

CITY OF HARARE  
versus  
GIBSON INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
CHAREWA J  
HARARE, 24 June 2019 & 24 July 2019

### **Civil Trial**

*Mr C Kwaramba*, for the plaintiff  
*Mr T Zhuwarara*, for the defendant

CHAREWA J: This matter was heard before me as a stated case on the single issue whether or not there exists good and sufficient grounds for the termination of the statutory tenancy in terms of s22(2) of the Commercial Premises (Rent) Regulations, 1983 (Statutory Instrument 676 of 1983) [hereinafter referred to as “the regulations”].

#### **Facts**

The agreed facts are that on 1 September 1989, plaintiff and defendant entered into a 24 years 11 months lease agreement which expiration date was 31 July 2014. On 21 May 2013 plaintiff gave defendant notice that the lease would not be renewed upon its expiry as plaintiff intended to put the premises to its own use. However, upon expiry of the lease, defendant did not vacate the premises, thus becoming a statutory tenant by operation of law. On 10 February 2015, plaintiff drew attention to defendant of the notice of 21 May 2013 and gave notice to defendant once more, that it should vacate the premises within 7 days, failure of which eviction processes would be instituted. Still defendant did not vacate and continued to pay its rentals on time.

#### **The pleadings**

Consequently, plaintiff issued summons claiming the ejectment of defendant and all those occupying through it, from Stand No 2344A Salisbury Township, (Julius Nyerere Parkade shops/offices), “arising from the termination of a lease agreement between the parties due to effluxion of time”, unspecified holding over damages with prescribed interest thereon,

and costs on the grounds that it is entitled to recover its property from the defendant since the lease expired on 31 July 2014 and has not been renewed. Subsequently, and after close of pleadings, the plaintiff filed a supplementary affidavit of evidence averring that it has good and sufficient grounds for ejection of defendant in that it intends to use the premises for its own use. Finally, in its heads of arguments, plaintiff raised a new causa, of *rei vindicatio*.

Defendant pleaded that the premises being commercial premises, it is a statutory tenant, in terms of the regulations, which remained in possession, subsequent to the expiry of the lease, and continued to observe its terms in accordance with s23 of the regulations. In that regard plaintiff was obliged to show good and sufficient cause for defendant's eviction.

### **The parties' submissions**

Plaintiff submits that, the lease having expired and notice of termination having been given on the grounds that it required the premises for its own use, is good and sufficient cause of action grounding a *bona fide* claim for eviction. That plaintiff does not disclose the purpose of the intended 'own use' in its letter of notice is irrelevant. What matters is that sufficient evidence has been placed before the court to enable it to make a value judgment. In the circumstances, what has been placed before the court is sufficient to enable it to decide whether plaintiff is *bona fide*. The suggestion that plaintiff in fact wants to lease the premises to other tenants as shown by minutes, at page 39 of the trial bundle, of a meeting held in 2014, is irrelevant as this was more than a year after the notice to terminate was given. In any event, the minutes merely carry management recommendations, rather than any intention to let the premises to other tenants. Nor does the revelation of a deadlock over rent negotiations, at page 43 of the trial bundle matter, as the intention to use the premises for own use had long been disclosed.

In any event, the undisputed evidence, in accordance with r199 of the High Court Rules, in the statement of agreed facts is that plaintiff is actually renting premises for its staff. This satisfies the "small measure" of evidence to show the *bona fides* of plaintiff's claim in view of the fact that the onus on it is very light, requiring only a small measure of evidence to be placed before the court. Thus a tenant resisting eviction in the circumstances must satisfy the court, in terms of the provisions of s22 of the regulations, that the landlord is unscrupulous in that he wants to increase the rent or to offer a lease to another tenant. The defendant's plea must therefore allege that it declined a rent increase or that the landlord wants to lease to someone else. *In casu*, the defendant's plea does not say so, therefore there is no case for the defendant as it cannot go beyond its plea which does not raise the necessary grounds for resisting eviction.

In its heads of arguments, the plaintiff moves the further argument that its claim is in fact in the nature of a *rei vindicatio*, where it is asserting that it is the owner of property, which is in the possession of another party without its consent and which must be vindicated. In the circumstances the onus is on the defendant to prove its entitlement to possession of the property.

For its part, the defendant submits that s22 (2) of the regulations places a direct onus on the plaintiff to satisfy the court on the reasons why it seeks eviction. In that case, it is not enough for a plaintiff to “naively” state that it is the owner and wants its premises for its own use. “Good and sufficient” cause therefore requires the court to be satisfied that indeed plaintiff intends to put the premises to its own use. This therefore entails that the plaintiff’s declaration must specify the use to which it intends to put its premises in order to satisfy statutory requirements and benchmarks set by the Supreme Court.

Clause 19 at page 39 of the record, being minutes of a meeting held before issuance of summons, reveals that plaintiff intended to let the premises to another tenant and this information not having been disclosed in the pleadings reveal an intention to concealment and is therefore evidence of an unscrupulous landlord. While it is true that the court does not ordinarily look into the reasons for “own use”, there must be *bona fides*, which is belied in this case by plaintiff’s failure to reveal its true intention by hiding the fact that the intention to let the premises to other tenants was once considered.

Further, that plaintiff required the premises for its own use or that this is an action for *rei vindicatio*, is an afterthought, which is not sufficiently pleaded and is thus improper. Therefore, defendant advances, that plaintiff wants to accommodate its employees is not *bona fide* as minutes and resolutions by plaintiff show that the intention is to let the premises to other tenants.

Finally the defendant refutes that the statement of agreed facts include the agreement that plaintiff intended to use the premises for its own use. Further, it submits that plaintiff misinterprets r199, which tenor is to refer to documentary evidence that plaintiff intends to put the premises to its own use, rather than evidence that it is renting property elsewhere. In this regard, the minutes at page 39 of the trial bundle are central.

### **The law**

It is common cause that the defendant is a statutory tenant. The law with regard to statutory tenancy is prescribed in the Commercial Premises (Rent) Regulations, 1983

(Statutory Instrument 676/83). The relevant provision is s22 (2) which places limits on ejection from commercial premises by providing as follows:

“(2) No order for the recovery of possession of commercial premises or for the ejection 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.”

The principles that can be gleaned from case law, on interpretation of this provision, are therefore to the effect that:

1. A statutory tenant shall not be evicted or have his tenancy terminated as long as he continues to pay his rent within seven days of due date and complies with all other conditions of the lease as the Commercial Premises (Rent) Regulations 1983 were enacted to protect tenants against unscrupulous landlords;<sup>1</sup>
2. However, a tenant may face termination of tenancy or ejection should there be good cause shown such as the genuine need to effect renovations or to utilise the premises for the own use of the landlord, which intended use must be specified;<sup>2</sup>
3. In averting that good cause exists to ground termination of statutory tenancy and thus allow ejection, sufficient evidence must be placed before the court to permit it to make a value judgment on the good faith and genuineness of the lessor’s claim in order to shift the onus onto the lessee to cast doubt thereon;<sup>3</sup>
4. In that regard s22 (2) places a direct onus on a party seeking ejection to satisfy the court of the reasons for ejection. Thus, since 1988, the Supreme Court has qualified the manner and level of pleadings and evidence required to be placed before the court, where a landlord professes that it wants to use the premises for its own use, in order to comply with the statutory requirement obliging the court to be satisfied that the landlord does indeed intend to use the premises.<sup>4</sup>

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<sup>1</sup> *FBC Building Society v Pavian Investments (Pty) Ltd* HB34/17

<sup>2</sup> *Boka Enterprises (Pvt) Ltd v Joowalay & Anor* 1988(1) ZLR 107 (S)

<sup>3</sup> *Kingstones Ltd v D Ineson (Pvt) Ltd* 2006(1) ZLR 451

<sup>4</sup> See *Boka Enterprises* (supra). See also *Leafam Investments (Pvt) Ltd v Kupara* 1987 (2) ZLR 179 (H)

5. Where good and sufficient cause for ejectment exists, ejectment can only be effected after a reasonable lapse of time, taking into consideration the equities in favour of the lessee.<sup>5</sup>

Thus, the upshot of the above principles is that, that the tenant has refused to agree to an increase in rent or the landlord wishes to lease the premises to another tenant shall not constitute good cause for termination of lease or ejectment. In my view therefore, termination of lease or ejectment on the basis of refusal by the tenant to accept a rent increase or because the landlord wishes to let the premises to another tenant is in fact grounds for a finding that the landlord is unscrupulous. Therefore what matters in the determination of matters such as these is the position of the lessor: if he has good and sufficient grounds to terminate the lease and seek ejectment that should be the end of the matter.

### **Analysis**

*In casu*, I do not intend to belabour the issue of the change in *causa* raised in the supplementary affidavit of evidence or the heads of argument. To plead a cause of action in a supplementary affidavit of evidence or heads of argument is clearly improper. If plaintiff intended to expand its cause of action it ought to have sought amendment to its summons. Plaintiff is bound by its pleadings wherein it raised its cause of action as, to quote the summons:

“...ejectment of defendant and all those occupying through it, from Stand No 2344A Salisbury Township, (Julius Nyerere Parkade shops/offices), arising from the termination of a lease agreement between the parties due to effluxion of time”

While the first notice to vacate dated 21 May 2013 alleged that plaintiff intended to convert the premises to its own use, this was not pleaded as the basis for its cause of action in the summons. I am of the view that it is specifically for this reason that, after having noted the deficiency in its summons, the plaintiff sought to rectify its *causa* in its supplementary affidavit of evidence. As stated by plaintiff itself with respect to the defendant’s plea, a party must stand and fall by its pleadings.

The pleadings must thus lay the basis of the *causa*. The evidence that is subsequently adduced merely supports and bolsters the cause of action. Therefore, where the cause of action, with respect to a statutory tenant, is not in accordance with the regulations, it is of no moment,

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<sup>5</sup> See *Lincoln Court (Pvt) Ltd v Zimbabwe Distance Education College (Pvt) Ltd* 1990 (1) ZLR 158 (HC)

in my view, that the landlord seeks to amend its *causa* through evidence. As I have already stated, plaintiff ought to have properly sought amendment of its summons and declaration.

For the same reasons, I will not deign to consider the claim for *rei vindicatio*.

Further, that plaintiff intended to use the premises itself was claimed at the time of the first notice. After defendant became a statutory tenant, the plaintiff did not, in its notice dated 10 February 2015, give notice that it intended to convert the premises to its own use. It does not automatically follow that since in 2013, plaintiff intended to use the premises for itself that was still the position almost two years later, in 2015. Besides, the notice given in 2015, being notice to a statutory tenant ought to have been clear as to the intention of the plaintiff, to use its premises itself, in seeking eviction of a statutory tenant. This coupled with the absence of similar *causa* in the summons, and bolstered by paragraph 19(3) of the minutes of its Finance and Development Committee, suggests that plaintiff had indeed moved from the position of wanting to convert the premises to its own use but intended to let the premises to other tenants willing to pay increased rentals.

I am not persuaded by plaintiff's argument that the minutes, at page 39 of the trial bundle, of a meeting held in 2014, are irrelevant as this was more than a year after the notice to terminate was given and its position could have changed over the years. A clear distinction must be made between notice given to an ordinary tenant in terms of the lease agreement, and notice given to a statutory tenant in terms of a statutory provision which intention is to protect such tenant from an unscrupulous landlord. The notice given prior to the 2014 Finance and Development Committee meeting of the plaintiff was to an ordinary tenant in terms of contractual provisions. Those minutes are, in my considered opinion, relevant with respect to a notice given to a statutory tenant almost two years after the first notice, wherein the law requires that such statutory tenant be protected from a landlord who is not *bona fide*.

It is my view that the actions by plaintiff highlight the lack of good faith and genuineness in its claim for ejection and thus undermines the existence of good and sufficient grounds for requiring the tenant's eviction. True, plaintiff is renting premises from Old Mutual. But apart from the mere production of that lease agreement, nothing on the pleadings supports the notion that plaintiff intended to cancel it or not to renew it in order to minimise expenditure by using its own premises instead.

*In casu*, as I have already commented above, apart from the notice given prior to the defendant becoming a statutory tenant, nothing in the pleadings and annexures thereto support that plaintiff intended to use its own premises. Further, the lease agreement with Old Mutual is

not proof that plaintiff intended to use the premises itself. Rather it is only proof that plaintiff was a tenant of Old Mutual. In fact, the plaintiff's declaration, in paragraphs 4 and 8 supports the *causa* in the summons: that plaintiff sought defendant's eviction on the grounds of termination of lease by effluxion of time.

It is pertinent to note that plaintiff's lease agreement with Old Mutual was set to expire on 30 June 2014, subject to plaintiff giving three months' notice whether it intended to vacate or to renew the lease. Despite this, plaintiff has not taken the court into its confidence as to whether it gave Old Mutual such notice to vacate with the expectation that after 31 July 2014, it intended to move into its own premises; and, as a consequence of defendant becoming a statutory tenant with effect 1 August 2014, whether or not plaintiff gave notice to renew its lease with Old Mutual, and if so, for what period.

The law requires that a landlord who wishes to evict a statutory tenant on the grounds that it wants to convert its premises to its own use must put before the court such minimal evidence as to permit the court to make a value judgment as to its *bona fides*. While it is true that only a small measure of evidence is required to be placed before the court, it is also necessary that such evidence be sufficient in order for the plaintiff to discharge the onus upon it and shift the burden of disproving such evidence onto the statutory tenant. In that regard I must agree with the defendant that the tenor of r199 is to require the landlord to produce documentary evidence that it intends to put the premises to its own use, rather than evidence that it is renting property elsewhere.

In the circumstances I cannot find that the plaintiff discharged the onus upon it to show that there exists good and sufficient grounds for the termination of the statutory tenancy in terms of s22 (2) of the Commercial Properties (Rent) Regulations, 1983 (Statutory Instrument 676 of 1983).

### **Disposition**

Consequently, it be and is hereby ordered that

1. The plaintiff's claim is dismissed with costs.