SUPLINE INVESTMENTS P/L
versus
FORESTRY COMPANY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 23 and 31 October 2007.

Opposed Application

Adv *E Morris,* for applicant
Mr *J Zviuya,* for respondent.

MAKARAU JP: The applicant is a property owning company that leased certain premises to the respondent in terms of a written lease agreement that has been varied from time to time with the written consent of the parties. A dispute arose between the parties as to the payment of rentals for the leased premises resulting in the applicant canceling the lease agreement between the parties on 24 January 2007. At the time of the cancellation of the lease agreement, the applicant alleged that the respondent was in arrears with its rentals to the tune of $ 5 810 000-00.

On 11 April 2007, the applicant addressed another letter to the respondent, alleging that the rental for December 2006 and March 2007 had not been cleared and that nothing had been paid for the month of April 2007, resulting in the cancellation once again of the lease agreement.

In its letter dated 24 January 2007 and in which the cancellation of the lease was first communicated to the respondent, the applicant stipulated that the rentals that were in arrears were for the months of September, October , November and December 2006 and for January 2007. Payments had been made for September to December 2006 but in amounts that the applicant alleges were underpayments. No payment had been made as rentals for January 2007. In responding to the allegations and cancellation of the lease agreement, the respondent conceded in a letter dated 25 January 2007 that no rentals had been paid for January 2007 and explained the circumstances leading to the non-payment of the rentals. I shall revert to the contents of this letter in detail.

It is not clear on the papers when the rentals for January 2007 were finally paid but in a letter dated 5 February 2007, the applicant's legal practitioners acknowledged receipt of

payment of the outstanding rentals. In the same letter, it brought to the attention of the respondent an alleged shortfall in the rentals and the accrued interest and maintained that the cancellation of the lease would hold and the instructions of the applicant would be sought on whether or not to reinstate the lease.

On 24 April 2007, the applicant filed this application seeking an order evicting the respondent from the leased premises together with costs of suit on the higher scale.

The application was opposed.

In opposing the application, the respondent relied on four main issues. It firstly raised a point in *limine* attacking the authority of the deponent to the applicant's founding affidavit. It then alleged that the agreement of lease was illegal as it fixed the rentals of the property in foreign currency. As a third defence, the respondent denied that the rental for January 2007 was outstanding at the time of the filing of the application. Finally, the respondent contended that the same matter is pending before the Rent Board and was thus raising the plea in bar of *lis alibi pendens.*

At the hearing of the matter, the respondent withdrew the first two legs of its defence leaving the *lis alibi pendens* defence and one objecting to the procedure adopted by the applicant.

I shall deal with each in turn starting with the procedural one.

The respondent argued that there are serious disputes of facts that arise from the application and the applicant must have proceeded by way of action rather than by filing this application.

In support of this argument, Mr *Zviuya* referred to the dispute relating to the amount of rent payable within each quarter and whether or not CB Richard Ellis acted as the agent of the lessor or of the lessee in submitting a Rental valuation Report in respect of the leased premises for each quarter.

In my view it is the settled practice of this court for which authority is hardly necessary that for a dispute of fact to deter a court from resolving a dispute before it, the dispute must be material.

The need on the part of the court to be robust is now common place, the exhortation having been made by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1*987 (2) ZLR 338 (S)at 339C-D. The exhortation was taken up and endorsed by SANDURA JA in *Van Niekerk v Van Nierkerk and Others* 1999 (1) ZLR 421 (SC).

It remains the practice of this court to endevour to resolve applications without calling evidence where to do so will not result in a miscarriage of justice. I am to be guided by this practice in determining the application before me.

In *casu*, I am convinced that the dispute of facts are not material to the resolution of the dispute between the parties and that in resolving the matter without referring it to oral evidence, I will not be causing any prejudice to either of the parties.

It is not in dispute that as from September 2006 to date of issuance of summons, the parties did not agree as to what constitute fair rentals for the property. CB Richard Ellis was appointed in terms of the agreement to set rentals for the three months of each term. This it did by stipulating rental payable for each month of the term. Allegations were then exchanged as to whose agent CB Richard Ellis and whether it had an obligation to set the rent for each individual month or for the entire period of three months. This dispute was referred to the Rent Board, giving rise to the respondent' plea of *lis alibi pendens*, which I deal with below.

It is my considered view that the factual dispute relating to the amount of the rental payable each month does not materially affect whether or not the rental for January 2007 was paid, even in the amount admitted by the respondent as the correct amount. A tenant has an undisputed obligation to pay rentals for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non- payment of rentals even if its challenge to what constitutes fair rentals if subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentions as to what constitutes fair rentals are validated.

Further, it is my view that the dispute relating to whose agent CB Richard Ellis was is a non- issue as the parties agreed in the various addenda to the lease agreement that the rental for each quarter would be determined by CB Richard Ellis. The parties therefore in my view appointed CB Richard Ellis as their joint but independent point of reference.

In my view, the simple issue that falls for determination in this application is whether the admitted failure by the respondent to pay rent for January 2007 was such a breach as to entitle the applicant to cancel the lease.

I think it was.

The contract between the parties specifically provided that rent would be paid "on presentation of invoice and statements reconciling the period." It is common cause that the invoice for January 2007 was furnished to the respondent on 14 January 2007. The respondent itself concedes that rent was not paid until the letter of the applicant's legal practitioners of 24 January 2007 canceling the lease agreement was received. In the circumstances, the respondent was clearly in breach of the lease agreement. The breach committed by the respondent was contemplated by the parties and specifically provided for in clause 25 of the lease agreement. It was the common intention of the parties that should the lessee fail to pay rent within 7 days of its due date, then the lessor would be entitled to cancel the lease as it did. It is common cause that the rent was due on 14 January 2007 when the invoice was presented to the respondent. It remained unpaid up to 24 January 2007, more than 7 days after due date when the letter canceling the agreement was delivered.

Mr *Zviuya* attempted (and valiantly so in my view), to prevent the applicant from relying on the clear and admitted breach of the lease agreement by the respondent by raising the issues of *lis alibi pendens* and waiver on the part of the applicant.

It is trite that the plea of *lis alibi pendens* is not a complete bar to the bringing of proceedings in this court. It is merely a plea to the court for the court to stay the proceedings before it to allow the other proceedings to be completed.

"As is made clear in *Mhungu v Mtindi* 1986 (2) ZLR 171 (S), where a plea of *lis alibi pendens* is raised, the court has a discretion as to whether or not it should stay the proceedings. See too *Williams v Shub* 1976 (4) SA 567 (C)." per SMITH J in *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000 (2) ZLR 84 (HC).

For those seeking the jurisprudential basis for holding that a plea of *lis alibi pendens* is in the discretion of the court, reference may be made to the remarks of GILLEPSIE J in *Zikiti v United Bottlers* 1998 (1) ZLR 389 (HC).

For my purposes I seek guidance from the learned judge's remarks that the power of the court to stay proceedings on the grounds that the matter is pending before another tribunal

should be sparingly exercised since the courts of law should be open to all, and it should only be in exceptional circumstances that these doors will be closed upon a litigant.

The attempt by counsel for me to withhold my jurisdiction at this stage fails to succeed for in my view, to do so will unnecessarily prolong the resolution of the dispute between the parties and lead to a duplication of proceedings as a rent board cannot order the eviction of a tenant from the leased premises.

I now turn to the issue of the alleged waiver by the applicant to rely on the clear breach by the respondent in failing to pay on time the rent due for January 2007.

It is my view that by continuing to accept rentals from the respondent after the letter of 24 January 2007 canceling the lease, the respondent did not waive its rights to rely on the breach by the respondent as it was made quite clear in correspondence that ensued between the parties that rentals were being received without prejudice and were actually damages for holding over. In such circumstances, the acceptance of the payments cannot be construed as condoning the breach by any stretch of the imagination. In my view, the facts of this matter are to be distinguished from the facts in *Stracon Developmnet (Pvt) Ltd v Guer* 1990 (1) ZLR 357 (H), relied upon by Mr *Zviuya*, where the landlord purported to cancel the lease after receiving the rental for that month and continued to receive further rentals timeously paid. It then sought to rely on the alleged past breach.

For waiver to operate there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. In *casu*, the applicant was quite aware that it was entitled to cancel the lease agreement on account of the breach of January 2007. It proceeded to cancel the lease and to inform the respondent that all future payments would be accepted without prejudice to its rights to proceed to cancel the lease agreement. It then described the payments that it demanded from the respondent rentals/ holding over damages. At no stage in my view did it blow hot and cold. It was quite clear it had cancelled the lease agreement and was now entitled to damages for the continued use of its premises by the respondent.

On the basis of the foregoing, I find it hard to establish a legal basis upon which the continued occupation of the leased premises by the respondent can be justified.

Finally, it was submitted that in the event that I grant the application, my order should operate notwithstanding the noting of an appeal in the matter. I believe that our law and

procedures provide ample protection to the applicant in the event that an appeal is noted and such is perceived to be without merit.

In the result, I make the following order:

1. The respondent shall give vacant possession of no 49 Coventry Road to the applicant within 10 days of service of this order failing which the Deputy Sheriff is hereby authorized to evict the respondent and all those occupying through it and hand over vacant possession of the premises to the applicant.
2. The respondent shall pay the applicant's costs of this application.

Wintertons, applicant's legal practitioners.
Bere Brothers, respondent's legal practitioners.