

SOUTHVIEW HOLDINGS (PVT) LTD
versus
BRUCE NHAMO TARUVINGA
and
MICRO PAL FINANCE (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 9 and 10 November 2015 and 13 January 2016

Trial

E K Kadzere, for the plaintiff
P Kawonde, for the defendants

FOROMA J: In this matter plaintiff sued first and second defendants for cancellation of a lease agreement on account of breach, ejectment of the first defendant and all those claiming occupation through first defendant from plaintiff's premises, payment of the sum of US\$9 000-00 representing rent arrears as at the time of breach and holding over damages at the rate of US\$1500-00 per month from 1 April 2015 to date of ejectment and 5% *per annum* interest from the due date of payment.

First defendant was sued in his personal capacity as the principal debtor he having been the tenant in terms of a written lease agreement with plaintiff. Second defendant was sued in its capacity as the surety and guarantor for the first defendant.

Defendants initially defended the whole of plaintiff's claims praying that the whole claim be dismissed with costs.

The defendants whilst admitting breach of the lease challenged the quantum of arrear rentals in its summary of evidence prepared for the purpose of a pre-trial conference resulting in the issue of the quantum of arrear rentals being referred to trial. The issue of quantum of arrear rentals was settled before trial. A proper reading of the defendants' summary of evidence (para 3) will reveal that issue 1.1 1 of the joint pre-trial conference minute could not properly have

been referred to trial. The issue of rent arrears and ejectment was however settled before commencement of trial leaving the sole issue for trial as quantum of holding over damages.

At the trial plaintiff called its only witness one Darlington Mandaza whose evidence was briefly that even though the economic down turn did not spare the plaintiff in its property renting business it did not affect the renting out of 3 bedroomed apartments which continued to fetch the same rentals. Darlington Mandaza conceded fairly that 2 and 4 bedroomed apartments had been difficult to fill once vacated and agreed that a number of units remained vacant.

The plaintiff insisted that its claim for holding over damages as made in the summons was sustainable and that the plaintiff would have been able to realise the same rental return for the entire holding over period. Whilst conceding a general deflation in the economy plaintiff's witness maintained that 3 bedroomed units were not adversely affected by the market and this evidence was not challenged by the defendant. It is common cause that market rentals at the time of breach are the yardstick for determining holding over damages see *Sandown park (Pty) v Hunter Your Wine and Spirit merchant (Pty) Ltd and Another* 1985 (1) SA 248.

The onus to establish market rentals for purposes of proving holding over damages is on the plaintiff and the standard of proof is on the usual preponderance of probabilities. The evidence adduced by plaintiff in *casu* to prove market rentals was that of Mr Mandaza which was largely unchallenged and it was that there was no difficulty in securing tenancy on the same terms and conditions as to rent and operational costs in respect of 3 bedroomed units in the area.

First defendant on the other hand was unable to dislodge the evidence that in the area where the cluster units were located 3 bedroomed units were not significantly affected by the general economic down turn. The court thus finds that the market rental for purposes of assessment of holding over damages was adequately established by plaintiff in the absence of any cogent evidence in rebuttal.

In the result as the plaintiff's premises in issue had since been vacated it is ordered that first and second defendant pay plaintiff jointly and severally the one paying the other to be absolved;

- i) Arrear rentals in the sum of \$9 000-00
- ii) Holding over damages in the sum of \$1 500-00 per month for the period 1 April 2015 to the date defendant vacated plaintiff's apartment

- iii) 5 per cent *per annum* interest on \$9 000-00 with effect from 1 march 2015 to date of payment in full.
- iv) 5 per cent *per annum* interest on holding over damages with effect from 1 April 2015 to date of payment in full.
- v) Costs of suit on the scale of legal practitioner and client in terms of clause 24.4 of the cancelled lease agreement.

Kadzere, Hungwe & Mandevere plaintiff's legal practitioners
Kawonde & Company, defendants' legal practitioners