BIRRIA INVESTMENTS (PRIVATE) LIMITED
versus
ART DEAL (PRIVATE) LIMITED
and
HANIF KHAN

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 28 September 2010 and 12 January 2011

H Nkomo, for the plaintiff
N Bvekwa, for the defendant

GOWORA J: On 28 September 2010 I granted an order for summary judgment in favour of the plaintiff. An appeal has now been filed and reasons for my judgment have been requested and these are they.

In this application, the plaintiff seeks summary judgment for an order in the following terms:

a) A declaration that the lease agreement is null, void and of no effect;
b) Alternatively that the agreement of lease is duly cancelled
c) Payment of the sum of US$75 000-00 together with interest thereon at the prescribed rate with effect from 27 January to day of payment;
d) Payment of the sum of $13 500-00 together with interest thereon at the prescribed rate with effect from the 29th January 2010 to date of payment; and
e) Costs of suit.

The background to this dispute is in relation to a shop which the second defendant supposedly let to the plaintiff. On 26 January 2010 one Richard Jie, representing the plaintiff, paid the sum of US75 800-00 to the second defendant as good tenancy deposit/goodwill for Shop 2 Cameron Street, Harare. On 28 January 2010 the said Jie paid an additional sum of US$13 500-00 being rentals for February, March and April in respect of No. 2 Shop Cameron Street, Harare. The receipt reflects the rental as $4 500 x 3. A lease agreement was then concluded between the first defendant and the plaintiff in terms of which the former let to the latter "certain No. 2 Cameron Street, Harare" for retail purposes.

The lease was to commence on 1 February 2010 and was to continue for three years up to 31 February 2013 (*sic*). The rental was reflected as US$4 500-00 payable in advance on the first day of the month and the seventh day of every month at Harare. The lease further provided for its renewal after three years at a monthly rate of USD4 500-00. The lease was signed by the second defendant representing the lessor and one Richard Jie representing the lessee.

The plaintiff alleges that it has not been given vacant possession and further that it has discovered that the premises were occupied by other tenants who expressed surprise when Jie indicated that the plaintiff had a lease agreement to occupy the premises. The plaintiff's representative, Jie, who has acted for plaintiff throughout the transactions relating to the lease deposed to the affidavit. In it he avers that the keys he had been given for the premises were not the correct keys as they did not work. In effect he states that he was unable to gain access to the premises using the said keys. He concluded that the second defendant had defrauded the plaintiff as he did not have the owner's authority to purport to lease the premises.

Jie therefore demanded a refund of all the sums paid by the plaintiff. The second defendant allegedly agreed to refund the money but thereafter Jie would find it difficult to get hold of him. The money has not been refunded leaving the plaintiff with no option except to approach the court for relief.

It is trite that where a defendant raises a defence to an application for summary judgment, he has an onus to satisfy the court that he has a good prima facie defence.[1] He, the defendant is required to allege facts, which, if proved at trial would entitle him to succeed in his defence. It is not necessary that the defendant set out all the facts he relies on but it is necessary that he allege material facts upon which he relies on with sufficient clarity and in some detail to enable the court to determine if the facts would constitute a good defence if they were proved at trial.

In *casu*, the second defendant has set out in detail the facts that he seeks to rely on a defence to the claim by the plaintiff. The second defendant contends that the plaintiff's representative, Jie, was shown the correct premises but the address on the lease is incorrect. The second defendant is of the opinion that despite the error on the written agreement as it relates to the leased premises a contract in fact came into being. The plaintiff on the other hand argues that the mistake as to the identity of the leased premises is a fundamental and material factor that constitutes a material mistake which vitiates the contract. In effect the plaintiff contends that there is no binding contract.

[1] See Hales v Daverick Investments P/L 1998 (2) ZLR 235 at 253E-F

Lease is the most common form of hiring and letting of property. The contract can be oral or written depending on the election of the parties to the agreement. Where the parties elect to have a written agreement of lease, the object of the written lease is to avoid subsequent disputes as to what the parties contracted on. This is to obviate the need for the parties to advert to oral evidence in establishing the material elements in the agreement. As the contract is one for the letting and hiring of things, it is an essential term of the contract that the thing, or property that is the subject matter of the agreement be described with sufficient clarity for the contract not be found void for vagueness. Therefore the description of the property being leased must be such that it will enable the property to be indentified and that the description must not consist of a reference to and depend upon the evidence of the parties to the agreement. This is not to mean that evidence on the description of the property will not be permitted, nevertheless there must be sufficient clarity in the description as not to lead to a conclusion that due to the vague description of the same, no contract was in fact concluded.

In *casu*, there are a number of challenges as regards what in fact was being leased out to the plaintiff. The first is the actual address of the leased premises. Whilst the documents speak of number 2 Cameron St the defendants refer to the property as number 6. According to the plaintiff there then exists a unilateral mistake such as to warrant the court to conclude that no contract came into effect. In the opposing affidavit filed on behalf of the defendants, the point is taken that the plaintiff's representative was advised when viewing the premises that there were tenants occupying the butchery who were not going to be moved out. This statement then leads one to conclude that the plaintiff would not, in terms of the lease, occupy the premises on its own. It would presumably be entitled to occupy a specified area or floor space. An examination of the lease agreement does not show this as it does not qualify the floor space that the plaintiff is entitled to occupy. There is no clause excluding the butchery for occupation by the other tenants and not the plaintiff.

The improper description of the area that the plaintiff was to occupy is a unilateral mistake which can be attributed solely to the defendants. The parties were clearly not in agreement, as the plaintiff understood that it would occupy the entire floor space whereas the defendants sought to exclude part of it. There therefore existed a fundamental mistake as to the description of the premises being let. It is not necessary in my view to decide whether or not the mistake was unilateral or common to both parties. The manner in which the premises were described on the written agreement of lease and the divergent views of the parties as to what was being leased

manifests a lack of consensus on the part of the lessor and the lessee. It is clear that due to the lack of clarity as to what was being lease no contract came into being. Thus the facts alleged by the defendants as the basis of their defence to the claim would not entitle them to succeed at trial. In the event the facts have not provided a sufficient basis for this defence to the application for summary judgment.

In addition to resisting the claim the defendants have also adverted to facts alleging a counter-claim against the plaintiff. The second defendant has alleged in the opposing affidavit that he is owed damages by the plaintiff under various heads. The first is for alleged trauma suffered by himself and his wife. The second defendant alleges that the plaintiff's representative constantly harassed and threatened him at the office and at home. On one of the occasions the plaintiff's representative had pointed a gun at the defendant threatening to shoot him. The threat to kill him had been repeated on another occasion when the plaintiff's representative 'camped' at the defendant's offices and later that day, the defendant had received threatening phone calls from people who claimed to be members of CIO. On 19 February 2010 the plaintiff's representative had arrived at the defendant's residence with 'hordes' of people. They threatened to break down the gate and kidnap the second defendant and his entire family. The noise they made attracted the other residents in the neighbourhood. They only left after three hours. They returned on 26 and 27 of February 2010. As a result the second defendant's wife, who was expecting a child collapsed on both occasions. On the second occasion she started vomiting without letting. The result of this was that she delivered a premature baby on 3 March 2010. On 28 February they returned and this time they entered the yard and the defendant was pushed around and shoved. The police had to be called. The plaintiff's representative and his aides were arrested as a result.

The upshot of this is that the second defendant intends to claim US$40 000 for alleged trauma. The premature delivery of the baby has resulted in him paying US$5000 which amount he anticipates will get to US $7000. He was also suspended from employment with the first defendant and as a result of the plaintiff's representative going to the immigration department his permit was suspended and he had to pay US $1000. As a result of his suspension he has lost a monthly income of US$4 500 from and at the time of filing the affidavit he had been prejudiced to the tune of US$13 500. He also states that the first defendant has lost an amount of $6000 in lost revenue as a result of the actions of the plaintiff.

The second defendant was arraigned before the court on certain charges and the newspapers reported the matter. He intends to claim an amount of US$15000 for defamation. It is

not clear if this claim is intended against the newspaper or the plaintiff's representative. He further states that in view of the antics of the plaintiff's representative and those of his aides, he is now viewed by the community in which he resides as a con artist. In addition, the plaintiff's representative had delivered a letter at his house in which he attacked members of the Indian community at large. In the letter it was also claimed that the defendant was having extra marital affairs. This letter was seen by his wife and almost ruined his marriage. He has therefore particularised the claims he intends to bring against the plaintiff as follows:

Rent	US$ 13 500
Patrimonial loss	US$ 40 000
Medication actual and future	US$ 7 000
Loss of income (for himself)	US$ 13 500
Immigration	US$ 1 000
Loss of income (first defendant)	US$ 6 000
Defamation	US$ 15 000
Patrimonial loss (letter to his wife)	US$ 2 000
Total	US$ 98 000

He prays that in the event that the court finds that he is liable to pay the plaintiff's claim he be excused as his claim is higher than that of the plaintiff. He intends therefore to file a counter-claim against the plaintiff.

It is not in dispute that the plaintiff's representative went to the defendant's residence accompanied by other people. The letter annexed to his opposing affidavit did not state the number of occasions when this occurred. It is also common cause that when the plaintiff's legal practitioners were appraised of his conduct they indicated that they had spoken to him and advised him to desist. I must consider therefore whether the defendants can escape liability on the basis of the alleged counter claim being raised by the second defendant.

The leading authority in our jurisdiction on the issue is *Anglo-African Shipping Company (CA) Pvt Ltd v Trinity Engineering (Pvt) Ltd & Anor* 1984 (2) ZLR 199 (H). At p 206 SMITH J stated:

> "Where a defendant has raised a claim in reconvention and the claim is unliquidated, the law to be applied has been stated by CORBETT J (as he then was) in *Stassen v Stofberg* 1973 (3) SA 725 (C) at 728-9. I quote from the official English translation as follows:

> 'If it is accepted therefore that the defendant can hold plaintiff liable for damages in respect of the alleged defects in the house, the question arises whether defendant's affidavit discloses a valid defence on this ground. Defendant alleges that he is entitled to a "substantial counter-claim" against the plaintiff for damages caused by the latter's "defective work". Although the various defects are fully described, the quantum of this alleged counter-claim is not fully set out. Indeed there is no indication whatsoever of e.g to what extent the value of the property was reduced by the defects or of how much it would cost to repair them. Whatever the amount may be, it is probably less than the balance of the purchase price and the other amounts claimed by the plaintiff. I will accept that in terms of the uniform Rules of Court-particularly Rule 22(4)-a defendant who admits the claim is entitled to raise an unliquidated counter-claim as a defence; that if the counter-claim exceeds the main claim, it constitutes a defence in respect of the whole claim (see *Spilous & Co Ltd v Coreejees* 1966 (1) SA 525 (C); and if the counter-claim is less than the main claim, the defendant may pay the balance into court and in this way raise a valid defence to whole main claim (see *Koornklip Beleggings (Edms) Bkp v Allied Minerals Ltd* 1970 (1) SA 674 (C). On the other hand, if a defendant raises an unliquidated counter-claim without in any way establishing its quantum-or indeed making an effort to establish it –and where it appears that, in all probability, the counter-claim will be appreciably less than the main claim, and no payment into court was made such "counter-claim" in my opinion does not disclose a bona fide defence for the purpose of summary judgment'.".

It is the contention of the plaintiff that the second defendant's alleged counter-claim is vague, embarrassing, unsubstantiated and that it clearly does not disclose a *bona fide* defence for the amounts claimed by the plaintiff in the application for summary judgment. The second defendant claims an amount of rent equal to what the plaintiff paid as part of the lease agreement. An amount of $40 000 claimed as patrimonial loss has not been justified under any legal head for damages. The medication referred to as special medication is not specified and has not been linked with the supposed pre-mature birth of a child which event has itself not been linked to any event to do with the plaintiff instead of a medical condition. The loss of income by the defendant has not been justified. If his actions in leasing the property were on behalf of his employer he has then not explained how his actions in letting the property could have led to his suspension for employment. The claim for loss of salary on the part of the defendant as a result of being suspended defies logic when the defendant supposedly deposed to an affidavit on behalf of the first defendant. If he was suspended on what basis then is he deposing to an affidavit on its behalf? Even if he was suspended it would be a tenuous link for that suspension to be premised on the actions of the plaintiff's agent. The claims for money paid to immigration, the defamation claim and the patrimonial claim in favour of his wife can only have been included to beef up the sums to constitute a counter-claim for purposes of evading the claim for summary judgment. As for the

loss of income for the first defendant that would be a claim properly brought by the first defendant and not the second defendant. As for defamation claim arising out of the article in the Herald it would be difficult if not impossible to link the plaintiff with the publication of the article. Granted there is a letter of complaint to the Herald, there is not letter of complaint to the plaintiff over its publication. There is no suggestion that the plaintiff gave a story to the newspaper which then published the article. As suggested by the plaintiff's counsel the Herald is not under the control of the plaintiff and the cause of action if any, is against the newspaper and not the plaintiff.

In order to succeed in the counter-claim as a defence to the application for summary, a defendant must aver sufficient facts as to disclose a cause of action in the counter-claim. See *Koornklip Beleggings v Allied Minerals Ltd* (*supra*). The averments in the opposing affidavit do not in my view disclose a cause of action under any of the heads on which the second defendant purportedly seeks to raise a counter-claim. It is incumbent upon a defendant raising an unliquidated counter-claim as a defence to a claim for summary judgment to establish the counter-claim. See *Stassen v Stofberg* (*supra*) at p 730. In my view the counter-claim raised by the defendant in this application does not disclose a *bona fide* defence and the plaintiff is entitled to judgment as prayed.

In the premises there will be an order for summary judgment in terms of the summons against both defendants jointly and severally, the one paying the other to be absolved together with costs of suit.

Mtetwa & Nyambirai, plaintiff's legal practitioners
Bvekwa Legal Practice, defendants' legal practitioners