

JENNIFER NAN BROOKER NEE PEARCE
and
MARGARET COLLINGWOOD GODWIN NEE PEARCE
and
ADRIENNE STALEY EMMERSON NEE PEARCE
and
STALEY ROY ALFORD PEARCE
versus
SPELLBOUND INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 15-17 July 2015, 23-24 July 2015
and 18 May 2016

Civil Trial

Ms J. Woods, for the plaintiffs
O.D Mawadze, for the defendant

MUREMBA J: The plaintiffs issued summons against the defendant claiming

1. US\$2000.00 in respect of outstanding rentals for the period April 2013 to August 2013 in respect of premises owned by the plaintiffs and which are occupied by the defendant.
2. An order for the eviction of the defendant and all these claiming occupation through it from 122B Harare Street, Harare.
3. Holding over damages at the rate of US\$134.00 per day from 1 October 2013 to date of defendant's vacation of premises.
4. Costs of suit.

At the commencement of trial the plaintiffs amended by consent their claim for arrear rentals from US\$20 000.00 to US\$16 000.00 stating that it is for the period April 2013 to September 2013. They also amended para 5 of their particulars of claim to read that, " in breach of the lease agreement, the defendant has not paid the rentals for April 2013 and has paid only \$2000.00 per month for the months of February, May, June, July, August and September 2013."

In their particulars of claim the plaintiffs stated that the defendant is their statutory tenant at 122B Harare Street, Harare. They said that the monthly rental is US\$4000.00 inclusive of VAT. I must point out from the onset that I found the amendment very confusing because the summons says the arrear rentals are for the period April 2013 to September 2013, which is a period of 6 months. On the other hand the particulars of claim refer to the period February 2103 to September 2013, which is a period of 8 months. To add on to the confusion, the amended para 5 of the particulars of claim is completely silent about the rentals for March 2013. It is not known whether they were paid or not.

In its amended plea the defendant stated that it was a tenant for ComYiannakis of Fit and Fix Company for a period of 10 years from 23 February 2010 terminating on 23 December 2021. It stated that in terms of the lease agreement they entered into, it was agreed that the defendant would renovate the premises as they were dilapidated. Consequently, it made improvements worth US\$100 000.00 to make the premises a modern shopping mall. The defendant said that in terms of the lease agreement it was also made to pay US\$25 000.00 as refundable good will. The defendant stated that it was agreed that it would recover the total of US\$125 000.00 from the rentals after subletting the property.

The defendant also pleaded that Com Yiannakis of Fit and Fix Company later gave it a directive to pay rentals to Guest and Turner after Guest and Turner had taken over the lease agreement as it stood with all its benefits, terms and conditions and when it expired it was never renewed.

The defendant averred that there was never a lease agreement between itself and the plaintiffs save for the one between itself and Com Yiannakis of Fit and Fix which Guest and Turner took over. The defendant averred that it was assuming that Guest and Turner was or is possibly the plaintiffs' agents. The defendant stated that if its assumption is correct then it means that it is a statutory tenant of the plaintiffs since when the lease agreement between it and Com Yiannakis of Fit and Fix Company expired it was never renewed.

The defendant averred that it has been and continues to pay the agreed rental to Guest and Turner and has never been in default. It further averred that sometimes it pays rentals 2-3 months in advance.

The defendant further averred that it has a lien over the property for the improvements it made and the money it paid in goodwill and as such it cannot be evicted without recovering those monies. The defendant said that if it is evicted without having recovered the US\$ 125 000.00 the plaintiffs will have been unjustly enriched.

The defendant disputed that the agreed rental was US\$4 000.00 per month. It said in terms of the written lease agreement that it entered into with Com Yiannakis of Fit and Fix Company, for the first 2 years from February 2010 to February 2012 the agreed rental was US\$4000.00 per month. After that period the rental would be automatically varied downwards to US\$2000.00 for 5 years. This was so that the defendant could recover its money for the improvements it had made in the sum of US\$1000 000.00 and the US\$25 000.00 it had paid as goodwill. The defendant stated that it was never agreed between itself and Guest and Turner when it took over the lease agreement that the new rental would be US\$4000.00 per month.

At the pre-trial conference it was agreed between the parties that the issues for determination were:

1. Whether there was a lease agreement between them;
2. If so, what were the terms thereof;
3. Whether the plaintiffs are entitled to the amount claimed or any part thereof;
4. Whether the plaintiffs are entitled to evict the defendant.

In order to determine this matter I will deal with these issues one by one. However, let me point out from the onset that in order to prove their case the plaintiffs led evidence from Cletus Chakoma, the managing director of Guest and Turner whom they gave a special power of attorney to represent them in these proceedings by virtue of Guest and Turner being the property manager of the plaintiffs premises which are being leased by the defendant.

On the other hand, the defendant led evidence from Damison Kumirai and Clepperton Kariwo who are the directors thereof.

I now turn to deal with the issues for determination.

1. Whether or not there was a lease agreement between the parties

Cletus Chakoma's evidence was as follows. In 2009 Guest and Turner entered into a 5 year lease agreement with Fit and Fix Company in respect of the said premises. Fit and Fix Company said that it was leasing the premises for itself. However, as time went by Fit and Fix Company failed to pay rentals which prompted Guest and Turner to terminate the lease agreement around 2012 between the parties. Upon termination of this lease agreement Cletus Chakoma discovered that Fit and Fix Company had been subletting the premises to the defendant yet there had not been an agreement that allowed Fit and Fix Company to sublet the premises. The defendant was in occupation. The defendant's 2 directors pleaded with him so that they could be allowed to remain in occupation and offered to pay the US\$4000.00

they had been paying to Fit and Fix Company as monthly rental. Cletus Chakoma said that he accepted the offer and let the defendant continue in occupation now as the tenant of the plaintiffs. He said that he asked the defendant's directors to come and sign a lease agreement with Guest and Turner, but they never came, and as such, that agreement was never reduced into writing. He said that when Fit and Fix Company was still in occupation its monthly rental was \$2 000.00.

Damison Kumirai for the defendant gave the following evidence. He said that he first came to know about the plaintiffs when he received the summons for the present matter, otherwise the defendant had no direct legal relationship with them. He said that the defendant's initial relationship was with Fit and Fix Company which is in the business of getting or finding places in town, renovate them and then let them out like an estate agent. He said that Fit and Fix Company offered them 122A and B Harare Street, Harare in 2009 and they entered into a written lease agreement. He said that initially he thought that Mr Com Yiannakis of Fit and Fix Company was the owner of the building, but Mr. Com Yiannakis later said that he had a partner, Mr. Chakoma and he said that they were sharing the money for rentals. Damison Kumirai said that the person who would collect rentals from them for Fit and Fix Company was one Pedro. He said that Guest and Turner only came into picture in December 2012 by way of receipts which bore its name, which receipts were now being issued to the defendant upon payment of rent. He said that is the month when Pedro started issuing the defendant with Guest and Turner receipts upon defendant's payment of rentals. He said that it was not clear to them whom Pedro was working for between Fit and Fix Company or Guest and Turner. He said that when Guest and Turner took over the property from Fit and Fix Company the defendant was never told about that change. He said that Mr Chakoma never told them about that change and the defendant never had an agreement with Guest and Turner about the rentals. He said that it was not true that the defendant had refused to sign a lease agreement with Guest and Turner. He said that the truth was that the defendant was never invited to sign any lease agreement by Mr. Chakoma as no rent negotiations had ever been entered into. He said that he only became aware that the premises belonged to Guest and Turner clients when he was served with the summons. He said that all along he had been under the impression that Mr Chakoma and Mr Com Yiannakis were in partnership because at one time Mr Chakoma had come to the premises together with Mr Com Yiannakis and was introduced by Mr. Com Yiannakis as his partner. He said that even when Fit and Fix Company got out of the picture and Guest and Turner featured, he still thought that they were

partners and as such he thought that Mr Chakoma was aware of the lease agreement which was between Fit and Fix Company and the defendant. He said that as such he never bothered to discuss anything about the terms of the lease agreement with Mr Chakoma or to even show him the lease agreement. He said that he did not know the arrangements which were between Fit and Fix Company and Guest and Turner. He said that Fit and Fix Company never told them that it was leasing these premises from Guest and Turner. He said that he also did not know that Mr. Chakoma was working for Guest and Turner because when he was introduced to them in 2010, he was just introduced as Mr Chakoma, a partner of Mr Com Yiannakis. He said that Mr. Chakoma was brought to the premises at the time the defendant was doing renovations to the premises. He said that from February 2010 up to November 2012, Pedro was issuing them with receipts written Fit and Fix Company. He said that in December 2012 Pedro from nowhere issued them with a receipt written Guest and Turner. He said that nothing was explained, all they saw was the change of receipts. He said that when they asked Pedro about the change in receipts, Pedro simply said that it was for administration purposes. He said that they never queried the explanation because Pedro who had been collecting money for rentals from them and issuing them with the receipts for Fit and Fix Company before, was still collecting rentals from them and issuing them with receipts. The only difference was that he was now issuing them with receipts written Guest and Turner. He said that Pedro even gave them the bank account number of Guest and Turner such that sometimes they would even make rental payments straight into Guest and Turner account.

Clepperton Kariwo's testimony was basically the same as that of Damison Kumirai. He also said that Mr. Com Yiannakis brought Cletus Chakoma and introduced him as his partner. He also said that when Pedro started issuing them with Guest and Turner receipts they asked him why and he said that it was for administration purposes. He said to them Guest and Turner and Fit and Fix Company were one. He also said that he knew nothing about the lease agreement which had been between Guest and Turner and Fit and Fix Company. He said that to his knowledge Fit and Fix Company was just a managing agent just like Guest and Turner. It would let out premises, but never occupied any shop. He said that in February 2013 when the defendant started paying \$2 000.00 as rental, Pedro never objected, so it was boggling to him why Cletus Chakoma was saying that he was not aware of the lease agreement which was between Fit and Fix Company and the defendant. He however, said that they (defendant's directors) never discussed with Cletus Chakoma about their lease agreement with Fit and Fix Company because they took it that he was well aware of it since he had been

introduced to them as Mr. Com Yiakkanis' partner long back in 2010. He said that he did not understand why Mr. Chakoma wanted to run away from the terms and conditions of the lease agreement which was entered into by the defendant and Fit and Fix Company since it is the only lease agreement that the defendant signed and was aware of. He said that that lease agreement was never cancelled and no fresh lease agreement was ever entered into between them and Mr. Chakoma.

The lease agreement that was signed between the defendant and Fit and Fix Company was produced as an exhibit together with its addendum. The two documents were signed of the same day, 23 February 2010. Basically the two documents are in line with what the two defendant's directors said in their evidence. However, in clause 2.1 of the addendum which deals with the rent issue, it is said that the rental payable for the premises is US\$4 000.00 per month for the first two years from date of commencement (23 February 2010) up to 23 February 2013. A calculation of the period shows that from February 2010 to February 2013 there is 3 years not 2 years. When the defendant's witnesses were asked about this, they said that the parties could have made a mistake in saying up to February 2013 instead of February 2012. They said that it showed that they had actually over paid the rentals to Fit and Fix Company as they should have paid \$4 000.00 per month up to February 2012, instead of February 2013.

The Law

A lease agreement is a contract between a lessor and a lessee that allows the lessee rights to the use of a property owned or managed by the lessor for a period of time. It also states what the lessee will pay monthly for rent and stipulates other various conditions¹. A lease agreement may be made in writing, orally, tacitly or by a combination of these methods². It is an agreement which is created when the lessor who is the offeror makes an offer to the lessee who is the offeree and the lessee accepts the offer.

For an offer to be valid it must clearly define all the terms in which an agreement is sought. It must not be vague, but certain and definite in its terms³. The offer must be communicated to the offeree. The offeree must have knowledge of the offer if his acceptance

¹ R.H. Christie, *Business Law in Zimbabwe* 2nd Ed p 272.

² *Woods v Walters* 1921 AD 303; R.H. Christie, *Business Law in Zimbabwe* p 274.

³ *Nkomo and Ors v ZESA* 2004 (1) ZLR 345 (H) 350C.

is to constitute a valid contract⁴. An offeree cannot have an intention to accept an offer of which he is not aware of. The offer may be verbal, written or implied⁵.

On the other hand, the lease agreement comes into existence if the lessee accepts the offer unequivocally. Acceptance of the offer must be clear, unambiguous and should not leave any reasonable doubt in the mind of the lessor that his offer was accepted. The acceptance must exactly correspond with the terms of the offer. In *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd and Ors* 1987 (1) ZLR 141 (S) it was held that,

“For a contract to be formed it is necessary that the offeree must, in agreeing, accept the exact terms offered by the offeror”

A valid acceptance can be either express or implied from the conduct of the offeree. It is also a requirement of the law that a valid acceptance must be communicated to the offeror⁶.

The foregoing shows that for a valid lease agreement to come into effect or existence there must be offer and acceptance. The minds of the contracting parties should therefore meet⁷. The terms of the agreement must be clear. The parties must have the serious intention to be legally bound by the agreement⁸.

Once parties enter into a valid lease agreement the doctrine of privity of contract applies. The doctrine provides that contractual remedies are enforced only by or against parties to the contract, and not third parties. Innocent Maja in his book *The Law of Contract in Zimbabwe* at p 27 states that,

“According to Lilienthal, privity of contract is the general proposition that an agreement between A and B cannot be sued upon by C even though C would be benefited by its performance. Lilienthal further posits that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.”

What this therefore means is that a person who is not a party to a contract cannot sue in contract for breach of contract and for contractual remedies. This is because contractual remedies are meant to put the parties in the position they would have been had the contract been properly performed.

⁴ Innocent Maja *The law of Contract in Zimbabwe* p 34

⁵ Innocent Maja *The law of Contract in Zimbabwe* p 34

⁶ Innocent Maja *The law of Contract in Zimbabwe* p 40

⁷ Innocent Maja *The law of Contract in Zimbabwe* p 20

⁸ Innocent Maja *The law of Contract in Zimbabwe* p 20

Application of the Law

In *casu*, the persons with the onus to prove the existence of the lease agreement are the plaintiffs. This is because he who seeks a remedy must prove the grounds thereof. The party who alleges must prove.

Looking at the evidence which was led on behalf of the plaintiffs by Cletus Chakoma I am not satisfied that he managed to prove on a balance of probabilities that the plaintiffs have a lease agreement with the defendant. In other words he failed to show or prove that Guest and Turner and the defendants entered into a lease agreement after Fit and Fix Company had gone out of picture. Whilst Mr. Chakoma says that there was an initial lease agreement between Guest and Turner and Fit and Fix Company, it appears from the evidence of the defendant's two directors that they were not aware of this. They mentioned that from the time they started knowing Mr. Chakoma they knew him as a partner of Mr. Com Yiannakis. They said that when Fit and Fix Company got out of the picture and Guest and Turner came into picture no one explained anything to them except that all that they saw was the change of receipts and Pedro who continued to collect money from them said that the change of receipts was just an administration issue. Whilst Cletus Chakoma says that the defendant's directors pleaded with him to take them on board as their tenants this is a thing he failed to prove on a balance of probabilities. He said that as parties they agreed on rentals of \$4 000-00 per month which thing the defendant's directors vehemently denied or disputed. They were adamant that no rent negotiations were entered into. They said that they continued paying rentals as per their agreement with Fit and Fix Company and that agreement was never cancelled. They said that as a result they thought that Guest and Turner had taken over the lease agreement on the same terms and conditions they had with Fit and Fix Company. They said that they thought that way because Mr Chakoma had once been introduced as Mr. Com Yiannakis' partner. They said that they never saw the point of discussing the terms of the lease with Mr. Chakoma because they thought that he already knew about them as a partner of Mr. Com Yiannakis. They said that Mr. Chakoma had been aware of the improvements that had been made to the premises since he would occasionally come to the premises at the time the premises were being renovated and improved.

Cletus Chakoma admitted that improvements were made to the premises, but said that he never consented to them. He said that Fit and Fix Company made those improvements for its own benefit and as such it was not entitled to be compensated by the plaintiffs. On the other hand, the defendant's two directors contended that they agreed with Fit and Fix

Company that the defendant was entitled to recover its money through a reduction of rentals from \$4 000-00 to \$2 000-00 per month for 5 years 2 months. They produced their lease agreement with Fit and Fix Company which the plaintiffs' counsel said to be suspect because it had some anomalies. The anomalies were that (a) Fit and Fix was said to be the owner of the premises though it was not; (b) the rent of \$4 000-00 was said to be chargeable for 2 years, but the period actually specified was 3 years (c) the lessee agreed to pay US\$100 000-00 for improvements even though it was not the owner of the premises; (d) there is provision for payment of US\$ 25 000.00 which was said on one hand, to be for goodwill (which was not refundable) and on the other, to be a refundable good tenancy deposit.

Of course there might be anomalies in the lease agreement, but that alone is not enough for me to be convinced that the defendant's directors manufactured this lease agreement for the purposes of using it in the present proceedings. Despite the anomalies, I am convinced that it is the lease agreement that the defendant and Fit and Fix Company entered into in 2010 when the defendant started leasing the premises. To disprove this lease agreement, the plaintiffs could have called Fit and Fix Company to testify. I believe the defendant's witnesses because it is not in dispute that there was a lease agreement between Fit and Fix Company and the defendant before Guest and Turner cancelled its contract with Fit and Fix. It is also not in dispute that improvements were made to the plaintiffs building. Mr. Chakoma did not lead any evidence to show that the improvements were made by Fit and Fix Company and not by the defendant. The defendant's directors said that in terms of their lease agreement with Fit and Fix Company the defendant was entitled to recover its money. When the defendant's directors testified they showed that they felt strongly about the money they expended in improving the building. They said that they even had to have the plan to improve the building approved by the City Council. With this, I do not believe that they could have entered into a lease agreement with Cletus Chakoma and agreed to pay rentals to Guest and Turner at the rate of \$4 000-00 per month and completely disregard the money they had spent on the improvements to the premises and the money they had paid as refundable goodwill or good tenancy deposit.

I am inclined to believe the defendant's directors when they said that when Guest and Turner took over it did not enter into a lease agreement with the defendant. The parties did not discuss the terms and conditions of the lease. If they had, there would not have been a subsequent dispute over the amount of rent payable per month by the defendant. The defendant would not have continued to adhere to the terms and conditions of its old lease

with Fit and Fix Company. The lease agreement states that the rent of \$4 000-00 per month was payable from date of commencement of the lease to 23 February 2013. Thereafter rent was going to go down to US\$ 2 000-00 per month for the next 5 years and 2 months. It is true that the defendant paid \$4 000-00 and switched over to \$2 000-00 per month as per the lease agreement. Even when the lawyers for the plaintiffs wrote to the defendant on 24 May 2013 demanding arrear rentals of \$16 000-00, the defendant wrote back saying that according to its books its rentals were up to date and it urged the plaintiffs' lawyers to verify or check with their accounts department. Even in August 2013 when another demand for arrear rentals was made by the plaintiffs' lawyer, the defendant again wrote back saying that it did not owe the plaintiffs any arrear rentals maintaining that it was fully paid up and that it always paid its rentals on time to Guest and Turner. In a letter dated 6 September 2013 the defendant even wrote to the plaintiffs' lawyers asking them to explain to it how it was indebted to the plaintiffs. These letters by the defendant are testimony that the parties (Guest and Turner and the defendant) never agreed on the amount of rental payable per month. What it shows is that after Fit and Fix Company had left the picture, Cletus Chakoma did not engage the defendant's directors and put them into the picture of what was happening. If the parties had agreed on the amount of rental, this misunderstanding over how the rental arrears had arisen would not have happened. The defendant would have known why the plaintiffs' lawyers were saying that it was in arrears. I am convinced that the parties never sat down to define the terms of their new agreement. In court Cletus Chakoma was insisting that the agreed rental was \$4 000-00 per month. Other than that he did not tell us what the other conditions of the lease agreement were. He did not even tell us the duration of their lease agreement. He did not say what the parties agreed upon in respect of the improvements that the defendant had made on the property and the money they paid as goodwill. Considering the huge amount involved I do not believe that the defendant's directors would have completely ignored or abandoned the recovery of that amount. If they had chosen to abandon it then, why would they make a turn-around now and insist on recovering it? It also does not make sense to me that Mr. Chakoma said that the defendant's directors refused to come and sign the lease agreement that he invited them to come and sign. How could people who were illegal sub-tenants, who had begged him to take them on board as tenants refuse to sign a lease agreement? On what grounds would they refuse as beggars? I find this to be highly incredible. I do not believe that Mr. Chakoma was being truthful that the defendant's directors refused to sign the lease agreement. From the evidence led before the court it is not

in dispute that the defendant paid US\$4000.00 per month to Guest and Turner from December 2012 to February 2013 and that it was in March 2013 that the defendant started paying \$2000.00 per month. This was clearly consistent with the terms of the lease agreement that the defendant had entered into with Fit and Fix Company in 2010. What I make out of this whole scenario is that since Mr. Chakoma was not aware of the terms and conditions of the lease agreement between Fit and Fix Company and the defendant, he did not realise that the defendant was entitled to recover the money that it had spent on improvements and the money it had paid as goodwill which was refundable. He did not realise that there was going to come a time when the rentals were going to go down from \$4000.00 to \$2000.00. He thought that it would remain at \$4000.00 per month. This explains why he never engaged the defendant to discuss any terms of the new lease agreement between the defendant and Guest and Turner. In doing this he took advantage of his previous relationship with Com Yiannakis, he had already been introduced as a partner. On the other hand, Pedro also continued to collect the money for rentals. Pedro had been collecting rent for Fit and Fix Company before and he continued to collect it for Guest and Turner. So administratively, nothing much had changed except for the type of receipt which was now being issued which bore the name of Guest and Turner. As to how Pedro was operating, it was not known to the defendants, but to Fit and Fix Company and Guest and Turner.

The foregoing shows that the terms of the agreement between Guest and Turner and the defendant were not made clear between the parties. The parties did not agree on the exact terms of their contract. No valid offer and acceptance was ever made by the parties. There was never a meeting of the minds between Guest and Turner and the defendant when Fit and Fix went out of the picture. The defendant continued to operate on the basis of the lease agreement it entered into with Fit and Fix Company thinking that Mr. Chakoma of Guest and Turner was a partner.

In view of the foregoing it is my conclusion that the plaintiffs did not prove on a balance of probabilities that there was a lease agreement between the parties. There being no contract between the two parties, the plaintiffs cannot sue the defendant in contract for contractual remedies such as the recovery of arrear rentals, holding over damages and eviction.

In the result, the plaintiff's claim is dismissed with costs.

Dhlakama B. Attorneys, plaintiffs' legal practitioners
Manase and Manase defendant's legal practitioners