nd defendant's counter claim is totally without merit and should be dismissed. The witness conceded however that there was no mutual agreement between the parties for the period January to December 2009. Plaintiff had set the rent at US$450,00 excluding VAT but when defendant was shown the lease, he altered the figure to US$206,00 per month. The parties remained deadlocked until January 2010 when rent was determined by the Rent Board through a Rent Order referred to earlier.

Under cross-examination, the witness pointed out the 2nd defendant as the person who signed the lease agreement and that he was running a Hair Salon which required him to comply with certain by-laws by the City of Bulawayo. In order to comply and be licensed, defendants were required to install a number of fittings and fixtures inside the shop. They also had to retile the entire floor area. He maintained that in terms of the lease agreement, it was the defendants' responsibility to meet the requirements set by the local authority. The plaintiff's duty is to provide the open floor space, carry out external repairs including the roof and paint work.

Commenting on why plaintiff allowed the situation to drag on for such a long time, Mr Moyo said the 2nd defendant was a difficult client to deal with in that he would engage several lawyers at different times to negotiate on his behalf but he would not sign an agreement in the end. At one time a deed of settlement was crafted but 2nd defendant made a U-turn and refused to sign it accusing his lawyer of not representing his interests effectively.

In my view, the evidence of Mr Moyo reads well. In fact apart from the period January to December 2009, his evidence on the breach of the lease agreement is unchallenged. He relied on a payments schedule spanning the entire nine (9) year period that depicts the defendants in those 108 months as stubborn tenants bent on breaching the lease agreement. This conduct has not been denied by the defendants whose only defence is some obscure claim to a refund. Plaintiff's witness was credible in all material respects and his evidence is accepted *in toto*.

After this witness, the plaintiff closed its case. *Mr Ngulube* for the 2nd defendant indicated that since his client was not in attendance, the 2nd defendant was not calling any witness. He then closed the defendant's case and urged the court to rely on the pleadings in arriving at a decision. In his closing submissions, he urged the court to exclude the period January to December 2009 from the total amount claimed. Further, he concluded that costs at a higher scale were not justified in that 2nd defendant assumed that if he effected repairs he would be compensated through a reduction in rent.

In my view, the 2nd defendant's assumption that they would be entitled to offset rentals with the costs of repairs was not well taken, in that they deliberately refrained from establishing the correct position which was glaring in the lease agreement. Not only that, defendants have always been legally represented, such that they could have obtained legal advice on this rather simple issue. Instead, they chose to ignore the material terms of the lease agreement. It appears their pre-occupation was the physical occupation of the shop and make money for themselves using the plaintiff's property. For these reasons, I find that the answer to the 1st issue is in the negative. Consequently, I would dismiss the 2nd defendant's counter claim.

As regards the second issue, Mr Moyo's evidence, supported by the terms of the lease agreement and the payment schedule, show quite clearly that the defendants breached the lease agreement. In terms of clause 33 of the lease agreement, such breaches entitle the plaintiff to cancel the lease agreement and claim arrear rentals and costs at attorney-client scale. I find therefore that defendants breached the lease agreement by allowing rent to be in arrear after the 7th day of the month for which it was due. I further find that the plaintiff is entitled in terms of the agreement to cancel the lease.

In terms of clause 33.2 of the lease agreement, the plaintiff is entitled to costs on the legal practitioner client scale. The clause states;

> "33.2 In the event that the Landlord consults legal practitioners following any breach of any term or condition of this agreement, the Tenant shall meet the costs incurred by the landlord in protecting, preserving or pursuing its rights and/or in recovering any moneys due by the tenant such costs being calculated on legal practitioner and client scale, as if payable to the legal practitioner out of the client's own funds, and the Tenant shall also meet the collection commission properly incurred with the Landlord's legal practitioners."

The award of costs is a matter whole within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The leading authority on the award of costs on an attorney and client scale is *Mudzimu* v *Chinhoyi Municipality* 1986 (3) SA 140 (H) where it was stated that, "by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case may consider it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that a successful party will not be out of pocket in respect of the expense caused by the litigant."

In casu an award of attorney and client costs is warranted because the defence was frivolous, vexatious and was taken for the sole purpose of gaining time. Such conduct is blameworthy, reprehensible and mendacious.

Finally, it became common cause between the parties that the period January to December 2009 be excluded from exhibit 2, the schedule showing payments and arrear rentals. This means that a figure of US$3 998,90 should be deducted from US$50 146,36 leaving the amount owing as US$46 147,46.

Accordingly, it is ordered that:

1. The lease agreement entered into between plaintiff and defendants on 30 April 2010 and subsequent addendums be and is hereby cancelled.
2. The defendants and all those claiming title through them be and are hereby evicted from shop number 1 Africa House, Fife Street/10th Avenue Bulawayo.
3. The defendants pay to the plaintiff the sum of US46 147,46 being arrear rentals.
4. The defendants pay plaintiff's costs of suit on an attorney and client scale.

Danziger & Partners, applicant's legal practitioners