

E & J LEASING (PRIVATE) LIMITED
vs
YUSUF WADEE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 16, 17 AND 25 February, 2004

Urgent Chamber Application

Mr *R Cowper* for applicant
Mr *C Lemani* for respondent

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CHITAKUNYE J: The applicant is owner of Stand 48 St George Street

Ardbennie, Harare. The respondent leases the said property from the applicant.

On the 26th November, 2003, the applicant wrote a letter to the respondent giving respondent two months notice to vacate the leased premises on the 31st January, 2004 when the lease period expired.

In the same letter the applicant referred to other prior dates which he had given respondent similar notice.

The respondent objected to the notice to vacate. The respondent's then legal practitioner in his letter to the applicant dated 27th November, 2003 made it clear that -

"My client will not vacate the premises on 31 January 2004 and will litigate strenuously in this regard".

As a result of the statement on the 9th February 2004 the applicant filed this application. The applicant seeks an order that -

- "(1) It is confirmed that the lease agreement between applicant and respondent is hereby cancelled;
- (2) The respondent shall vacate the leased premises within 7 days of the granting of this order, failing which the Deputy Sheriff, Harare be and is hereby ordered to evict the respondent, his employees and any other persons claiming any right of occupation to the leased premises through the respondent from the leased premises....".

The grounds of opposition included that -

- "(1) the application is not urgent; and
- (2) the applicant has not demonstrated good and sufficient cause for wanting to repossess the premises."

From a reading of the documents filed of record and submissions by counsel, it is apparent that this was not a one off offer and acceptance contract. The parties discussed the contract over a period leading to firstly the Heads of Agreement on the 25th April 2001 and through the lease agreement on the 21st November, 2001.

In the Heads of Agreement the issue of rentals was left for further discussions.

The heads of Agreement provided for a 5 years lease period with an option for renewal for a further 5 years. It was witnessed by two witnesses for each party.

The Lease Agreement on the other hand provided a lease period of 3 years from 1st February 2001 to 31 January 2004. The agreement is silent on the issue of renewal after the 3 years.

As can be noted there are some material differences between what the parties agreed to and signed for on the 25th April 2001 and on the 21st November 2001. The effective date for the Heads of Agreement was stated as 31 May 2001, whilst the effective date for the Lease Agreement was stated as 1st February 2001.

The applicant argued that the contents of the Lease Agreement are the final terms the parties agreed to. In the Heads of Agreement are therefore irrelevant.

The Respondent on the other hand contended that the Heads of Agreement cannot be totally ignored. He agreed to purchase some assets from the applicant on the understanding that the lease period will be long enough for him to recoup his expenses. This is why they originally agreed on a term of 5 years with an option to renew for another 5 years. When they were discussing the final lease agreement they came to a term of 3

years to be renewed for a further 2 years. This would ensure he still had the initial 5 year period.

He thus signed the agreement on the understanding that after the initial 3 years the lease would be renewed for a further two years. But for that he could not have agreed to the shortened lease period.

He was thus shocked when the applicant purported to give him notice to vacate the premises at the end of January 2004.

There is clearly a dispute as regards what the parties intended to be the practical effect of what they were entering into.

The applicant submitted that Clause 33 of the Lease Agreement excludes consideration of anything outside the agreement itself. Clause 33 is still subject to interpretation.

The clause provides that -

"This Agreement represents the entire contract between the parties and no addition or amendments thereof shall be of any force or effect unless and until reduced to writing and signed by the parties, each before 2 (two) witnesses".

Though signed on the 21 November, 2001 the lease agreement provides that it is effective from February 2001. There is however no specific provisions regarding the Heads of Agreement which the parties had reduced to writing and had signed before two witnesses for each party. The Heads of Agreement were effective from 31 May 2001 implying that by the time the lease agreement was signed for on the 21 November, 2001 the parties had been operating under the Heads of Agreement whether the lease was meant to obliterate everything from the Heads of Agreement is unclear.

It may also be noted that from the time the applicant notified the respondent of its intention to terminate the Lease Agreement on the 31 January 2004, the respondent

indicated that he would vigorously contest the said termination. The basis for the challenge being that it is not what the parties intended when they entered the Lease Agreement.

As far back as early November 2003 the applicant indicated that the respondent was objecting to the termination of the Lease Agreement. That being the case the applicant should have set in motion a normal court process for the termination of the agreement with each party being given an opportunity to further argue their case. Indeed the applicant may be desirous to use the premises for its own needs such as food production but surely applicant knew well before the end of January 2004 that respondent would not vacate the premises.

If applicant ignored the clear signal from the respondent and proceeded with arrangements to take occupation on the 1st February 2004 that cannot be reason to bring this case on an urgent basis.

I am of the view that this is not an appropriate case to be dealt with on an urgent basis.

There are disputes of facts that need to be resolved with each party being given an adequate opportunity to present their case.

The application is thus dismissed with costs.

Gollop & Blank, applicant's legal practitioners
Hove, lemani & Associates, respondent's legal practitioners