

CAFCA LIMITED  
versus  
HIGH PEAK MARKETING (PVT) LIMITED

HIGH COURT OF ZIMBABWE  
MTSHIYA J  
HARARE, 15 September 2009 & 21 October 2009

*D.L.L Morgan*, for applicant  
*C.P. Moyo*, for respondent

MTSHIYA J: The applicant is the owner of premises known as 11 Stourbridge Road, Donnington, Bulawayo (the premises). It is common cause that in August 2004 the applicant appointed the respondent as its agent for the distribution or sale of its products in Matabeleland. In order to facilitate that arrangement the applicant, through a signed agreement dated 31 August 2004, leased its premises to the respondent. The initial period of the lease was to run from 1<sup>st</sup> September 2004 to 30 November 2004. The lease agreement was subject to extension upon agreement between the parties. The lease was silent on the notice period for termination.

The agency agreement (i.e. distributorship agreement) which prompted the lease agreement was of no fixed duration.

It is also common cause that in a separate arrangement the parties had agreed that depending on agreement on a purchase price the respondent would buy the premises. As revealed in the papers before the court, the parties were never able to agree a purchase price for the premises. The premises therefore remained the property of the applicant.

On 10 April 2008 the applicant gave respondent three months notice to terminate both the lease agreement and the distributorship agreements. The respondent, in terms of the notice, was to vacate the premises at the end of the three months notice. This was understood by both parties to be 31 July 2008. The reason for the termination of both agreements was that the applicant was dissatisfied with the respondent's performance on the distributorship agreement. The relevant part of the notice read as follows:-

“We note with concern the decline in your performance over the given period. As you are aware as a distributor we expect a contribution of at least 15% of our monthly turnover.

We are also concerned by market information that one of your customers has received imported cable via DSK Wholesalers in conflict with our exclusive arrangement with High Peak.

On the basis of the above scenario, we are considering other plans of distribution in the Bulawayo and Southern area of Zimbabwe as we realize there is adequate potential which is evidently under siege from imports from Botswana and South Africa. We are therefore giving you three months notice to rescind your distributorship and vacate 11 Stourbridge in, Donnington so that we can resuscitate our CAFCA operations”.

In response to the above notice the respondent, through Kevin Ellerman, requested for an extension in the following terms:-

“I am in receipt of your e-mail re vacation of the premises at 11 Stourbridge Road at the end of July I have taken it up with Worthwhile and we would like to request that you permit us to remain in the premises until after a written presentation on Worthwhile’s part is submitted to the CAFCA Board sitting in August as per Rob’s suggestion”.

On 23 September 2008, the applicant, through its chairman responded to the request for extension as follows:

“We acknowledge receipt of your submission made directly to the Board in appeal to the Executive’s decision to terminate both the CAFCA distributorship and the lease of 11 Stourbridge Road property.

The Board studied and discussed in detail the documents presented. It is with regret that we must advise that the Board stands by and supports the decision taken by management.

On the distributorship the Board notes that there is no disagreement on the facts and therefore the rationale given by management to the Board previously to terminate still holds valid.

On the property, there is dispute as to any authority given to either sell the property or allow the tenant to make renovations at our risk or cost. We can find no approval given. In fact the last paragraph of the attached lease agreement dated 31 August 2004 states, “the property and effects within shall be returned to the landlord in the same condition as at the start of the lease period”

As notice had previously been given, we would like to request that you vacate the property by the end of October 2008 so that we may take vacant possession on Monday 3 November 2008”.

On 23 September 2008, the respondent again requested that the period to vacate the premises be extended to the end of December 2008. The request was granted, with the period to vacate the premises being extended to 5 January 2009. The respondent did not, however, vacate the premises on 5 January 2009.

The papers before me show that the matter was then referred to the respondent’s legal practitioners who, in the main, argued that the applicant was not entitled to order the

respondent to vacate the premises “until or unless the issue of the sale to it of the property is rendered. The lease was to continue until the premises had been sold to respondent”.

On 24 March 2009 the applicant filed this application seeking the following order:-

- “1. That respondent’s lease from plaintiff of 11 Stourbridge Road, Donnington, Bulawayo is confirmed as terminated at 31 December 2008.
2. That respondent vacate the said premises within seven (7) days of service of this order at 11 Stourbridge Road and failing compliance therewith that the Deputy Sheriff evict from the said property the respondent and all those claiming a right of occupation thereof through respondent.
3. That respondent pay the costs of this application.
4. That applicant shall be entitled in due course to bring an action against respondent for holding over and any other damages applicant may have suffered in consequence of the occupation of the property by respondent”.

The applicant submitted that it had given reasonable notice for the termination of the lease. It also argued that in requesting for extensions the respondent acknowledged the existence of the notice and indeed the fact that the lease was terminable on notice. Accordingly due to the extensions the termination date became the 5<sup>th</sup> of January 2009.

The applicant further submitted that the lease agreement, was based on the distributorship agreement. The distributorship agreement was the basis for both the sale and lease agreements. The distributorship agreement had terminated on 31 July 2008. The parties had failed to agree on a purchase agreement for the property. There was therefore no longer any basis for the lease agreement to continue. In reference to the issue of sale, the applicant submitted that “a lease agreement which is dependent for its duration on an event, which may never occur cannot be treated as an indefinite lease but as a lease terminable on reasonable notice”. In the circumstances, argued the applicant, three months notice was reasonable.

The respondent submitted that the distributorship and lease agreements were to be treated separately and that being the case the applicant could not rely on the distributorship agreement to terminate the lease agreement. The respondent argued that the applicant’s notice of 10 April 2008 did not clearly state that it was the applicant’s intention to terminate the lease. Furthermore, it was argued, the applicant had not disclosed whether or not the extensions of the period within which to vacate the premises were consented to by the respondent. It was argued that such extensions called for a fresh notice.

The papers before me and the submissions by both parties confirm to me that:

- (a) There were three agreements between the parties, namely the distributorship agreement, the lease agreement and the sale agreement. The sale agreement was never reduced to a formal written agreement as acknowledged by the applicant who, on 28 September 2004, stated, in part, “then we can look forward to drawing up the final purchase agreement to enable the formal hand over of the premises this December 1, 2004”. As already stated, there was never any such final agreement because the parties failed to agree on the purchase price for the premises.
- (b) Although separate, the agreements, in my view constituted a package in the sense that the applicant was saying: “In order for you (respondent) to carry out the business of distributing my products in Matabeleland as agreed, I shall lease to you 11 Stourbridge Road, Donnington, Bulawayo and in the event of us agreeing on a purchase price, I shall sell the premises to you”. The sale of the premises did not occur as indicated in (a) above.
- (c) The challenge to the termination of the distributorship agreement did not succeed and accordingly that agreement terminated on 31 July 2008. This is confirmed by the applicant’s letter of 23 September 2008 reproduced herein at page 3.
- (d) The respondent acknowledged the three months notice of termination of both the distributorship and lease agreement dated 10 April 2008. The respondent then specifically requested for extensions of the period to vacate the premises. The respondent did not then argue that the notice excluded the lease agreement. Extensions were granted with the last one ending on 5 January 2009. The respondent has however, refused to vacate the premises.

Given the above scenario, I am inclined to ignore details relating to rentals and dwell on the issue of whether or not a reasonable notice was given to the respondent to vacate the premises. In so doing one would have to determine whether or not there was indeed a notice given and if so, was the three months notice of 10 April 2008 reasonable and applicable to the lease agreement. In any case the respondent’s main argument is that there was never any notice to terminate the lease agreement.

My finding is that the notice of 10 April 2008 applied to the lease agreement dated 31 August 2004. In the last paragraph of the notice the applicant clearly requested the respondent to vacate the premises after the three months notice. The applicant wrote: “We are therefore giving you three months notice to rescind your distributorship and vacate “Stourbridge in Donnington so that we can resuscitate our CAFCA operations”. It is

therefore clear to me that the respondent acknowledged the notice and hence its specific requests for extensions of the period to vacate the premises. The requests were not for the extension of the distributorship agreement. The requests were for the extension of the lease agreement. The respondent clearly understood that vacating the premises meant the termination of the lease. I therefore agree with the applicant's submission that there could be no lease without the right of occupation. The respondent's argument that extensions killed the original notice, is, in my view, misplaced. The extensions were anchored on an accepted existing notice.

Also misplaced in the arguments of the respondent is the notion that the lease agreement would remain in force until the property was bought by the respondent. There is nothing in the papers which supports that argument and there is also nothing in the papers which suggests that the parties cannot agree on the purchase price outside the lease agreement. The lease agreement itself envisaged termination and hence the last paragraph which provides as follows:-

“It is understood by both parties that upon completion of the lease period the property and effects within shall be returned to the Landlord in the same condition as at the start of the lease period”.

In the circumstances, my finding is that the respondent was given reasonable notice to terminate the lease and should therefore render vacant possession to the applicant (See Kerr, Law and Lease, 2<sup>nd</sup> Edition, gages 31- 2). The notice was, in my view, in accordance with our law in respect of a reasonable notice required for a statutory tenant. The applicant has not claimed holding over damages.

I therefore order as follows:-

1. That respondent's lease from plaintiff of 11 Stourbridge Road, Donnington, Bulawayo, is confirmed as terminated as at 5 January 2009.
2. That respondent vacate the said premises within seven (7) days of service of this order at 11 Stourbridge Road Donnington, Bulawayo, and failing compliance therewith that the Deputy Sheriff evict from the said premises the respondent and all those claiming a right of occupation thereof through the respondent; and
3. That respondent pays the costs of this application.