YVONNE CHISESE
versus
ALLUVIAL EXPLORATION SERVICES (PRIVATE)
LIMITED

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 16 June and 25 January 2012

Opposed application

M Sachikonye for the applicant
A Muchandiona for the respondent

MAVANGIRA J: The application before this court is for an order of ejectment of the respondent from the property known as 46 Van Praagh Avenue, Milton Park, Harare. The application is based on an alleged breach by the respondent of a lease agreement in terms of which it is a lessee of stand 4343 Salisbury Township of Salisbury Township Lands, also known as 4b Van Praagh Avenue, Milton Park. The said property is owned by the applicant.

The respondent raised a preliminary issue on the basis of which it contended that this application is fatally defective. It contended that the applicant filed a similar application in the Magistrates Court which application was opposed by the respondent. The said application was referred to trial by the presiding magistrate. The respondent contends that the instant proceedings are an attempt to clandestinely disguise an appeal or review of the magistrate's ruling. The respondents state that the application in the Magistrates Court was withdrawn on 4 November 2010 before the instant application was filed in this court on 8 November 2010 with the applicant seeking the same relief on the basis of similar allegations. The respondent contends that the applicant's failure to comply with the Magistrates Court's directive is fatal to the instant application.

In response to this preliminary issue the applicant's stance is that the application before this court is a different application as the one before the Magistrates Court sought not only the respondent's ejectment but also the payment of outstanding rentals. It further contends that the

withdrawal of the application in the Magistrates Court was properly done in terms of the rules of court and was accepted by the respondents. The withdrawal thus has no prejudicial effect on any application, including the instant application, or action the applicant may bring. The applicant has in this regard relied on the provisions of the Magistrates Court Rules. In terms of Order 33 Rule 5(1) of the Magistrates Court Rules, (Civil Rules, 1980):

> "The withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action."

This preliminary issue was not persisted with in the respondent's heads of argument. I take it that the respondent has abandoned this issue and properly so in my view.

The respondent also raised the issue that the applicant's legal practitioner who swore to the founding affidavit had no proper authority to do so. In its opposing affidavit, the respondent contends that this is because the legal practitioner had not been granted power of attorney to that effect. However in heads of argument it is contended that the legal practitioner had no authority because the matters deposed to in the founding affidavit are not within her personal knowledge but are based on inadmissible hearsay evidence.

In response the applicant states firstly, that the deponent was properly authorized to depose to the affidavit and to bring the application on behalf of the applicant through a power of attorney granted by the applicant. Secondly, that the deponent was in any event authorized to depose to the affidavit by operation of law. Reference is made in this regard to Rule 227(4) of the High Court Rules, 1971 which provides:

> "(4) An affidavit filed with a written application –
>
> (a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein...."

Thirdly, the applicant has placed reliance on *TFS Management Co (Pvt) Ltd* v *Graspeak Investments* (*Pvt*) *Ltd & Anor* 2005(1) ZLR 333 (H) where at 338 B – C GOWORA J as she then was, stated:

> "It would be an absurdity for Mr Lloyd (legal practitioner) to be given the mandate to sue for the claim and not to have authority to depose to an affidavit in the name of the applicants where such affidavit would be in relation to matters particularly within his knowledge and necessary for purposes of the successful performance of his mandate on behalf of the applicants. The affidavit was deposed by him in his capacity as legal

> practitioner for the applicants, in circumstances that are related to the due performance of that mandate."

In *casu* the applicant's legal practitioner in swearing to the founding affidavit stated *inter alia*:

> "The facts deposed to hereunder are within knowledge and are both true and correct to the best of my knowledge, information and belief."

In the applicant's heads of argument the submission is made that the facts deposed to by the applicant's legal practitioner are within the deponent's knowledge having been fully advised of same and instructed by the applicant. In the circumstances, I find no reason for making a finding that the deponent to the founding affidavit in *casu* does not fall within the parameters of r 227(4) or that her situation is not within the realm adverted to in the *TSF Management* case. I thus find no merit in this preliminary issue either.

On the merits, clause 2 of the lease agreement provides *inter alia*, rent is payable monthly in advance. It is contended by the applicant that the respondent is in breach of this clause of the agreement in that he has, as from 2008, been making lump sum payments for rentals without the consent of the applicant thereby unilaterally altering the lease agreement. Furthermore, that the payments were also constantly made late. The applicant contends that she is entitled to cancel the lease agreement in terms of clause 9 of the agreement which provides:

> "Should the Lessee fail to pay the monthly rental on due date, or commit a breach of any of the other terms and conditions of the lease, . . . then and in such an event the Lessor shall have the premises without prejudice to any claim it may have for arrear rent, or for damage for breach of contract, or both."

The respondent opposes the application on the following bases. Firstly, that the applicant has not cancelled the lease agreement and so there is no basis for her to seek the respondent's ejectment from the leased premises. Secondly, that the applicant has frustrated the respondent's tender of rental payments through providing incorrect or insufficient banking details as well as changing the place and mode of payment without informing the respondent of such changes. Thirdly, that there are serious material disputes of fact which are not capable of resolution on the papers and that such disputes were known to the applicant at the time of instituting the application. Finally, that the applicant has waived her right to cancel the lease agreement through

her acceptance of rentals tendered by the respondent and cannot now seek to cancel the lease on the basis of past breaches which she has forgiven.

Regarding the first ground of opposition, on the papers before this court, on 21 December 2009 the applicant wrote to the respondent in the following terms:

> "Further to my emails dated 17 October 2009, 1 October 2009 and 18 September ….. I have received neither response nor payment of the contractual rentals since July 2009…. Due to your breach of contract, I am now writing to inform you that I will be taking possession of my property, and will occupy it on the 29th of January 2010. Meanwhile my contractors will begin various works to ameliorate the property and the grounds.
>
> I thank you in advance for your cooperation and early vacation of the premises."

Clearly therefore, as submitted by the applicant's legal practitioner, and on the basis of the above quoted letter, the applicant elected to cancel the agreement in December 2009.

The position was also succinctly put in the case of *Thelma Court Flats* v McSwigin 1954(3) SA 457 cited in the applicant's heads of argument, where it was held that:

> "A party's election to cancel may be inferred from his conduct eg a lesser who issues summons for ejectment thereby elects to cancel, his conduct being inconsistent with the continuance of the lease."

It appears to me therefore that in addition to the letter of 21 December 2009, the applicant's election to cancel is also evinced by the institution of these proceedings.

The second ground is that the applicant has frustrated the respondent's tender of rental payments; the applicant denies that the respondent faced problems in remitting the rentals because when the respondent made payment in August 2010, the bank details had not changed. Furthermore, the respondent never communicated to the applicant that they were facing difficulties in making the payment.

On the papers before this court there is no proof that the difficulties allegedly then faced by the respondent in making the payments for rentals were communicated to the applicant. Neither is the claim by the applicant that payment for rentals for the period September 2009 to August 2010 was only made in August 2010 after the applicant had instituted legal proceedings, challenged. Rather the respondent claims that there was a communication breakdown during the period when his legal practitioner was away on holiday.

The claim by the respondent that it promptly made payment only when the correct banking details were made available on 3 August 2010 does not in my view assist the respondent's defence. This is so particularly in the absence of proof of communication to the applicant regarding the alleged difficulties which are alleged to have been caused by the change of mode and place of payment made by the applicant and accompanied by incomplete or incorrect banking details. It defies logic for the applicant to have deliberately frustrated the timeous payment of rentals to her prejudice and thereby depriving herself of rentals for such a lengthy period.

The third ground that there are serious material disputes of fact does not appear to be borne out or supported by the papers. It is not in dispute that the respondent has made a lump sum payment of arrear rentals. I have already dismissed the explanation proferred by the respondent for such conduct. It is in my view patent that such manner of payment was clearly in breach of clause 9 of the lease agreement. It is not all disputes of fact that matter in the determination of applications. It is the material disputes of fact that matter. I am not persuaded that there are such material disputes of fact as to have required the applicants to proceed by way of action.

The fourth ground is that by continuing to accept rentals from the respondent the applicant has waived her right to cancel the lease agreement. In this regard the applicant's legal practitioner has in his heads of argument aptly cited two case authorities. The first one is *Parkview Properties* v *Chimbwanda* 1998(1) ZLR 408 where the following was stated by BARTLETT J at 413:

> "…the lessor must, if there is a late or partial payment, make his election within a reasonable time and at the latest when the next payment is tendered…"

The second is *Supline Investments* (*Pvt*) *Ltd* v *Forestry Co of Zimbabwe* 2007(2) ZLR 280 (H) at 285 E where MAKARAU JP as she then was, held:

> "It is my view that by continuing to accept rentals from the respondent after the letter cancelling the lease, the applicant did not waive its right to rely on the breach by the respondent…"

In consequence of my findings above, the application will succeed and costs will follow the cause. The order sought by the applicant is therefore granted as follows:

IT IS ORDERED THAT:

1. The respondent and all those claiming through him be and are hereby ordered to vacate from the property known as 46 Van Praagh Avenue, Milton Park, Harare, within 7 days of service of this order.
2. The respondent shall pay the applicant's costs of suit.

Atherstone and Cook, applicant's legal practitioners.
Danziger & Partners, respondent's legal practitioners.