

ART CORPORATION LIMITED t/a
CHLORIDE ZIMBABWE
versus
PENCASH INVESTMENTS (PRIVATE) LIMITED
and
ADAM SENI ABDULA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 2 November 2010 and 2 March 2011

N Madya, for the applicant
F Nyangani, for the respondent

MTSHIYA J: On 8 January 2010 the applicant filed this application seeking the following relief:

“It is ordered that:

1. The cancellation of the Lease Agreement between the parties be and is hereby confirmed.
2. The first respondent and all those claiming occupation of the property being No. 74 Douglas Road, Workington, Harare through it be and are hereby ordered to vacate the property forthwith failing which the Deputy Sheriff be and is hereby authorized to evict them at their expense.
3. That the respondents pay arrear rentals in the combined sum of US\$4 418-00 jointly and severally the one paying the other to be absolved.
4. The respondents pay to the applicant, as holding over damages the sum of US\$741-75 per month with effect from 1 January 2010 to the date the respondent vacates the property or is evicted whichever is sooner.
5. The respondents pay the costs of suit on an attorney and client’s scale including any collection commission that maybe levied in terms of the Law Society of Zimbabwe Regulations”.

The applicant is the owner of a property known as Eastern Factory situated on Stand No. 3875 Salisbury Township, also known as No. 74 Douglas Road, Workington, Harare (the property).

On 1 June 2009 the applicant and the first respondent entered into a one year lease agreement in respect of the property. The lease agreement was due to terminate on 31 May 2010. The first respondent agreed to a monthly rental of US\$645-00. However, prior to the lease agreement of 1 June 2009, the first respondent was already a statutory tenant paying a rental of US\$1 125-00. The reduction in rent was due to the fact that a former subtenant had entered into a direct and separate lease agreement with the first respondent.

On 20 October 2009, following failure by the first respondent to pay the agreed rent for the property, the applicant cancelled the lease agreement. In cancelling the lease agreement, the estate agent, managing the property on behalf of the applicant, wrote to the first respondent in the following terms:

“We note from our records that you owe the sum of \$4,418-00 unpaid rent.

We regret to advise that as you are in breach of your Lease, the agreement is terminated forthwith. Legal proceedings are now being instituted against you for your eviction from the above premises and for the recovery of the outstanding balance plus costs.

You can, however, rectify the situation by making the following payments in full by 12 noon on Friday, 23rd October 2009:-

Balance due	4,418-00
Penalty	<u>442-00</u>
	<u>\$4860-00”</u>

Part of the arrears reflected in the above letter (i.e. US\$3431-20) had accumulated prior to 1 June 2009.

At the commencement of the lease agreement, the second respondent bound himself as surety and co-principal debtor for the payment of rent by the first respondent.

The rental arrears accumulated prior to the lease agreement are still outstanding and the first respondent is still in occupation of the property. Through this application, the applicant now seeks payment of arrears, holding over damages, confirmation of the lease agreement and eviction of the first respondent.

Prior to the commencement of the hearing of this matter, the first respondent had maintained that it was up to date with the payment of its rentals. However, when the hearing commenced Mr *Nyangani* for the respondents conceded that contrary to the terms of the lease agreements, some payments were made late. He said although some payments were made late cancellation without notice was not proper. He said cancellation would have been proper if,

upon notice, the first respondent had failed to rectify the question of arrears. That was not the case *in casu*.

Mr *Madya* for the applicant also conceded that rental arrears that arose prior to 1 June 2009 could not be included in the relief sought by the applicant. To that end he moved for the deletion of para 3 of the draft order.

In his main submissions, Mr *Madya* stated that due to late payments the right to cancel the lease agreement was properly exercised. To support his submission he referred to clause 19(a)(1) of the lease agreement which provides as follows:

“In the event of the rent being in arrear whether the same shall have been legally demanded or not, or” (it appears this clause was incomplete – and accordingly nothing turns on it).

Mr *Madya* agreed that a late payment was made on 27 October 2010. He said the applicant would have had a different view if payment had been effected on 23 October 2010. He therefore insisted that cancellation of the lease agreement was properly made and therefore the applicant was entitled to the relief it sought as amended.

Mr *Nyangani* for the respondents, submitted that in making a late payment on 27 October 2010 the first respondent had met its obligation under the lease agreement and the applicant was therefore not entitled to cancel the agreement. The applicant, he argued, had failed to give notice asking the first respondent to rectify the position within 7 days. He therefore applied for the dismissal of the application with costs.

In his submissions in court, Mr *Nyangani*, did not make reference to the point *in limine* raised in the Heads of argument. I therefore assumed that by so doing he had abandoned the point *in limine*.

I shall now deal with the question of whether or not the first respondent was in breach of the lease agreement entitling the applicant to the relief it seeks.

Clause 3 of the lease agreement provides as follows:

“The rent in respect of the leased premises shall be sum of
US\$645-00 from 1st June, 2009, such rentals subject to review after six months, in line
with ruling market rates.

such rental being payable monthly in advance without demand and without any deductions whatsoever on the first day of each and every month at the offices of the Lessor’s agent in Harare or at such other address as the agent or lessor may from time

to time in writing direct. Any cheques that are returned by the bank endorsed refer to drawer will attract a penalty fee charged by the appropriate bank at the time of deposit”

In addition to the above clause 29 of the additional conditions attached to the lease agreement also provides as follows:

“The lessee shall ensure that all accounts have been paid before the end of each month, failure of which any future payments will be allocated to arrears first before crediting the current respective account”.

If the above clauses are carefully read together the result would be that the payment that was made by the first respondent on 27 October 2010 was allocated to arrears. However, the applicant conceded that the lease agreement of 1 June 2009 had nothing to do with the arrears accumulated during the period when the respondent was a statutory tenant. The applicant then correctly proceeded to remove the arrears from the relief it seeks.

The Annual General Leger attached to the applicant’s founding affidavit as Annexure TM3 shows that as from 1 July 2009 to 1 December 2010, the first respondent made six payments in accordance with the lease agreement of 1 June 2009. This application was filed on 8 January 2010 and there is no indication of the exact amount that was outstanding as at 20 October 2009 when the letter of cancellation was written. It is therefore not surprising that in its opposing affidavit the first respondents states as follows:-

“The first respondent disputes accumulating arrears in the sum of US\$4418-00. The receipts issued by applicant’s agent viz Robert Root between 1 June 2009 to January 2010 are attached hereto as annexure “A1” to “A3” indicating a total payment of US\$5592-00 hence the claim is totally without merit”.

Indeed there is evidence that the first respondent effected payment on 5 January 2010 before the application was filed. This would mean that at the time this application was filed the first respondent was already up to date with rental payments. Clearly therefore the application was filed on the basis of arrears indicated in the cancellation letter. Those arrears had nothing to do with the present lease agreement. The issue of notice did not therefore arise because the first respondent was not in default.

The foregoing indicates that there is no cause of action on which this application is based.

Accordingly the respondents have a valid defence and the application cannot succeed.

I therefore order as follows:

The application be and is hereby dismissed with costs.

Wintertons, applicant's legal practitioners
Hute & Partners, respondent's legal practitioners