JOHN DESMOND STAMBOLIE
versus
IMPERIAL MEATS (PRIVATE) LIMITED
and
W.T SWAN
and
J SWAN
and
ANDREW PAUL RABAN HOUSE N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 7 July & 7 September 2016

Civil Trial

IEG Musimbe, for the plaintiff
R Makamure, for the defendant

TSANGA J: The defendants have applied for absolution from the instance at the close of the plaintiff's case. The plaintiff issued summons in which his claim was stated as follows:

> "Plaintiff's claim is in the total of US$ 82 903.62 as against first, second, third and fourth defendants jointly and severally liable, the one paying the other to be absolved made up as follows:
>
> 1.1 Payment of US $2 025.68 in respect of rates and water for the months of September 2011 to 14th February 2012, together with interest at the legally prescribed rate from 14th February 2012 to date of full payment.
>
> 1.2 Payment of US $1 225.00 being the agreed 10% penalty for late payment of rent for the months of April, May, June and July 2011, together with interest at the legally prescribed rate from 31 July 2011 to date of full payment.
>
> 1.3 Payment for the sum of US$10 986.30 being damages for holding over from September 2011 to February 2012, calculated at US$67.75 per day, together with interest at the legally prescribed rate from 14th February 2012 to date of full payment.
>
> 1.4 Payment of the sum of US$58 491.00 being the cost by the plaintiff to replace and install the refrigeration equipment damaged and /or removed by the defendants from the premises leased from the plaintiff by the first defendant.
>
> 1.5 Payment for the sum of $10 175.64 being in respect of electricity charges incurred on the leased premises by the First defendant, together with interest at the legally prescribed rate from 14th February 2012 to date of full payment.

The above amounts arise from the First defendant's breach of the written lease agreement between the plaintiff and the First Defendant, in respect of which the second third and fourth defendants, stood as sureties and co-principal debtors.

2. Costs of suit on a legal practitioner and client scale together with collection commission to the extent that the same is permitted by the Law Society By-Laws as provided for in the written lease agreement between the Plaintiff and First Defendants."

The Plaintiff's evidence

Plaintiff's evidence was that he leased the premises in question in December 2004 after he had been approached whilst in Binga at the time, by Mr V Swan and Mr WT Swan who wanted to take over the premises for a butchery. He disclosed that it was sometime in 2009 when he had come from Binga and found a gentleman by the name of Mr Mitchell who said he was in partnership with Mr W T Swan. In January 2010, he had come again and this time saw another gentleman by the name of Mr Harvey, who had informed him that Mr Mitchel was in the process of selling him the business inclusive of the machinery. It was at that time that he had noticed that various motors and compressors were missing from some of the cold rooms. New equipment had been put in which essentially replaced the open drive freezer units that were on the premises with sealed units which worked as cold rooms. He had written to the second defendant emphasising that the tenancy was with him and that he could not sublet the premises.

The defendants had subsequently written to him indicating that they were vacating the premises in June 2011. A list had been given to them of all the issues that they had to attend to before they could vacate the premises. These, in part, related to compressors that had been removed from the premises. After the defendants said they had effected the repairs, he had asked them to confirm in writing that the sealed units they had put in were able to operate at the same temperature and performance as the open drive units that they had removed. Whilst they had responded to say the units worked they would not give an undertaking that they worked at the requisite temperatures for freezers, being a minimum of -10 degrees.

His evidence was that he had rented the premises with equipment as freezers which were now operating as cold rooms. His evidence was that he had given the defendants an opportunity to remove the closed units which they had installed and return the old units which they had failed to do. He said that to have the open drive system back again would require an outlay of $36 900.00 which was what he was now claiming as a reduced amount for second hand units. He said he had arrived at this figure by getting quotes for new units and removing a third from the figure. He also said that he had sold the closed units to the

present tenant as cold rooms. He stated that the lease contained a clear provision that the maintenance of premises and equipment was the tenant's responsibility. It was his evidence that the equipment had been in good working order at the time of the lease although he acknowledged in cross examination that no prior inspection had been done to confirm its condition prior to the taking up the lease. He said an estate agent had been responsible for administering the lease on his behalf. He also agreed that the issue of the freezer room temperatures was not captured in the lease agreement and that what was leased were freezer rooms.

As regards the claim for rent for $10 948.00, he said he was claiming this because he had had a tenant who had been ready to takeover in August 2011 but who could not do so because of the problems the plaintiff was having with the defendants in sorting out the refrigeration. As such his claim for arrear rentals, was up to February 2012 because that was when he had found a new tenant. As regards these arrear rentals it was put to him that the loss had been occasioned by his unreasonable behaviour given that the machinery in question remains on the premises and is still functioning. Any loss of income for the months in question was said to be due to his own conscious decision not to find a tenant. He disagreed that asking for his equipment back would amount to unreasonableness. Instead he saw the removal of the equipment as being tantamount to theft.

As regards the claim for $1 225.00 made up of the penalty for late payment of rentals for the months April to July 2011, he agreed in cross examination that the amount does not constitute 10% of the $1 750.00 but justified the claim as being for a total of seven months.

With regards to his claim against the defendants jointly and severally in cross examination the plaintiff agreed that the surety to the lease was W T Swan and that the other two defendants had not signed as sureties.

His claim for City of Harare charges for US$ 2 028.00 still stood, constituting the balance left off by the defendants up to the end for February 2012 when he finally found a tenant. However, his evidence was that the claim for $10 175.64 being in respect of electricity charges on the leased premises had fallen away as the account had been transferred to the defendants by ZESA for payment.

He also claimed US$1 638.75 for repairs he had done to the freezer units. It was also put to him that this claim for $1 638.75 could not be attributed to the plaintiff given that at the time of the repairs two other tenants had since occupied the same premises. Whilst he agreed

that two tenants had indeed been in occupation he maintained that the repairs had been necessitated due to a hot gas pipe having been cut by the plaintiffs.

It was put to him that overall his claim was deceitful and malicious as against the plaintiffs and clearly lacked merit as his legal practitioner had clearly indicated that he was replacing the equipment and would issue summons in light of the replacement yet this had not been done. His standpoint was that the deceit was not intentional and insisted that his machinery had been removed and that he has a right to claim for it back again. Whilst he said he had since sold the closed system to a tenant, he agreed that he had no evidence to prove it.

The plaintiff's second witness was Mr Itai Zvenyika Munyoro, the managing director of Exodus Refrigeration who carried out maintenance of equipment at the premises. His evidence was largely of a technical nature in terms of how the two systems operate. He stated that the open drive freezers are more expensive than the closed systems that were installed by the defendants. He also stated that the quotation that the plaintiff had obtained for replacement seemed reasonable and that acceptable depreciation would indeed be about 30%.

The application for absolution from the instance

The gist of the defendants' application for absolution was that what the plaintiff had not proved his claim as per his summons and declaration. At the heart of the claim is that the plaintiff did a u turn at the trial in terms of his claim when it is in essence the duty of a plaintiff to state in concise terms what their claim is, so as to enable the other side to know the case they have to answer. (See *Hackleton Investments (Private) Limited* v *Time Bank of Zimbabwe Limited.*[1]) It is argued that it is incompetent for the court to base its decision on grounds outside the pleadings of the parties. The case of *Matambanadzo Bus Services (Pvt) Ltd* v *Magner*[2] was cited for the proposition that the trial should not be allowed to become a free for all with disregard to the issues raised in pleadings and that of *Keavney & Anor* v *Msabaeka Bus Services (Pvt) Ltd*[3] was put forward that a pleader cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another.

As regards the claim against the defendants jointly and severally it is argued that the defendant is a company capable of entering into its own agreements and that the lease agreement is clear that it was entered into with the first defendant with the second defendant only standing as surety. The late payment claim is said to mathematically inaccurate in light

[1] *Hackleton Investments (Private)Limited v Time Bank of Zimbabwe Limited 2000(1) ZLR (H) 60 at p 62*
[2] *Matambanadzo Bus Services (Pvt) Ltd v Magner 1971 (1) ZLR 54 (A) at 551*
[3] *Keavney & Anor vs Msabaeka Bus Services (Pvt) Ltd 1996(1) ZLR 605 (S)*

of the months for which it is claimed. As regards vacant possession, counsel's position is that the defendants vacated the premises 30 June and that there was no evidence that defendant was in occupation after 30 June. Defendant also says that on the evidence led it cannot be held responsible for loss of income as it was the plaintiff's duty to mitigate his loss by finding a tenant after the defendant vacated on 30 June. The case of *Jayber (Pty) Limited* v *Miller & Ors*[4] is relied upon on the duty to mitigate. This is said to be more so as the defendant had given its notice on 2 May 2011 of the intention to vacate. Since equipment complained of is still in use today, it is said that there is no merit in the argument that the premises could not be leased out at the time. Moreover, it is argued that how the plaintiff arrived at the damages he claims has not been shown.

Plaintiff's opposition

The gist of plaintiff's resistance to absolution is firstly that the defendants signed the lease in their personal capacities trading as Imperial Meats. As regards the claim for late payment it is argued that the real issue is whether there was late payment of rent. As regards the vacation of the premises, plaintiff argues this it is misleading to say that they vacated on 30 June when correspondence shows they had not effected the requisite handover. Furthermore, it is emphasised that there could not have been a new tenant put on the premises because of the dispute that was on going on the condition of the premises. It is submitted that the real issue is whether they handed over the premises in the agreed condition after the termination of the lease, with the refrigerators operating at the agreed temperatures.

It is also argued that the real issue is not whether they were replaced but what would be the cost of replacing the freezer units. It is further put that the fact that the plaintiff did not actually replace the units does not take away the fact that the real issue is that of the reasonable cost of doing so. The plaintiff's position, relying on *Dube* v *Dube,*[5] is that a case should not simply be dismissed because it contains contradictions particularly in this case where quotations were produced to establish the damages being claimed. It is also argued that sufficient evidence has been produced relating to all elements of the claim. In resisting the application for absolution plaintiff relies on the case of *Standard Chartered Finance Zimbabwe LTD* v *Georgias & Anor*[6] where Smith J opined that:

[4] *Jayber (PTY) Limited v Miller & ors 1980 (4) SA 280 at 286*
[5] *Dube v Dube 2008 (1) 326*
[6] *Standard Chartered Finance Zimbabwe LTD v Georgias & Anor 1998 (2 ZLR 547 (H)*

> "In considering an application for absolution from the instance a judicial officer should always lean in favour of the case continuing. If there is reasonable evidence on which the court might find for the plaintiff, the case should continue".

Analysis and disposition

Both counsel rely on the case of *Lourenco* v *Raja Dry Cleaners and Steam Laundry (Private) Limited*[7] for the test of absolution, which, adopting the approach laid down in *Gascoyne* v *Paul Hunter*[8] is that in an application for absolution, the question is whether the plaintiff has adduced evidence upon which a reasonable court could or might find for the plaintiff. This test for absolution in *Gascoyne* and as adopted by our courts is formulated as follows:

> *"A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which the court, directing it mind reasonably to such evidence 'could or might (not should or would) find for him."* [9]

The test is said to imply that a plaintiff has to make out a prima facie case on all elements of a claim in order to avoid absolution from the instance. Without such prima facie evidence on all elements, it would be difficult to for the court to arrive at a decision in favour of the plaintiff. Materially, it is not what the plaintiff said in cross examination that decides a case for absolution but rather the evidence that the plaintiff has led to support the case before the court that is decisive. Essentially, at the close of the plaintiff's case, the evidence that has been led must hold reasonable prospects for success.

Whilst defendants' counsel, Ms *Makamure* is correct in her observation that the plaintiff did not plead damages at all in his declaration and that a party must prove what they allege, I nonetheless find it hard to see how this prejudices the defendants. In essence, the main issue as rightly pointed out by his counsel Mr *Musimbe,* is the plaintiff's desire to have the fridges replaced whether this is by way of damages or direct replacement by the plaintiff who then seeks compensation. This is something that the defendants are aware of and have always been aware of. However, to the extent that the plaintiff's evidence centred on damages, the onus of establishing quantum of damages lies on the plaintiff. Also the method that has been utilised in arriving at those damages should be appropriate to the case.[10]

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[7] *Lourenco vs Raja Dry Cleaners and Steam Laundry (Private) Limited 1984(2) ZLR 151*
[8] *Gascoyne v Paul Hunter 1917 TPD 170*
[9] *United Air Charter v Jarman 1994 (2) ZLR 341(S) at p 343 C*
[10] *Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C)*

In casu, the evidence would need to show that the plaintiff suffered damages and the quantum thereof. The causal link between the actions of the defendants and the damages suffered by the plaintiff must also be apparent. The loss must not be remote. Bearing in mind that the evidence must be such that a reasonable person would find for the plaintiff, it is notable in this case that no evidence has been adduced as to how old the equipment was at the time of the lease or indeed clear evidence to substantiate that it was in good working order at the time of the lease and that by removing it the plaintiff suffered damages at the hands of defendant's actions. This more so in light of the gist of the defence that only one cold room was functional and that the equipment was decrepit. No evidence has been put forward on why a one third reduction would be appropriate other than the fact that the plaintiff makes a deduction for second hand refrigerators. It is hard to see how he would succeed in proving quantum. The plaintiff also gave evidence that he sold the closed unit systems to the current tenant but did not furnish any evidence to the effect or state how much he has sold these units for. Thus even at a *prima facie* level he cannot be said to have made out a case for the damages he claims. As stated in the case of *Monumental Art Co* v *Kenston Pharmacy*[11]

> "it is not competent for a Court to embark upon a conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made."

Since Plaintiff's own evidence was that the premises are being let with the very same equipment that was in place in August 201, it is therefore hard to attribute the loss of rentals up to February 2012 to the defendant. The same applies to the accrual of City of Harare charges for the same period.

I come to the conclusion that the application for absolution from the instance at this stage is indeed merited and that not much purpose would be served in taking this trial further in light of the evidence provided.

In the result absolution is granted with costs.

I.E.G Musimbe: Plaintiff's Legal Practitioners
Kantor & Immerman Defendants Legal Practitioners

[11] *I bid @ p 111 E*