

ABDULLAH ISMAIL KASSIM
(in his capacity as Executor Dative
of the Estate of Ralph Simon Lapin)
versus
MATTHEWS MUKWAWAYA

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 20 July and 7 September 2010

Civil Trial

B. Mujeyi, for the plaintiff
P. Makuwaza, for the defendant

PATEL J: The plaintiff herein sues in his capacity as the executor dative of the estate of one Ralph Simon Lapin. He seeks, *inter alia*, an order ejecting the defendant from 120 Harare Drive, Marlborough, Harare (the property), arrear rentals and holding over damages, together with interest and costs on a higher scale. The defendant, who is now a statutory tenant, challenges the plaintiff's *locus standi* and also resists the claim on several substantive grounds. In any event, as appears from the Joint Pre-Trial Conference Minute, he admits having breached the lease agreement by the non-payment of rentals.

The issues for determination *in casu*, as set out in the Joint Pre-Trial Conference Minute, are as follows:

1. Whether the plaintiff has the capacity to institute this action against the defendant.
2. Whether the defendant has a right of first refusal in the event that the property is sold.
3. Is the plaintiff entitled to an order that the defendant be evicted from the property?

Evidence for the Plaintiff

Simon Gochero is the Property Manager of Knight Frank, the estate agents mandated to manage the property. His testimony was that the Lease Agreement between the parties (annexed to the Summons) was entered into in September 1999 for a period of one year, expiring on 31 August 2000, at a monthly rental of ZW\$18,000. In March 2009, acting on instructions from the plaintiff's lawyers, he

attempted to fix the rent at US\$400, but eventually met with the defendant and they agreed on a monthly rental of US\$200, payable with effect from 1 March 2009. In August 2009, he wrote to the defendant proposing a rental of US\$900 per month, but this was rejected by the defendant. Consequently, he was instructed to place the property for sale on the market. He did so initially in September 2009 and also informed the defendant of that fact by letter at the end of October 2009. The defendant refused to allow access for prospective buyers to view the property, contrary to clause 22 of the Lease Agreement, and has not made any offer to purchase the property himself. Moreover, he had stopped paying rent as from the beginning of September 2009. In his letter of 11 November 2009 [Exh 1], he stated that he had suspended rental payments because of various defects in the property and that he had effected some repairs and would continue with other repairs. The defendant had not previously given any notice of these defects, as required by clause 24 of the Lease Agreement. The witness responded to that effect by letter on the same day [Exh 2], adding that the defendant had no right to withhold rentals. In his view, the defendant has breached the Lease Agreement by not paying any rent since September 2009 and by not allowing prospective buyers to view the property.

Under cross-examination, he stated that there was nothing in the Lease Agreement granting the defendant a right of first refusal in the event of sale, and that no such indication was ever conveyed to him by the deceased or his beneficiaries or by the deceased estate's lawyers. He further explained that the intended beneficiary of the property in question is one of the deceased's daughters, who is critically ill and is presently residing in a nursing home. The proceeds from the sale of the property are to be used for meeting the costs of the nursing home.

Imtiaz Ahmed Kurawley is a partner in the firm of Gollop & Blank which represents the deceased estate *in casu*. He testified as follows. In July 2009 the distribution account in respect of the Lapin deceased estate was submitted to and approved by the Master of the High Court. The account provided that the property in dispute was to devolve to the Annette Usher Trust which, as was subsequently ascertained contrary to the deceased's intimations, had not in fact been established. Annette Usher is the deceased's daughter and has been under the care of the Athol Evans Home for many years. As the estate had no funds, it was decided to dispose of the property in order to sustain Annette Usher and provide for her upkeep at the nursing home. In November 2009 the Master granted his consent for the plaintiff to

dispose of the property by private treaty [Exh 3]. Thereafter, Knight Frank estate agents were again instructed to sell the property. The estate's lawyers wrote several letters to the defendant's lawyers, from December 2009 to May 2010, cancelling the Lease Agreement for failure to pay rent and advising that the property was to be sold, as well as inviting the defendant himself to purchase the property for US\$100,000 [Exhibits 4, 5, 6 & 7]. The defendant did not provide any firm response to the offer to purchase and continued to obstruct prospective buyers from viewing the property. The witness was not aware of any written or verbal right of first refusal having been granted to the defendant by the deceased. Nor is there any indication to that effect in the Lease Agreement or other relevant document. The sale of the property has yet to be finalised and it remains part of the deceased estate. It has not yet been transferred to Annette Usher or to any trust for her benefit and the plaintiff is still responsible for bringing the estate to finality. Once the property is sold, a supplementary account will be lodged with the Master. In practice, the duties of an executor only terminate when the estate has been fully distributed and proof of such distribution or transfer to the beneficiaries has been furnished to the Master.

Under cross-examination, the witness explained that the plaintiff is a senior partner in Gollop & Blank and was appointed as executor dative to the Lapin estate in July 2009, following the death of the former executor who was also a partner in the same firm. In practice, it is the firm that deals with the administration of deceased estates. The witness is personally responsible for the Lapin estate and reports to the plaintiff as and when necessary.

Evidence for the Defendant

Matthews Mukwawaya is the defendant. His evidence was that he did not stop paying rentals but only suspended their payment because he was owed money for the repairs that he had effected to the property. In that regard, he produced quotations and receipts dating from October 2008 to October 2009 [Exhibits 8A, 8B & 8C] reflecting his expenditure of US\$5490.50. He needed to carry out these repairs because they were essential and on each occasion he informed Simon Gochero either by telephone or personal visit. He claimed his right of first refusal by reason of his long tenure of the leased premises, *i.e.* since 1999. The deceased had offered him such right in 2004. At the same time, the deceased had said that he did not want the property to be sold until after Annette Usher died. (In this regard, the defendant was

vague and unclear as to what specific right was offered to him by the deceased in 2004). When the property was placed on the market, he was prepared to purchase it. In January 2010 his lawyers wrote to the deceased estate's lawyers [Exh 9] rejecting the proposed sale price of US\$100,000. However, he did not make any specific counter-offer because there was no record of the property in the Deeds Office. He is still interested in purchasing the property for US\$70,000 payable over a period of 12 months under a rent-to-buy arrangement.

Under cross-examination, the defendant conceded that the Lease Agreement did not entitle him to stop or suspend the payment of rentals in order to recover the cost of repairing defects in the leased premises. Moreover, he was unable to explain what was meant by a right of first refusal in general or in relation to his own claim of such right.

Plaintiff's *Locus Standi*

It is common cause that the distribution account in respect of the Lapin deceased estate was submitted to and approved by the Master in July 2009. However, the evidence for the plaintiff was that the property in dispute could not be transferred because the intended trust in favour of Annette Usher had not been established. It consequently became necessary to sell the property and, following such sale, a supplementary account would be lodged with the Master. None of this evidence was challenged at the trial.

It must be noted, however, that Exh 3, which was produced as the Master's consent to sell, relates not to the property in question but to a different property forming part of the Lapin estate (*i.e.* not 120 but 122 Harare Drive). This aspect was not raised at the trial and it is therefore not clear whether the Master has in fact approved the sale of the property *in casu*.

Nevertheless, I take the view that this anomaly does not affect the plaintiff's continuing capacity as executor dative of the deceased estate. This is so because of the provisions of s 52 of the Administration of Estates Act [*Cap 6:01*]. In terms of subsection (4) of that section, the executor may be directed from time to time to render periodical accounts of his administration and distribution until the estate is finally liquidated. Additionally, after an account has been laid open to inspection for the prescribed period, the executor is required by subsection (10) to pay out the creditors and heirs and to lodge with the Master the vouchers in support of the

account. Finally, subsection (11) explicitly stipulates that the executor shall only be entitled to obtain his discharge *qua* executor “upon the final and complete liquidation of the estate to the satisfaction of the Master”.

It is abundantly clear from the above-cited provisions that, notwithstanding the submission and approval of the distribution account in July 2009, the plaintiff retains his status as executor dative of the Lapin estate. Moreover, he will continue in that capacity until the deceased estate has been finally and completely liquidated to the satisfaction of the Master. It follows that the plaintiff is fully endowed with the requisite *locus standi in judicio* to institute the present action.

Right of First Refusal

A right of first refusal, in the context of a lease, is an agreement between the lessor and the lessee creating an enforceable first right of purchase should the lessor wish to sell the leased property. This right, otherwise known as a right of pre-emption, does not compel the grantor to sell, but only compels him to give the grantee preference, in the event that he sells during the stipulated period of the grant. In effect, the grantor cannot sell the property to a third party without giving the grantee the option of first refusal. See Cooper: *Landlord and Tenant* (2nd ed.) at p. 141; Belcher: *Norman’s Purchase and Sale in South Africa* (4th ed.) at pp. 96-97; Lubbe & Murray: *Farlam & Hathaway’s Contract Case Materials and Commentary* at p. 76.

Turning to the instant case, there is no written record of the claimed right of pre-emption, either in the Lease Agreement or elsewhere. The defendant claims that the deceased Lapin verbally granted him such right in respect of the property in question. However, his evidence in this regard was generally nebulous as to the precise terms of the alleged agreement with the deceased. In my assessment, it was entirely unconvincing.

Moreover, even if the defendant were to be believed, the documentary evidence shows that the defendant has been invited to purchase the property at market value on several occasions. However, he has pointedly rejected the offer [Exh 9] and, by his own admission, he does not presently have the requisite funds to purchase the property at the offered price of US\$100,000.

As is made clear by the learned authors that I have cited, the alleged right of first refusal does not give the defendant the additional right to compel the sale of the property to him at a price or on terms fixed by himself. Nor does it prevent the

plaintiff, after having made an offer to the defendant, from selling the property to any interested third party at a competitive price. Equally significantly, it does not entitle the defendant to breach the terms and conditions of his tenancy and to avoid the legal consequences of such breach during the subsistence of that tenancy. For all of these reasons, it follows that the claimed right of pre-emption, even if it were shown to have been granted, does not avail the defendant in the circumstances of this case.

Relevant Provisions of Lease Agreement

In terms of clause 6(a) of the Lease Agreement, the tenant is required to pay the agreed rent “*monthly in advance, without demand and without any deduction whatsoever, on the first day of each and every month*”. By virtue of clause 29(a), the landlord is entitled to cancel the lease forthwith in the event that “*any rent is in arrear, whether the same has been legally demanded or not*”.

With reference to repairs and maintenance, the Lease Agreement is fairly specific as to the respective responsibilities of the parties. Clause 11(a) provides that the tenant shall notify the landlord in writing within 72 hours of the commencement of the lease of any defects, which defects must then be rectified by the landlord in accordance with clause 24(b) and (c). Clause 11(b) and (c) and clauses 40 to 44 spell out the repairs and maintenance responsibilities of the tenant during the currency of the lease agreement. Paragraph (a) of clause 24 stipulates the general obligation of the landlord to keep and maintain the basic structures of the leased premises in good order and condition, while paragraphs (d), (e) and (f) expand on that obligation in relation to specific structures. The landlord is required, after receiving written notice from the tenant, to commence and complete the repair of any structural defect as soon as is reasonably possible in the circumstances.

Clause 30 of the Lease Agreement provides generally for the arbitration of any dispute between the parties as regards the interpretation or application of the agreement or any matter relating to or arising from the agreement. Clause 24(b) deals specifically with the arbitration of any dispute concerning the repair of defects notified by the tenant at the commencement of the lease in terms of clause 11(a).

As regards legal costs, clause 29(f) of the Lease Agreement expressly entitles the landlord to recover such costs on a legal practitioner and client scale in the event of any breach of the agreement by the tenant.

Following the expiry of the Lease Agreement on 31 August 2000 and the conversion of the lease into a statutory tenancy, the foregoing terms and conditions of the contractual lease continued to apply as integral stipulations of the statutory tenancy, to be faithfully observed and adhered to by both parties. See sections 30(2) and 31 of the Rent Regulations 1990 (S.I. 626 of 1982) – now sections 30(2) and 31 of the Rent Regulations 2007 (S.I. 32 of 2007).

Order for Eviction

The defendant's evidence was that he needed to effect certain repairs to the property because they were essential and that he informed Gochero on each occasion, either in person or by telephone. Gochero flatly denied ever having been informed of any defects until he received the defendant's letter in November 2009 [Exh 1], by which stage the defendant had already stopped paying monthly rentals. It is common cause that the defendant did not give any written notice of defects and necessary repairs as he was required to do under the Lease Agreement. As for the alleged verbal notifications, the defendant's evidence was unreliable in general and not particularly convincing even in this regard. In any event, it seems very unlikely that he would have expended as much as US\$5490.50 from October 2008 to October 2009 without seeking any recompense until November 2009 and without some written assurance from Knight Frank that he would be reimbursed. It seems to me that the defendant's version of events is highly improbable and cannot be credited in light of all of the evidence before the Court.

Even assuming the veracity of the defendant's evidence, the fact that he may have spent money on repairs did not entitle him to withhold the payment of rentals. If he had indeed given notice of defects to Knight Frank and the latter had done nothing to remedy them, the matter should have been referred to arbitration at the earliest opportunity. Again, the defendant's claim for whatever he might have expended on repairs to the leased premises could also have been referred to arbitration at the same time or at a later stage. More crucially, the defendant was obliged to pay the agreed monthly rent **without any deduction whatsoever**. By failing to do so as from September 2009 he was in fundamental breach of his obligations as a statutory tenant. See section 30(1) and (2) as read with section 31 of the Rent Regulations 2007 (S.I. 32 of 2007). By reason of that breach, the plaintiff was fully justified in cancelling the lease, as was done by his lawyers in January 2010 [Exh 4].

Disposition

All of the issues for determination *in casu* were raised by the defendant in order to resist the plaintiff's claim for ejectment. Each of these issues constitutes a special defence in respect of which the onus of proof, on a balance of probability, lies squarely on the defendant. See *M.B. Investments (Pvt) Ltd v Oliver & Others* 1974 (1) ZLR 169 (AD) at 175-176.

It is apparent from the foregoing that the defendant has failed on a balance of probabilities to discharge the onus of establishing any one of the defences that he has raised. It follows that the plaintiff is entitled to an order confirming the cancellation of the lease and an order for ejectment and ancillary relief as well as costs on a higher scale. Given that the defendant has been in occupation of the leased premises for over 10 years, he should be given some time to vacate the property.

In the result, judgment in favour of the plaintiff as against the defendant is granted as follows.

It is ordered that:

- (1) The cancellation of the lease between the parties be and is hereby confirmed.
- (2) The defendant and all other persons claiming occupation through him of 120 Harare Drive, Marlborough, Harare, shall vacate the said premises on or before 31 October 2010, failing which the Deputy Sheriff is hereby authorised and directed to evict the defendant and all other persons claiming occupation through him from the said premises.
- (3) The defendant shall pay to the plaintiff:
 - (a) the sum of US\$1440 in respect of arrear rentals;
 - (b) holding over damages in the sum of US\$200 per month or such *pro rata* portion thereof from 1 March 2010 to the date on which vacant possession of the foresaid premises is given to the plaintiff;
 - (c) interest on the above sums *a tempore morae* at the prescribed rate;
 - (d) costs of suit on a legal practitioner and client scale.