

GAMBOGE INVESTMENTS (PVT) LTD**Versus****THE OCCUPIER SHOP 4 – SIKHANYISO SHIRI**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 18 JANUARY, 20 MARCH 2018 & 31 JANUARY 2019

Opposed Application

S. Mlambo for the applicant
Respondent in person

TAKUVA J: This is an application for summary judgment in terms of o10 r64 of the High Court Rules 1971. Applicant issued summons under case number HC 1533/16 for the recovery of arrear rentals, eviction of the respondent and all those claiming occupation through the respondent, cancellation of the lease agreement, hold over damages, water charges and costs of suit. The suit arose from repeated breaches of the lease agreement which has expired by the effluxion of time as well an acknowledgment of debt which has not been adhered to.

Respondent entered appearance to defend. Applicant being of the view that respondent has no *bona fide* defence caused to be filed this application for summary judgment. At the time of the hearing applicant had, in the summons claimed the sum of US\$57 021,00 being arrear rentals for the period 1st January 2009 to June 2017. Applicant had also claimed the sum of US\$2 020,00 being water charges consumed by the defendant on the plaintiff's (applicant's) premises for the period 1 January 2009 to June 2017. The respondent raised the defence that part of the amount had prescribed.

Applicant's original relief was as follows;

- “(1) Payment in the sum of US\$ 57 021,00 being arrear rentals for the period January 2009 to June 2017.
- (2) Payment in the sum of US\$2 020,00 being water charges from January 2009 to date.

- (3) Payment in the sum of US\$2 450,00 being costs for legal services paid to debt collectors previously dealing with the case.
- (4) Confirmation of the cancellation of the lease agreement between the parties in respect of shop 4, 42 Lobengula Street, Kelsheker Building, Bulawayo.
- (5) An order that the defendant and all persons claiming occupation through the defendant be evicted forthwith from shop 4 Kelsheker Building, 42 Lobengula Street, Bulawayo.
- (6) Interest at the prescribed rate from date of summons to date of full payment.
- (7) Hold over damages equivalent to the monthly rental from June 2017 to date of eviction.
- (8) Costs of suit on attorney and client scale”.

In her opposition, respondent raised the following defences which she unfortunately had not raised in her plea;

- (a) the deponent had no authority to depose to an affidavit on behalf of the applicant;
- (b) the lease agreement was not signed by herself and as such, it was a forgery;
- (c) the respondent had not acknowledged the debt;
- (d) the respondent has an oral lease agreement with Mr Ezobal Shah for an indefinite period having commenced on the 1st January 2009;
- (e) the oral lease agreement still subsists;;
- (f) the letter of demand was issued by the lessor and
- (g) that part of the debt has prescribed.

In an application for summary judgment, the applicant must show that respondent’s opposition is not *bona fide* or ill founded and has entered appearance for dilatory purposes. Put differently, the respondent must outline a defence and the material facts upon which it basis its defence with sufficient clarity so as to enable the court to decide whether he has a *bona fide* defence which if proved at the trial will constitute a defence to plaintiff’s claim. See *Dube v Medical Investments International Ltd* 1989 (2) ZLR 284 and *Mbayiwa vs Eastern Highlands Motel (Pvt) Ltd* S-139-86.

By raising new issues in her notice of opposition, respondent is belabouring under a misapprehension that she can treat a summary judgment application as representing a fresh

claim. Notwithstanding that an application for summary judgment is issued under a new case number, the relief sought by the applicant is based on the summons as applicant would only be verifying its claim as set out in the summons. See *P.B. Arnet & Son (Pvt) Ltd vs Steven Manota & Ors* HH-17-13.

It seems respondent's defences are an afterthought in which case she seeks to build her case as the matter progresses.

Be that as it may I will consider all the defences, keeping in mind that the sole issue is whether or not respondent has a *bona fide* defence to the applicant's claim.

The respondent's challenge on the deponent's authority to depose to an affidavit is neither here nor there. It is an established principle of law that the production of a company resolution has been blown out of proportion and is not necessary in every case as each case must be considered on the merits. What is key is that the courts must be satisfied that it is the applicant litigating and not an unauthorized person. See *Tianze Tobacco Company (Pvt) Ltd vs Vusumuzi Mutuyedwa* HH-626-15.

In casu, respondent's challenge to the deponent's authority is *mala fide* because she did not challenge it in the main action. Further, that authority was alluded to in the acknowledgment of debt signed by Mr Shiri from which a reasonable inference be made that he was making reference to the deponent as the lessor.

In her plea, respondent strongly denied the existence of a lease agreement between herself and the applicant but in her opposing affidavit she changed goal posts by challenging the validity of the lease on the grounds that she had not signed the lease. She claimed that the lease was signed by "some other person" she referred to as a "Mr". This defence is not *bona fide* in that the person who in fact signed the lease is respondent's husband and co-director in a company called Roblee Investments (Pvt) Ltd. According to the current CR 14 forms for this company, respondent and Mr J. Shiri are directors. However, the lease is in the respondent's name but all correspondence are in Roblee's name. Quite clearly, respondent has not been

candid with the court in so far as the concealment by herself of her relationship to Mr J. Shiri “who obviously signed the lease agreement with respondent’s permission and knowledge. Further, the acknowledgment of debt signed by Mr J. Shiri makes reference by using words “we/us” which strongly suggest the inclusion of the respondent who has the lease agreement with the applicant.

Respondent has sought to deny that there is a written lease agreement between her and the applicant by stating that she has a verbal lease with Mr Ezobal Shah the lessor. The existence of a verbal lease agreement flies in the face of the written lease signed on 29 June 2011, wherein the applicant is clearly identified and the lessor and the respondent the lessee. On the papers, it is clear that Mr Ecobal Shah is not the lessor as the premises are owned by the applicant. Mr Shah and the deponent are father and son respectively. Both are applicant’s directors. Therefore, the alleged existence of an oral lease agreement is a creation of the respondent in order to escape the terms of the lease of 29 January 2011.

In her plea, respondent admitted being a statutory tenant an indication that the lease had expired. Indeed the lease executed on 29 January 2011 was valid for 6 months from 1st January 2011 to 30 June 2011. This fact was corroborated by Mr J. Shiri when on the acknowledgment of debt, he indicated that the deponent had allowed “them” to trade as long as “they” paid current rentals due for 6 months up to June 2011. The respondent’s contention that the oral lease was for an indefinite period is inconsistent with the admission that she was a statutory tenant as the two are mutually exclusive. The position here is that respondent is a statutory tenant who has not been paying rent as shown on the payment schedule filed by the applicant.

Further in her plea respondent denied owing any money at all to the applicant as she was and is not in arrears nor had she breached terms of the lease. However, having so denied, respondent makes a u-turn and avers that part of the claim has prescribed. Be that as it may, even assuming that part of the claim has indeed prescribed, respondent cannot defeat an application for summary judgment as the part which has not prescribed remains outstanding and the defence that respondent is not in breach collapses.

In view of the fact that this is a legal point which has not been fully argued by the parties, I directed that both file supplementary heads of argument on the issue. Both have since complied with that order. The supplementary heads have been filed to address applicant's relief in paragraphs 1 and 2 on page 55 of the record.

Prescription is governed by the Prescription Act, Chapter 8:11. In terms of s15 (d) a debt prescribes after three years after which it cannot be recoverable at law. However, section 18(1) of the same Act provides that prescription can be interrupted by a debtor acknowledging his/her liability and that the acknowledgment should be clear and unequivocal. *First Merchant Bank of Zimbabwe Ltd vs Fortress Industrial Investments (Pvt) ltd & Anor* 2000 (1) ZLR 22 (S).

In the present matter, *Mr Mlambo* for the applicant rightly conceded in my view that taking into account the interruption, the three years backwards from date of issue of summons being 12 June 2017 takes us back to 12 June 2014. Applicant must therefore claim arrear rentals as well as water charges from the 12th day of June 2014 to 12 June 2017. In respect of rental arrears the total payment respondent is liable to is in the amount of US\$ 24 050,00 instead of US\$57 021,00.

In respect of water, respondent is liable to pay to applicant the sum of US\$860,00 being water consumed by the respondent from 12th June 2014 to 18 June 2018, being the date respondent moved out of the applicant's premises. Attached to applicant's supplementary heads is a schedule showing how the above amounts have been arrived at.

As I indicated above, respondent does not have *bona fide* defences in respect of the claims and applicant's case remains unimpeachable. What respondent sought to do is to cloud the court with irrelevant issues thereby circumventing the real issue that she ought to be evicted arising from non-payment of rentals and other charges.

The claim for "costs for legal services paid to debt collectors previously dealing with the case" is incompetent as there is no proof that those debt collectors followed a legitimate procedure of debt collection. However, applicant will be awarded costs of suit.

In the circumstances, it is ordered that;

Judgment be and is hereby entered for the plaintiff and against the defendant:-

1. Payment in the sum of US\$24 050,00 being arrear rentals for the period 12 June 2014 to 12 June 2017.
2. Payment of US\$860,00 being water charges from June 2014 to June 2017.
3. Confirmation of the cancellation of the lease agreement between the parties in respect of shop 4, 42 Lobengula Street, Kelsheker Building, Bulawayo.
4. An order that defendant and all persons claiming occupation through the defendant be evicted from shop 4 Kelsheker Building, 42 Lobengula Street, Bulawayo.
5. Interest at the prescribed rate from date of summons to date of full payment.
6. Holdover damages equivalent to the monthly rental from June 2017 to date of eviction.
7. Costs of suit

Messrs Majoko & Majoko, plaintiff's legal practitioners