

ALTEM ENTERPRISES (PVT) LTD T/A RUWA FURNISHERS
vs
(1) JOHN SISK & SON (PVT) LTD

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & MAKARAU JA
HARARE, MARCH 6, 2012 & FEBRUARY 12, 2013

L Uriri, for the appellant

H Zhou, for the respondent

GARWE JA: This is an appeal against the judgment of the High Court ordering the eviction of the appellant and all those claiming rights through it, from premises known as Lot 2, Manresa, Acturus Road, Harare and payment of holding over damages in the sum of US\$800.00 per month from 1 March 2009 to 31 August 2010 and in the sum of US\$1 575 per month from 1 September 2010 to the date of vacant possession of the premises.

The background to this matter is as follows. The respondent and the appellant entered into a lease agreement in respect of a property known as Lot 2, Manresa, Acturus Road, Harare in 1998. The lease agreement was for an initial period of three years commencing 1 June 1998 but was to run for a further seven years until 31 May 2008. After that date the appellant remained in occupation and therefore became a statutory tenant. The appellant remains in occupation to this date.

On 26 March 2010, the respondent issued summons out of the High Court seeking an order for the eviction of the appellant and all those claiming through it and holding over damages. The basis of the respondent's claim was that it required the premises for its own use and alternatively that it had terminated the lease owing to a number of breaches on the part of the appellant. The breaches cited by the respondent were that the appellant had last paid rentals in July 2007, that the appellant had erected a permanent structure on the premises without the respondent's authority and relevant local authority approval, that the appellant had sublet a portion of the premises without its consent and lastly that the appellant had failed to maintain the premises in a good state of repair.

In its plea before the High Court, the appellant disputed that it had breached the agreement in any of the ways alleged by the respondent. In particular, the appellant averred that it had attempted to pay rentals by cheque but on three occasions the respondent refused to accept the cheques and returned them. The last such cheque was for the sum of ZW\$1 which the appellant issued after the removal of several zeros from the Zimbabwe dollar. That cheque was issued on 6 August 2008 and bore the inscription at the back "Rent payment for 24 months".

In its judgment, the court *a quo* found that although there was evidence that the appellant had breached the agreement by sub-letting part of the premises to one Munengwa, the respondent had failed to give the requisite fourteen (14) days notice to the appellant to rectify the breach and accordingly had not accrued the right to cancel the agreement. The court also found that the claim by the respondent that the appellant had constructed a permanent structure on the premises and that it had failed to keep the premises in a state of repair had not been proved. The court further found that since the quantum of the

rental was not agreed, the appellant was under obligation to pay what it considered to be fair rental for the premises commensurate with the rentable market value of the premises. The court concluded that the tender of ZW\$1 was patently absurd and that therefore the appellant was in clear breach of the obligation to pay rental from August 2008. Consequently the court *a quo* made the order that is the subject of the appeal.

In its notice of appeal the appellant has attacked the judgment of the court *a quo* on two bases. These are:

- (a) That the court *a quo* misdirected itself in concluding that the appellant had lost its entitlement to the benefit of statutory tenancy with effect from August 2008 because it had failed to tender a fair rental when there was clear evidence that the respondent had refused to accept rentals from the appellant.
- (b) That the court *a quo* erred in concluding that the tender of ZW\$1 was not fair in the absence of evidence of what would have constituted fair rental, regard being had to the fact that the rental previously paid of ZW\$6 million had been reduced to a fraction of a cent following the revaluation of the Zimbabwe Dollar.

The respondent also filed a cross appeal, not against the final order made, but against the findings by the court *a quo* that the other breaches of the lease agreement had not been proved and that the respondent had not shown it genuinely required the premises for its own use.

At the hearing of the matter before this Court, Mr *Zhou*, for the respondent, conceded that since the cross appeal was not directed at the substantive order, the cross appeal was not properly before the court and should be struck off. This concession was made

in the light of the decision of this Court in *Chidyausiku v Nyakabambo* 1987(2) ZLR 119(S). Although the cross appeal is no longer the subject of this appeal, it has in my view raised a fundamental question on whether the decision in *Chidyausiku v Nyakambambo* (supra) is entirely correct. I will revert to this aspect shortly.

In his submissions before this Court Mr *Uriri*, for the appellant, argued that since the last rental to be accepted had been Z\$6 million, it was that amount that the appellant was obliged to pay, irrespective of the effect of inflation. When the local currency was revalued in June 2008 and several zeros removed from the Zimbabwe Dollar the sum of Z\$6 million was reduced to \$0.06. The appellant had then decided to pay rent for twenty four months and had accordingly tendered ZW\$1.00 revalued. Since the parties were not agreed on the new rental payable, the appellant had a duty to continue paying the last agreed rental. For this proposition, Mr *Uriri* relied on the decision of the High Court in *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd* HH-144-09. He further argued that the obligation on the appellant was to pay the rent due and not fair rent.

Mr *Zhou* on the other hand submitted that since the parties were not agreed on the rental payable, the appellant should have paid fair rental and a cheque payment of Z\$1.00 was not fair.

The real and perhaps only issue for determination before this Court is the construction to be given to the words “rent due” in s 30 of the Rent Regulations S.I. 32/07 and depending on such construction whether the \$1.00 tendered by the appellant in August 2008 constituted the rent due. Before attempting to make a determination of the above issue, I feel obliged, as already indicated, to express my personal view on the correctness or

otherwise of the decision of this Court in *Chidyausiku v Nyakabambo*. I confess that I do so without the benefit of argument from both counsel.

Chidyausiku v Nyakabambo (supra) is authority for the proposition that in order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question. GUBBAY JA (as he then was) remarked at p 124F-125A:

“... what this Court is being asked to do is not to reverse the order of the learned judge but to cure the procedural defects by either considering the merits of the application itself or remitting the matter for the learned judge to do so. Once that is done, the appellant will be content whatever the outcome should happen to be. That this is the approach is evident from the wording of the so-called prayer to the notice of appeal, which omits to seek an order that the application brought in terms of Rule 18 be dismissed.”

I am prepared to accept that as a general rule, the above remarks correctly reflect the law of this country. To the extent, however, that the judgment suggests that this is a hard and fast rule I am inclined to differ. There may well be cases, such as the present, where the slavish adherence to the above principle would not only cause prejudice but would result in a certain degree of absurdity. I revert to the facts of this case to justify why I am of this opinion.

In the court *a quo*, the respondent approached the court seeking the eviction of the appellant as well as holding over damages. It had several causes of action. The main was that it required the premises for its own use. In the alternative it alleged several breaches of the lease agreement. These were that the appellant had, without authority, sublet a portion of the leased premises, that the appellant had constructed a permanent structure without authority, that the appellant had failed to maintain the premises in a state of repair and lastly

that the appellant had failed to pay the rental due. It will be apparent from the above that each breach alleged by the respondent constituted a separate cause of action which, if proved, would have justified either singly or cumulatively, the eviction sought in the prayer.

The court *a quo* rejected the respondent's claim that it required the premises for its own use. It also rejected all but one of the respondent's claims that the appellant had breached the agreement. Having accepted that the appellant had failed to pay the rent due the court then ordered the eviction of the appellant as well as holding over damages. However the appellant appealed to this Court against that order. It was at this stage that the respondent had to make a difficult decision.

If the appeal filed by the respondent were to succeed, then the order of eviction and holding over damages would fall away. Since the issue before the Supreme Court would be only whether the court *a quo* was correct in holding that the appellant had failed to pay the rent due, there would be no basis for the respondent to attack the other findings by the court *a quo*, which findings could also justify the order of eviction and payment of holding over of damages, unless the respondent also cross appealed against those findings. This is what the respondent, represented by Mr *Zhou*, did. However faced with the decision of this Court in *Chidyausiku v Nyakambambo* (supra) the respondent was forced to concede that the cross - appeal did not comply with the law as it did not seek any relief on the substantive order made. My understanding of the respondents' position was that in the event the main appeal succeeded, this Court should revisit the finding made by the court *a quo* in dismissing the other causes of action and in the event that any one of them succeeded then the eviction and holding over damages would stand.

Speaking for myself I find nothing wrong with such an approach and indeed it seems to me that in a case such as this one there is no other alternative. Hopefully this issue will come up for consideration by a full court so that the principle can be revisited in order to ascertain whether it still makes good law.

The only issue that falls for determination is whether the court *a quo* was correct in determining that the tender of ZW\$1 did not constitute tender of the rent due. The place to start is s 30 of the Rent Regulations, 32/07. That section provides in relevant part:

- “For the purpose of sub-section (2), “rent due”, in relation to dwelling, means –
- (a) So long as an order fixing the rent for a dwelling is in force, the authorised rent fixed by that order or
 - (b) Rent agreed under the terms of the lease agreement.”

It is clear from the above definition that the legislature had in mind two situations. These were firstly where the rent was fixed in terms of an order by the Rent Board and secondly where the rent is agreed in terms of the lease agreement. The definition does not however cover a situation, such as the present, where the rent was no longer agreed.

It is correct that the appellant had been paying the sum of Z\$6 000.00 per month as rent. However, the cheque payments for May, June and July 2008 were returned by the respondent because the respondent believed that the appellant had breached the lease agreement and should vacate the premises rather than continue to pay rentals and remain in occupation. In August 2008, the appellant forwarded another cheque to the respondent in the sum of Z\$1.00 with the inscription “Rent payment for 24 months” at the back.

That the amount of rent as at August 2008 had not been fixed or agreed upon is not in dispute. Neither party had sought an order from the Rent Board to fix a fair rental in

respect of the premises. No agreement had been reached on what rental would be payable for the occupation of the premises, notwithstanding the stance by the respondent that the appellant was to vacate the premises. By the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations S.I. 109/08 gazetted on 30 July 2008 new bank notes were introduced whilst the old bearer cheque continued to be legal tender but at the revalued rate. It is correct therefore that as at August 2008 the rental of Z\$6 million previously paid by the respondent would have been a fraction of a cent. Despite the revaluation of the local currency, hyperinflation continued unabated resulting in the gazetting of the Presidential Powers (Temporary Measures/ Currency Revaluation and Issue of New Currency) Regulations S.I. 6/09 which became effective on 2 February 2009. That legislation also had the effect of slashing a number of zeros from the existing currency.

Given the fact that no agreement had been reached on the quantum of rent due, can the tender of Z\$1 be said to have been a valid one? The appellant has argued that in terms of the law, its obligation was to pay the “rent due” and not “fair rent” and that the suggestion that it should have paid fair rental is at variance with the Rent Regulations. Whilst that may be correct up to a point, the position is clear that the Regulations did not specifically provide for a situation, such as the present, where there may be disagreement on what constitutes the rent due. One must of necessity resort to the common law to answer this question. In other words where parties are not agreed on what rental is payable and there is no order by the board what rental is payable in exchange for occupation of premises?

The position is settled that a tenant has no right to occupy property save in return for payment of rent and that where there is no agreement on the amount of rental payable, the lessee is liable to pay the lessor a reasonable amount for the use and occupation

of the property, the rental value of the property in the open market being the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress. – see *Landlord & Tenant* by W.E. Cooper, 2nd Ed., p 59.

Whilst it is noted that in *Parkside Holdings Private Limited v Londoner Sports Bar* HH-66-00, the High Court held that in a situation where there is no agreement on the rental, the lessee must continue to pay the last agreed rental, that finding would be correct in a normal economic environment and not applicable to a situation such as the one under consideration where there was revaluation of the local currency both in 2008 and 2009 and the introduction of foreign currency which resulted in the local currency becoming *moribund*.

In dealing with the appellant's obligation under the lease, the court *a quo* remarked at pp 10-11 of the cyclostyled judgment:

“It is settled that where the amount of rent payable has not been agreed upon by the parties, the lessee must pay that amount which it contends represents a fair rental. The lessee's failure to do so entitles the lessor to cancel the lease and repossess the tenanted premises by ejecting the lessee. See *Supline Investments (Pvt) Ltd v Forestry Company of Zimbabwe* 2007(2) ZLR 280(H) at 281, where it was held as follows:

“A tenant has an undisputed obligation to pay rental for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rentals is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentions as to what constitutes fair rentals are validated”.

I would add to these principles the additional requirements that the lessee's contention as to what represents a fair rental must be reasonably formed and defensible by some commercial criterion. He cannot relieve himself of his obligation to pay fair rent by

tendering some arbitrary and paltry sum entirely incommensurate with the rentable market value of the leased premises.”

I agree with the above remarks which accord with both common sense and the common law. Indeed one of the functions of the Rent Board is to fix fair rent, the intention being to ensure that a landlord continues to receive a fair but not excessive consideration in exchange for the occupation and use of his premises.

In my view a tenant who seeks protection of his statutory tenancy must endeavour to pay fair rent. Such fair rent must be objectively and not subjectively assessed.

In the present case the appellant tendered Z\$1 as rental for 24 months. It had not been asked to pay rental for two years in advance. It obviously must have appreciated that Z\$1.00 as at 6 August 2008 was not reasonable value for occupation of the premises for twenty four months. Even after the introduction of the foreign currency system it felt no obligation to pay any rentals for the whole of 2009, believing, one would assume mischievously, that the \$1.00 it had paid in August 2008 was, in terms of the agreement, sufficient rental for 24 months. Indeed, Mr Fraser did concede that the tender of Z\$1.00 was neither fair nor reasonable. In holding that the appellant lost the right to protection as a statutory tenant, the court *a quo* remarked at p 10 of the judgment:

“.... The amount tendered was unquestionably derisory and could not possibly have represented a fair rental for the premises by any measure of value, mercantile or otherwise. The subsequent tender of US\$800 per month, 24 months later, was premised on the contention that the intervening period had been duly accounted for by the payment of ZW\$1 in August 2008. This contention was not only mischievous but also obviously fallacious. Moreover, the tender had been overtaken by events, in particular, the cancellation of the lease and the institution of this action 6 months before.”

Again I am inclined to agree with the above remarks. The appellant lost its right to statutory tenancy. The court *a quo* consequently was correct in ordering the eviction of the appellant and the payment of holding over damages.

In the circumstances, I agree that the appeal is without merit and that it must fail.

The appeal is accordingly dismissed with costs.

ZIYAMBI JA: I agree

MAKARAU JA: I agree

Kantor & Immerman, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners