

FIRST MUTUAL INVESTMENT (PRIVATE) LIMITED  
versus  
JONSPUT TRADING (PRIVATE) LIMITED  
and  
JOHN KONDO  
and  
ZANELE KONDO

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 26 October, 16 November, 3 December 2015 & 6 January 2016

**Civil Trial**

*T. Pasirayi*, for the plaintiff  
*K. Ncube*, for the defendant

MUSHORE J: The plaintiff company is the owner of a building in Bulawayo, simply described as Rhodian House. On 1 October 2012, the plaintiff (as the landlord) entered into a lease agreement with the first defendant (as the tenant) wherein the plaintiff leased Shop 2 Rodian House, 95-97 Jason Moyo Street, Bulawayo to the first defendant. On 4 October 2012, the second and third defendants bound themselves in writing as a Surety and Co-Principal Debtors for the performance by the first defendant of its obligations in terms of the lease agreement.

It is common cause that the period of lease was three (3) years with the lease being expected to run from 1 October 2012 to 30 September 2015. However according to the plaintiff, before the expiration of the lease agreement, the first defendant breached the terms of the lease agreement in that it failed to keep up with payments due for rent and operating costs. It was also the plaintiff's case that the overdue amounts attracted interest which the plaintiff also claimed separately in its particulars of claim. It was further alleged by the plaintiff that when the first defendant failed to rectify the breach it was then that the plaintiff instituted the current suit in order to recover the money it felt was due to it and also in order to obtain vacant possession of the premises. The first defendant however defended the action

denying liability for the plaintiff's claims and denying that the plaintiff was entitled to vacant possession it being alleged by the first defendant that the plaintiff never cancelled the lease agreement in the first place. The matter went on to the trial stage and after several postponements it was finally placed before me for trial. On the trial date the parties' legal practitioners advised me that they required time to try to settle the matter and it was after several hours that they advised that they had reached agreement on the liability aspect of the dispute. Subsequently they filed a Consent Order which put the liability aspect to rest and which read as follows:--

“BY CONSENT

- (1) First, second and third respondents are ordered to pay the plaintiff the amount of USD\$ 34, 219-81 with interest at the prescribed rate to be calculated from the 30<sup>th</sup> November 2015 to the date of the payment in full”

The parties' legal practitioners are to be commended their efforts and for having had the common sense to secure the settlement mentioned above because from my viewpoint they have significantly curtailed unnecessary proceedings in this case. Unfortunately and despite their best efforts, their respective clients could not see eye to eye on the issue of costs. It was then that I invited the parties' legal practitioners to make submissions with respect to costs, more particularly on the level of costs, or indeed whether costs could be shared by the parties; and if so to what extent so that I could make a ruling on the costs issue. Accordingly I convened a hearing in chambers to hear their arguments on the costs issue.

In its submissions the plaintiff is suggesting to me that it is entitled to an award of costs on a legal practitioner and client scale because during the settlement negotiations the plaintiff it had made meaningful concessions on *quantum* by settling for a reduced amount of its claim. The plaintiff explained that by so conceding it had in actual fact done away with half of the sum it had initially claimed in its declaration. I have established for myself by comparing the two amounts against each other, that indeed the plaintiff has effectively reduced its claim by half by settling for payment of the amount reflected in the Consent Order. I find the plaintiff's concession to be both considerable and meaningful.

The defendants, on the other hand submit that they should not have to pay the plaintiff's costs on a legal practitioner scale, their joint reasoning being that any costs award should be equitable in that each party should bear its own costs because the defendants regard the plaintiff's concession on *quantum* to be an admission by the plaintiff that its original

claim for rentals and operating costs was unduly excessive because it included rentals charged for an uninhabitable and unoccupied portion of the leased out space. To that end, it is being suggested by the defendants that had the plaintiff accepted from the beginning that the amount it had sued for wrongly included money relating to an uninhabitable and thereby unoccupied portion of the premises, then the plaintiff would not have had to bring unnecessary proceedings against the defendants. I have looked at the Joint Pre-Trial minute which was filed by the parties on 13 July 2015. According to the joint minute the following were the issues presented and agreed to by the parties as they proceeded to trial:-

“ISSUES

Main Claim

1. Whether or not 1<sup>st</sup> Defendant breached the lease agreement? If so, how?
2. If 1<sup>st</sup> Defendant did breach the agreement; how much rent and operational costs are due?
3. What rate of interest is applicable and is it legal?
4. Whether or not Plaintiff is entitled to collection commission.

Counter Claim

5. Whether or not Plaintiff was unjustly enriched and in that event the quantum thereof.
6. Whether or not the first defendant was and is entitled, in terms of the lease agreement to an abatement of rent in cases of delayed occupation and not to pay rent for parts of the premises which are not habitable i.e. 66.721% of the total lettable space.
7. Whether or not the 1<sup>st</sup> Defendant is entitled to withhold US\$14, 898-02 from the money due to the Plaintiff, if any and if none, payment of same.”

It is obvious when one peruses the minute that there were several issues to be ventilated at the trial including whether or not the parties were agreed as to the date when the first defendant had assumed occupation of the premises and whether or not the level of interest charged is legal [*inter alia*]. Thus in my view the defendants are being overly simplistic in their expectations that the court presiding over the trial on the issues would have only been concerned with the measurement or extent of the leased space to which the plaintiff was entitled to charge rentals. I cannot therefore ignore the fact that the defendants themselves also filed a counter-suit in which they wanted to ventilate other issues extraneous to the issue of the leased space. That being the case it is misleading for the defendants to allege that it was only the plaintiff who was being unnecessarily contentious right throughout the filing of pleadings and up until the trial. The defendants had raised their fair share of points which required the court's determination at trial. Accordingly the defendants have not

provided me with reason enough to make an equitable award of costs as they were equally to blame for the matter remaining contentious up until the trial date.

Now at the hearing I had anticipated that the parties would draw my attention to the lease agreement itself as a starting point to their argument on costs. Initially I had assumed that perhaps the lease agreement was silent on the costs aspect because for some reason or another both legal practitioners had seen it fit not to turn their attention to the lease agreement which as far as the pleadings described was in writing. In fact in preparation for the trial I had noticed that from the very beginning of the suit, the plaintiff had never appended the agreement to its pleadings and had never referred to the agreement at all save to mention that there was a written lease agreement. Even at the pre-trial stage the document had not been referred to at all or appended to the discovery affidavits. At the costs hearing I invited the plaintiff's legal practitioner to hand me a copy of the agreement and it was then that I saw that the lease agreement itself contains within it a specific clause which describes how costs should be awarded or apportioned in the event of a material breach of the agreement. Neither the plaintiff nor the defendants counsel referred me to the clause in question in the lease agreement in their respective submissions. I can only surmise that it had never occurred to either party's legal practitioners to address me on this specific costs clause, an observation which perturbed me bearing in mind that the legal practitioners involved were not novices. I have directed my attention to the costs clause therein (Clause 34:14) which is couched in very clear language and which reads as follows:-

“34.14 In the event that, as a result of or in connection with any breach by the Tenant of any obligation owed in terms of that agreement; or because the Landlord reasonably wishes to protect or preserve his rights in terms of this agreement, the landlord instructs legal practitioners to make demand and/or institute legal proceedings against the Tenant, the Tenant shall be responsible for all legal costs and disbursements incurred (on the legal practitioner and client scale, as if payable wholly from the client's own funds) and for any collection commission properly levied by the Landlord's legal practitioners” [My underlining]

Now the above clause 34:14 entitles the plaintiff to demand costs on a legal practitioner and client scale, in the event that the first defendant breaches any obligation of the lease agreement leading to the landlord having to make demand and instruct its lawyer to file a suit against the tenant. In this case and irrespective of any settlement having been achieved, the fact remains that money will pass from the hands of the defendants into the plaintiff's pocket by virtue of the first defendant having breached the lease agreement in its failure to pay the plaintiff the amounts due for rent, operating costs and interest thereon. Further after the commencement of the suit and during the filing of pleadings, the first

defendant vacated the premises concerned thereby constructively abandoning its insistence that it had the right to remain in occupation of the premises. Therefore it can be said that the first defendant acknowledges breaching the lease agreement in all aspects pleaded in the plaintiff declaration.

The above-mentioned clause 34:14 is therefore apposite in that it provides the plaintiff with remedies in the case of a breach or breaches of the lease agreement by the first defendant.

The clause is framed in very clear and express language and no ambiguity arises therein. It being trite that where the parties enter into a contract freely and voluntarily, the court which interprets the contract must ensure that the contract becomes sacrosanct when enforcing it, the court cannot and is not allowed to create another contract for the contracting parties. *Sir David Hughes Parry* in his book entitled “*The Sanctity of Contracts in English Law (1959) The Hamlyn Trust Series*” expounds the principle with clarity when he states that:-

“When all persons in a particular transaction have given their consent to and are satisfied, the law may safely step in with its sanctions to guarantee that right be done by the fulfilment of reasonable expectations”

In *Old Mutual Shared Services (Pvt) Ltd v Shadaya* HH 15/13, the court established that when applying the doctrine of sanctity of contracts, it is accepted that a court determining such a case cannot interfere by making a new contract for the parties but rather must interpret it and reinforce it.

Now in so far as the terms and the conditions and the obligations arising therefrom for the performance by any party to a contract, the court is obliged to “speak up” for the contract and ensure its sanctity is preserved and thereby enforced. However even though a court is generally bound to give effect to a contract as it stands, in special circumstances the court still retains a residual discretion to refuse to enforce the costs the way they appear on the agreement. A special circumstance may be where the claimant is guilty of conduct which warrants the court depriving the claimant of the costs agreed upon in the contract. To that end it is therefore apparent that where necessary the court has the means available to it to reward or penalise the claimant and therefore deviate from the strictures of a dogmatic approach of enforcement. However those circumstances should not only be special but more or less exceptional as the courts are reluctant to stray too far from ensuring that the sanctity of a contract be preserved and the agreement enforced. In *Western Bank Ltd v Meyer: De Waal:*

*Swart & Anor* 1973 [4] SA 687 (T); *S.A. Savings & Credit Bank v Bradbury And Others* 1975 (1) SA 936 (T); the Full Court of the Division acknowledged that although special circumstances may be found to exist, the predominately preferred approach is to apply the terms of the contract, because “*If the parties have seen fit to bind themselves to pay such costs, the Court must give effect to the contract*” [p 701 C-G]

In *Tselentes House (Pvt) Ltd v S A P & P House (Pvt) Ltd* 1995 (1) ZLR 56 (H) Malaba J, (as he then was), wholly embraced the views expressed by the Court in the Western bank cases, when he was presented with a similar argument regarding the court’s approach when dealing with an award of costs in circumstances such as those in the present case where there is a written agreement by one of the parties to pay legal practitioner and client costs in the event of a breach of the agreement. In the *Tselentes* case *Malaba J* enforced the agreement and granted an award for payment of costs on a legal practitioner and client scale after finding that the applicant for costs was not guilty of any conduct entitling the court to deprive it of the costs on the agreed basis of legal practitioner and client scale.

In the current matter I do not find any reason whereby I should deviate from the plain wording of the agreement in arriving at my determination. Section 31:14 is specific in describing the circumstances where the plaintiff can expect the court to award it costs on a legal practitioner and client scale in accordance with the agreement, where it provides for the following scenarios:

- (i) Where the first defendant has breached the agreement; and
- (ii) where the plaintiff is protecting or preserving its rights in terms of the agreement; and
- (iii) where the plaintiff has been forced to institute legal proceedings against the tenant.

In the current case, clause 34:14 of the contract plainly entitles the plaintiff to an award of costs on a legal practitioner and client scale in the set of circumstances which I have adverted to in the preceding paragraph. No reason exists in the manner that the plaintiff has conducted itself in this suit which warrants me to resort to applying a residual discretion in order for me to deviate from awarding the plaintiff higher costs. Accordingly, because I have no cause to detract from the plain meaning of this clause whilst enforcing it, I fully intend to award the plaintiff its costs in the terms stated in the lease agreement.

I therefore make the following order:

“The first, second and third defendants are ordered to pay the plaintiff’s costs on a legal practitioner and client scale, jointly and severally, the one paying the others to be absolved”

*Messrs Moyo and Nyoni*, defendants’ legal practitioners

*Messrs Gill, Gondlonton and Gerrans*, plaintiff’s legal practitioners