BP ZIMBABWE (PVT) LTD
versus
CEDAR PETROLEUM (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23 February 2015 and 22 April 2015

Special case

D Ochieng, for the plaintiff
T. Kanengoni, for the defendant

MUREMBA J: The plaintiff issued summons for the ejectment of the defendant from stand number 10232 Highfield Township, also known as Machipisa Service Station Corner 112th and Main Street, Machipisa, Harare (hereinafter referred to as the stand or premises).

This stand belongs to a company called Solta Trading (Pvt) Ltd (hereinafter referred to as Solta). In September 1998 the plaintiff and Solta entered into a written lease agreement in respect of the stand. In terms of the lease agreement the plaintiff would lease the premises from Solta until 31 July 2024. In or about October 1998 the plaintiff took occupation of the stand and built a filling station and related facilities. The premises were thereafter commonly called 'BP Machipisa Service Station.'

The lease agreement gave the plaintiff the right, at its sole discretion, to sub-lease the premises. In 2006 the plaintiff exercised that right by subletting the premises to Solta under a written sub-lease agreement. The sub- lease period would run from 1 January 2006 to 31 December 2006. At the commencement of the sub-lease agreement Solta took occupation of the premises. Notwithstanding the termination of the sub-lease agreement by effluxion of time, Solta remained in occupation after 31 December 2006.

In terms of the sub-lease agreement of 2006 Solta was not allowed to sub-let the premises without the prior written consent of the plaintiff. The relevant clause read that Solta "shall not be permitted to cede, assign or make over its rights and/or obligations under this agreement nor to sublet or part with the possession of the leased premises without the prior written consent of the Lessor"

Despite the sub-lease agreement of 2006 Solta went on to sub-let the premises to the defendant in February 2009 without the prior written consent of the plaintiff. The defendant assumed occupation of the premises and is still in occupation.

The plaintiff contends that it is entitled to protect its rights of use and occupation by seeking the ejectment of the defendant who is a wrongful occupier as the sub-lease agreement was concluded without the plaintiff's prior written consent.

In resisting the claim for ejectment the defendant contends that it is neither party nor privy to the lease agreements which were entered into by and between the plaintiff and Solta. The defendant said that it is party to a subsisting lease agreement between itself and Solta. The defendant states that it has no contractual or other legally binding relationship with the plaintiff. The defendant contends that:

(i) The plaintiff has no cause of action against it.

(ii) Solta cannot be a tenant at its own property so the alleged sub-lease agreement between the plaintiff and Solta is invalid. Consequently the requirement for Solta to obtain the plaintiff's prior written consent for sub-leasing to the defendant is invalid.

(iii) Alternatively, even if the sub-lease to Solta was valid, it had expired by the time of the sub-lease to the defendant. Solta was no longer bound by the alleged stipulation against sub-leasing.

On the day of the trial the parties' legal practitioners agreed to proceed by way of a special case in terms of Order 29 of the rules of this court. They submitted that by reason of neither of them being party nor privy to the agreements alleged in their respective cases, as summarised above, they cannot lead evidence to counter factual allegations they are not aware of. They submitted that however, certain legal issues arise which if determined, have the effect of disposing of the matter without the need for any evidence to be led before the court.

The issues for determination, as agreed upon by the parties, are as follows.

1 Does the plaintiff have a valid cause of action against the defendant on the pleadings before the court?

2 Consequently does the plaintiff have a right to seek the defendant's ejectment from the premises?

3 Is a person legally capable of leasing his or her own property from his/her own tenant?

4 Consequently, was the alleged sublease of the premises by the plaintiff to Solta legally valid?

5 Was Solta bound by the covenant against sub-leasing at the time of its agreement with the defendant, such that this sub-lease was legally invalid?

The parties stated that if the above questions are all answered in the affirmative, the plaintiff will be entitled to an order for the ejectment of the defendant and costs of suit. Conversely, if any one of the questions is answered in the negative the plaintiff's case must fail and costs of suit must be awarded to the defendant.

In my view issues 1 and 2 are one issue. It follows that if the plaintiff has a valid cause of action against the defendant then it has the right to seek the defendant's ejectment from the premises. Issues 3 and 4 are one issue as well. If a person is legally capable of leasing his own property from his or her tenant then it follows that the sub-lease of the premises to Solta by the plaintiff is legally valid. Issues 2 and 4 are therefore superfluous. So in essence I have three issues to deal with, the third issue being issue number 5.
I propose to deal with issue number 3 first, then 1 and lastly issue number 5.

(a) <u>Whether or not a person can lease his or her own property</u>

The defendant argued that a person cannot lease his or her own property from his or her own tenant. He made reference to the case of *Grootchwaing Salt Works* v *Van Tonder* 1920 AD 492 at 497 wherein INNES CJ remarked that no man can hire his own property. Innes CJ further stated that the capacities of both lessor and lessee cannot competently reside in the same individual. *In casu* the defendant argued that when the plaintiff sub-leased the premises to Solta it reverted full rights in the property to Solta as the owner such that it was at liberty to lease the property to any willing tenant without recourse to the plaintiff.

I had occasion to read the case of *Grootchwaing Salt Works* and upon reading it I realised that its facts are distinguishable from the facts of the present case. In that case the lessee, *Grootchwaing Salt Works* was hiring a certain piece of land from the lessor. The terms of the lease agreement conferred certain rights over the adjoining unleased land of the lessor which included free use of stone , clay and earth so far as these materials were required in connection with the lessee's salt business. However, the lessee subsequently bought the property that it was leasing from the lessor and became the owner thereof. Despite this development *Grootchwaing Salt Works* sought to enforce the rights which it used to enjoy as

a lessee over *Van Tonder*'s unleased property. INNES CJ said that clearly the relationship of lessor and lessee had come to an end between the parties when the former acquired the property and as such *Grootchwaing Salt Works* could not continue to enjoy rights it used to enjoy as a lessee. Those rights could only be enjoyed by a lessee. So for *Grootchwaing Salt Works, Ltd* to enjoy those rights it meant that it had to be paying rent. This is what prompted INNES CJ to make the remark that no man can hire his property. If Grootchwaing Salt Works, Ltd was to pay rent it would be paying it to itself because it had become the owner. INNES CJ said that a person can neither be his own creditor nor his own debtor. If there is no other debtor then the debt is extinguished.

The *Grootchwaing Salt Works, Ltd* scenario is not the scenario that we have in the present case. I am persuaded by the case of *Total Oil Products (Pty) Ltd* v *Perfect & Another* 1964 (2) SA 297 (D) which the plaintiff referred to. It is a case which almost falls on all fours with the present case. In that case the owner of certain premises (first respondent) leased them to a petroleum company (the applicant), which had lent it R10, 000. The applicant then sublet the premises back to the owner (first respondent). The terms of the lease and the terms of the sub-lease differed considerably. According to the terms of the sub-lease the applicant was entitled to cancel the lease agreement and re-enter the premises if the first respondent failed to pay rent when it became due. The first respondent then failed to pay rent when it became due. Apparently it had sub-let a portion of the premises to the second respondent (at least the sub-lease agreement allowed the first respondent to sub-let). When the applicant gave notice to the first respondent terminating the sub –lease agreement for failure to pay rent on time the first respondent handed over possession of the premises to the applicant minus the portion that was now being leased by the second respondent. The applicant instituted proceedings against the second respondent for its ejectment. The respondents' legal practitioner Mr *Pretorius* relying on *Voet* 19.2.4. argued that the owner (first respondent) cannot hire its own property from its tenant (the applicant) and as such when it contracted with the second respondent it did so in its capacity as the owner not as a tenant. So it had the right to lease the whole or a portion of the premises as the owner.

However, the passage from *Voet* which Mr *Pretorius* sought to rely on has the following paragraph,

> "The hiring of one's own property is only so ineffective when no other person has obtained any right over our property. Certainly to the extent that a right has been established in another over our property it is understood to have been alienated by us; and thus there is a hiring of it not as being ours but as belonging to another."

FRIEDMAN AJ had this to say about Mr *Pretorius*' submissions in view of the above passage,

> "It is quite clear that it is not an absolute rule as Mr Pretorius suggests, that a person is not entitled to hire his own property. When the lease which was entered into between the applicant and the first respondent was registered against the title deeds of the property, the applicant acquired a real right in the property. A lease in *longum tempus* is in the nature of an alienation. Johannesburg Municipal council v Rand Townships Registrar, 1910 T.S 1314 at p. 1320; *Breytenbach* v *Frankel and Another*, 1913 A.D 390 at p.402. The applicant became entitled to use of the property subject to the terms of the lease. It was then, in my view, perfectly entitled to sub-let the property to the first respondent which it did on terms and conditions substantially different from those contained in the lease with the first respondent. The applicant having obtained a real right in the property of the first respondent, the hiring of that property to the first respondent was, according to *Voet,* not ineffective. As the rights and obligations created by the lease and the sub-lease, differed so materially this is not a case where there was a "concurrence of the debtor and creditor in the same person and in respect of the same obligation." *Grootchwaing Salt Works* v *Van Tonder,* 1920 AD 492 at 497. Generally speaking, the obligations which are imposed upon the applicant by the lease have to be performed by the applicant under the lease and the obligations which are imposed upon the first respondent by the lease have to be performed by the first respondent under the sub- lease. Moreover if this contention of Mr *Pretorius* were upheld, a most inequitable and anomalous position would be created. It seems clear- and this was not disputed by Mr *Pretorius*- that the agreements of lease and sub-lease, viewed as one transaction, were entered into for the purpose of giving the applicant security for the grant of R10, 000 made by the applicant to the first respondent. It was obviously the intention of the parties that the two agreements of lease should operate as one transaction and that there should be no merger. It is common cause that this sum of R10, 000 was paid by the applicant to the first respondent, and was to be paid during the period of the sub-lease in the manner set out therein. If Mr *Pretorius's* contention were to be upheld it would mean that the first respondent, having obtained the benefit of the sum of R10, 000, would be entitled to deny to the applicant the rights conferred upon the applicant by the lease."

In *casu* the head lease between plaintiff and Solta should run up to 2024 from 1998 and it allows the plaintiff to sublet the premises. It does not say the plaintiff cannot and should not sublet to Solta being the owner and principal lessor. What is of significance is that this long lease agreement was Solta's way of repaying the loan that was advanced to it by the plaintiff for the purposes of purchasing these premises. The relevant portion of the lease agreement which is marked annexure A reads,

> "AND WHEREAS BP has agreed to assist the Owner (Solta) in the purchase of the property
>
> AND WHEREAS in recognition of such assistance, the Owner is willing to grant to BP a lease on the property upon the terms and conditions set out hereunder
>
> NOW THEREFORE the parties agree as follows:
>
> 1. <u>PERIOD</u>

The Owner hereby leases to BP who hereby hires from the Owner the property for a period commencing on 1 September 1998 and terminating on 31 July 2024 unless previously terminated..

2. …..
3. ……
4. RENTAL

It is recorded by the parties that BP has, by way of a loan, made available to the Owner certain funding of purchase of the property by the Owner from the Municipality. Accordingly, rental for the period set out in clause 1 above shall be determined as follows:-

4.1 the full value of the loan made by BP to the Owner and the subject of the Loan Agreement to which this agreement constitutes Annexure A (hereinafter referred to as "the Loan Agreement") together with the cost to BP of construction and development as set out in clause 3 above, shall be deemed to be the rental paid by BP to the Owner for the period set out in clause 1 above. Accordingly BP hereby waives its right to repayment of the said loan and to payment of compensation for any construction or development undertaken in accordance with clause 3 and such waiver shall constitute payment in full in advance of the entire rental for the lease period.

4.2 ….
4.3 ….
5 ….
6 ….
7 ….
8 SUB-LEASE

BP will, during the subsistence of this agreement, be entitled, in its sole discretion, to sublet the property upon such terms and conditions that it sees fit provided that any such sub-lease shall not contain any term or condition materially in conflict with any term or condition of this agreement."

So instead of Solta repaying the loan in cash, Solta would lease the premises to the plaintiff to the value of the loan. So this is not an ordinary lease agreement. The owner which is the principal lessor is indebted to the lessee and it has an obligation to extinguish its debt. It chose to extinguish the debt by entering into a lease agreement whereby the plaintiff would for 26 years lease the premises without paying a rent as the loan it advanced to Solta in 1998 constituted payment in full in advance of the entire rental for the entire lease period. A lease of 26 years is a lease in *longum tempus* simply meaning that it is in long time and long use, beyond the memory of man and suffices for a real right. FRIEDMAN AJ in the *Total Oil Products* case (*supra*) said it is in the nature of an alienation. In that regard Solta established in the plaintiff a real right and alienated its property and thus there is hiring of it as the property of the plaintiff and not as its own property. It is therefore incorrect to say that the sub-lease to Solta reverted full rights on the property and entitled it to lease the premises to any willing tenant. To uphold this contention would be to sanction Solta to run away from its

obligation to repay the loan that was advanced to it by the plaintiff. That will obviously create an inequitable and anomalous situation.

As correctly stated by the plaintiff the head lease and the sub-lease are two separate and unidentical agreements. No merger occurred. In terms of the sub-lease agreement which was produced as Annexure B, Solta was supposed to pay rent in the sum of US$ 4500 per month reviewable quarterly. In terms of clause 7 (m) thereof the lease was not entitled,

> "to cede, assign…. not to sub-let or part with the possession of the leased premises without the prior written consent of the lessor."

As was stated in the *Total Oil Products* case (*supra*) this is not a case where there was 'concurrence of debtor and creditor in the same person and in respect of the same obligation.' It was therefore permissible and valid for Solta to lease its own premises from the plaintiff. The lease agreement granted the plaintiff a real right over the property.

The plaintiff is correct in saying that when Solta took occupation of the premises in 2006 it was doing so as a sub-tenant and not as the owner of the premises. It was therefore bound by the terms and conditions of the sub-lease agreement. One of the conditions was that it was not supposed to sublet the premises without the prior written consent of the plaintiff. Under the circumstances the plaintiff had stepped into the position of the owner or the landlord or the lessor while Solta had stepped into the position of the lessee.

(b) <u>Whether or not the plaintiff has a valid cause of action against the defendant.</u>

The defendant's argument is that the plaintiff is suing the defendant basing its cause of action upon a breach of contract by Solta. The defendant avers that it being neither party nor privy to that contract the plaintiff cannot succeed in its claim without having sued Solta as the first defendant in this matter. The defendant argues that the plaintiff must first prove that Solta breached the sub-lease agreement. It averred that in the absence of Solta the plaintiff's allegation that there was breach of contract by Solta will remain an unproven allegation.

In *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445 (S) @ 453 Gubbay CJ as he then was said,

> "It is trite law that where a contract of lease contains prohibitions against sub-letting, cession or assignment, either absolutely or without the lessor's consent, a sub-lease, cession or assignment, entered into by the lessee, without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has. **Thus, if the third party enters into occupation of the leased property, the lessor is entitled to an ejectment order against him**. See *Stalson* v *Brook* 1922 WLD 143; *Akoon* v

> *Jhavary* 1934 NPD 282 at 285; *Hissaias* v *Lehman & Anor* 1958 (4) SA 715 (T) at 719B-C; Wille *Landlord and Tenant in South Africa* 5th ed. at pp 123 and 124. A further obvious consequence of the prohibition is that the court will refuse to enforce the sub-lease, cession or assignment, at the instance of the lessee. To do otherwise would be to confer a right upon the lessee not given him by the lessor."

R.H Christie in *Business Law in Zimbabwe* 2nd Edition 1998 at p 286 states that with a sublease there is no privity of contract between the landlord and the sub-tenant. He further states that because there is no privity of contract between the two a landlord who sues to eject a subtenant sues in delict not contract. See also *Greenhalgh* v *Rowley* 1925 SR 30 33.

At p 287 R. H Christie citing the case of *Potgieter & Another* v *Van Der Merwe* 1949 (1) SA 361 (A) says,

> "When the landlord's consent is required but the tenant has sublet without it the landlord is entitled to the ejectment of the subtenant and, if the lease contains a forfeiture clause, also of the tenant."

In *MacDonlad, Patterson's Tutor Dative* v *Hume* 1875 Buch 8, the owner of the property instituted an action for the ejectment of a sub-lessee who had been put in occupation of property by the tenant without his consent. The tenant was not joined as a co-defendant, but the court made an order for the ejectment of the sub-lessee.

In *Akoon* v *Jhavary* 1934 NPD 282 a lessee put in occupation a sub-lessee without obtaining the necessary consent of the owner. The owner sued for the ejectment of the sub-lessee without joining the lessee and an order was made for ejectment against him. HATHORN J remarked that the owner of the property had proved that he was the owner and that he had not given the sub-lessee the right of occupation. Consequently the lessee was said to be a trespasser. The learned judge went on to say that it might have been wiser to join the lessee, but the omission to join him was not fatal. See also *Hamza* v *Bailen* 1949 (1) SA 993 C.

In *Hissaias* v *Lehman & Anor* 1958 (4) SA 715 (T) at 719C ROPER A.J stated that the correct position of the law is that the owner of a property can directly sue for the ejectment of a sub-tenant who has been allowed occupation by the tenant without obtaining his (owner) consent. He said that if this was not the position it might be impossible for the owner to get an unlawful occupant out where the tenant has disappeared. On p 718B-C he said that a person with a real right in the property is *dominus*. As *dominus* he has the right of possession and occupation of it against all the world save and so far he has parted with his right to such possession and occupation.

In *casu* the defendant's argument that the plaintiff has no valid cause of action against it has no merit. In para 11 of the special case the parties said that they wanted the matter to proceed on the basis of a special case because there were no disputes of facts. They said neither party could lead evidence to counter factual allegations made by the other party since neither of them was party to or privy to the agreements each party entered into with Solta. Moreover the plaintiff attached the sub-lease agreement it entered into with Solta as annexure B. The defendant cannot therefore at this stage turn around and say that the averment that there was a sub-lease agreement with Solta and a breach thereof remain as mere allegations as long as Solta is not party to the proceedings as a co-defendant. If these averments were disputed then the defendant should not have agreed to have the matter dealt with as a special case. Instead it should have proceeded as a full trial. It is clear from the plaintiff's supplementary summary of evidence that it was going to call Solta's director to testify at trial that the plaintiff had long lease which will expire in 2024. That director was further going to say that in subletting the premises Solta had not obtained approval from the plaintiff in accordance with the sub-lease agreement between Solta and the plaintiff.

In view of the foregoing I therefore consider it as a fact that Solta entered into a sub-lease agreement with the plaintiff and in breach of that contract it in turn sublet the premises to the defendant without the plaintiff's approval.

The above cited authorities make it clear that if a tenant sublets without the consent of the lessor when in terms of the lease agreement he is required to seek the lessor's consent, the lessor is entitled to eject the sub-tenant and the lessor sues in delict not contract. It matters not that the tenant has not been sued as a co-defendant as long as the lessor can show that he has a real right in the property and that he did not give the sub-tenant the right of occupation. While it is wiser to join the tenant as a co-defendant, but as has been demonstrated by the above cited cases, it is not fatal for the lessor to omit to join the tenant as a co-defendant. It is therefore not mandatory that the tenant be sued as a co-defendant. In fact R.H Christie in *Business Law in Zimbabwe supra* at p 287 says the tenant may also be sued if there is a forfeiture clause in the agreement and the landlord wants the tenant evicted as well. So suing the tenant as a co-defendant will depend on the circumstances of each case and the remedy that the lessor wants to obtain from the court.

So under the circumstances the plaintiff has a valid cause of action against the defendant and the cause of action is delictual not contractual.

(c) <u>Whether or not Solta was still bound by the sublease agreement of 2006 at the time of its agreement with the defendant</u>

It is a fact that when the sublease agreement between Solta and the plaintiff expired on 31 December 2006 it was not renewed. At the same time Solta remained in occupation and in terms of s 22 (2) (a) and (b) of the Commercial Premises (Rent) Regulations 1983, SI 673/1983 it became a statutory tenant. A statutory tenant is entitled to remain in occupation indefinitely unless he or she fails to pay rent due within 7 days of due date under the lease and he fails to perform any other conditions of the lease. The section reads,

> "(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—
> (*a*) continues to pay the rent due, within seven days of due date; and
> (*b*) performs the other conditions of the lease;
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that—
> (i) the lessee has declined to agree to an increase in rent; or
> (ii) the lessor wishes to lease the premises to some other person."

S 23 thereof sets out the rights and obligations of a statutory tenant. It says,

> ***"23. Rights and duties of statutory tenant***
>
> A lessee who, by virtue of section 22, retains possession of any commercial premises <u>shall,</u> so long as he retains possession, <u>observe</u> and be entitled to the benefit of <u>all the terms and conditions of the original contract of lease</u>, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice:"

As correctly contended by the plaintiff, a statutory tenant must observe all terms and conditions of the expired lease to the extent that those terms and conditions are not inconsistent with the regulations. In *Total Zimbabwe (Pvt) Ltd* v *Appreciative Investments (Pvt) Ltd* HH268/10 KUDYA J said that the effect of s 22(2) as read with s 23 is that on acquiring statutory tenancy status the original lease is renewed to the extent it is consistent with the regulations.

In *casu* therefore, despite the non-renewal of the sub-lease agreement of 1996, Solta has a duty to observe all the duties imposed upon it by that agreement including the clause that bars it from subletting without the approval of the plaintiff. By subletting the premises to

the defendant Solta breached the contract. Consequently, the plaintiff is entitled to sue the defendant for eviction.

Conclusion

There are instances when a person is legally capable of leasing his or her own property from their own tenant. As such the sublease agreement of 2006 between Solta and the plaintiff is legally valid. That sub-lease agreement having expired 0n 31 December 2006 Solta became a statutory tenant, but it remained bound by the clause in the expired lease agreement which prohibited it from subletting the premises without the consent of the plaintiff. By subletting the premises to the defendant without prior consent by the Plaintiff, Solta breached the sub-lease agreement. As a result, the sublease is valueless and confers no rights on the defendant. The plaintiff is entitled to sue the defendant for its ejectment from the premises. There being no contract between the parties, the plaintiff's cause of action against the defendant is delictual. It is not fatal that the plaintiff has not sued Solta as a co-defendant.

Accordingly it be and is hereby ordered that:

1. The defendant and all those claiming occupation through it are hereby evicted from stand number 10232 Highfield Township, Harare (also known as Machipisa Service Station, Corner 112th and Main Streets, Machipisa, Harare).
2. The defendant pays cost of suit.

Scanlen & Holderness, plaintiff's legal practitioners
Nyika, Kanengoni & Partners, defendant's legal practitioners