PARKVIEW WEIZMAN SPORTS CLUB

Versus

PETER DUBE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 29 NOVEMBER 2022 AND 26 JANUARY 2023

Opposed Application

Advocate P Dube with Ms D Nyanyingwe, for the applicant

Mr N Mazibuko, for the respondent

MAKONESE J: This is an application for summary judgment in terms of Rule 30 of the High Court Rules, 2021, wherein applicant seeks the following relief:-

"1. The verbal agreement of Sub-lease between plaintiff and defendant be and is hereby cancelled.

2. Defendant and all those claiming occupation through or under him be and are hereby ejected from a portion of a certain piece of land in extent 7.7462 Morgan, being Parkview Sports Club site, portion of Bulawayo Township Lands situate in the District of Bulawayo.

3. Defendant be and is hereby ordered to pay the sum of US$12 797.75 and holding over damages at the rate of US$60.00 per month or the equivalent payable in Zimbabwean dollars at the prevailing interbank rate on the day of payment from the 31st of March 2019 to the date of eviction.

4. Defendant to pay the costs of suit on the attorney and client scale."

At the commencement of the hearing *Advocate P. Dube,* appearing for the applicant indicated that she was abandoning the liquidated claim for arrear rentals and hold over damages. In the event, this application for summary judgment relates to the claim for eviction of the respondent for the leased premises. This application is opposed by the respondent. *Mr Mazibuko* appearing for the respondent contends that this application is an abuse of court process and that the deponent to the Founding Affidavit has no authority to represent the applicant.

FACTUAL BACKGROUND

Applicant is the lawful occupier of premises known as Parkview Weizman Sports Club (hereinafter referred to as the premises). Applicant holds a lease with the City of Bulawayo dated 8 June 1956. In or about the year 2001 applicant entered into a verbal sub-lease agreement in terms of which respondent took occupation of a portion of the premises. Respondent leases the premises for the purposes of operating a bar and a hall. In terms of the verbal lease respondent was obliged to pay rentals amounting to US$60 per month. Applicant alleges that respondent has not paid rentals since October 2015. Applicant contends that respondent was obliged to contribute towards rates and taxes at the rate of 40%. On 31st October 2018, and through its legal practitioners, applicant made demand for

respondent to pay the outstanding rates, rates and insurance payments as well as a claim for respondent's eviction from the premises. Consequent to the demand, the applicant issued summons against the respondent based on the alleged breach and non-payment of rentals. Respondent defended the matter. In his plea, defendant challenges the authority of one Raymond Roth to bring the proceedings against him. The respondent's plea was filed on 13 June 2019. On the merits of the claims against him, the respondent avers that he is not in breach of the agreement and that plaintiff frustrated the performance of the terms of the agreement. On these broad facts this application for summary judgment was filed.

POINT IN LIMINE

Respondent disputes that one Raymond Roth who purports to bring this application on behalf of the applicant has the authority to depose to a Founding Affidavit in support of applicant's claims. Respondent contends that Raymond Roth is on a frolic of his own and challenges the authenticity of the Resolution filed on behalf of members of the applicant Sports Club. Respondent avers that the Resolution does not specify where the meeting authorising the deponent was held, and when the Resolution was signed. The Resolution does not indicate the members who attended the meeting authorising the said Raymond Roth. Respondent insists that Raymond Roth has never been a member of the applicant club. He has never been a chairman of the applicant. Respondent argues that in terms of the Constitution of the applicant there were supposed to be Annual General Meetings but these have never been held in the past few years. Respondent contends that the purported representation of the applicant is not in terms of the Constitution. Respondent avers that the Resolution attached to the Founding Affidavit is a mere concoction and is not reflective of the position of the applicant.

In its response applicant states that the mere allegation by the respondent that Raymond Roth is not a member or chairman of the applicant is not conclusion that this is factual. Applicant argues that the point *in limine* has been raised to cause annoyance to the applicant in full appreciation that he has no defence to the merits. The applicant avers that the application has been properly brought before this court. The persons appearing on the Resolution are identified as a Mr Zlatner and Mr Somer. These are the vice chairman and a member of the applicant respectively.

I would dismiss the point *in limine* on the basis that it has no merit. The resolution has not been shown to be fraudulent in any way. In *Dube* v *Premier Service Medical Aid Society* SC 73-19 it was held that when challenged, a person who purports to represent a legal entity must produce proof of his authority to represent such entity. *In casu*, the said Raymond Roth has tendered a valid resolution authorizing him to bring these proceedings. The resolution serves to show that respondent is aware of the proceedings being brought against him. Members of applicant club have attested to the fact that Raymond Roth is properly authorized. I make a finding that the applicant's proceedings are properly before the court. In any event there is a chain of correspondence between the applicant's legal practitioners and the respondent dating back to August 2016. The respondent's legal practitioners have dealt with applicant's legal practitioners being fully cognisant of the fact that applicant was threatening to bring legal proceedings on the instructions of the applicant.

BACKGROUND FACTS

Before dealing with this matter on the merits it is necessary to give a brief background leading to these proceedings. Applicant is the lawful occupier of premises known as Parkview Wiezman Sports Club by virtue of a lease agreement with the City of Bulawayo

dated 8th June 1956. In or about the year 2001, applicant entered into a verbal sub-lease in terms of which respondent took occupation of a portion of the premises. In terms of this verbal lease agreement, respondent was obliged to pay rentals of US$60.00 per month for its occupation. Respondent has failed to pay rentals since October 2015. Respondent was further obliged to pay a contribution of 40% of the rates and taxes owed by applicant and 40% of the insurance bills. Respondent failed to make these payments. Applicant avers that on the 31st October 2018 and through its legal practitioners of record, applicant made demand for respondent to pay the outstanding rent, rates and insurance payments as well as vacation of the premises. Respondent had failed or neglected to meet applicant's demands.

The respondent denies that he breached the agreement and avers that save that there was an agreement for payment of US$60.00 after dollarization of the economy in 2009. Respondent denies that he agreed to contribute towards 40% of the rates and taxes alleged by the applicant. Respondent avers that at one stage the applicant through its legal practitioners waived any claims to rentals and other amounts and cannot purport to claim any monies in respect of rentals. Further, respondent states that notwithstanding the dispute over the sub-lease of the bar and the use of the hall, the plaintiff is not entitled to an order for eviction against the respondent who is a *bona fide* member of the applicant.

SUBMISSIONS BY THE APPLICANT

In oral submissions, *Advocate P. Dube,* appearing for the applicant indicated that the applicant was not pursuing summary judgment in respect of the monetary claims. In substance therefore, the applicant seeks summary judgment in respect of cancellation of the lease agreement and eviction. Application submits that it is common cause that applicant is the lawful occupier of premises known as Parkview Wiezman Sports Club. Respondent

entered into a verbal lease agreement in respect of a portion of the premises with the respondent sometime in the year 2001. From the correspondence between the parties, respondent occupies a hall and a bar. The obligation that respondent was expected to pay rentals is not disputed. Applicant contends that it has chosen to pursue the cancellation of the lease and the eviction of the respondent from the premises. Applicant contends that the first duty that falls on a tenant is to pay the agreed rentals on or before the due date. The respondent has failed to pay rentals as agreed and consequently lost his right to occupy the premises. Applicant contends that if a tenant fails to meet the most essential requirement of paying rentals there can be no mention of a valid lease agreement. Consequently, the applicant argues the respondent is not entitled to remain in occupation of the premises. The applicant is entitled to vindicate its right in the property.

Applicant avers that the issue of arrear rentals was acknowledged by the respondent in various correspondence. Respondent seeks to enjoy occupation of the premises rent free and has no *bona fide* defence to the claims.

SUBMISSIONS BY THE RESPONDENT

The respondent submits that summary judgment is a drastic remedy only to be resorted to when the applicant has an assailable case and defendant has no *prima facie* defence. *Mr Mazibuko* appearing for the respondent argued that the respondent was never in breach of the lease agreement. He contended that applicant had not shown good cause for the relief sought. Respondent contends that there is no proof that the respondent ever agreed to pay 40% of the rates and insurance. Further, respondent avers that applicant conceded as much and purports to belatedly accept a 10% offer previously made by the respondent. The

respondent submits that the applicant does not have a cause of action for arrear rentals, hold over damages and eviction for these reasons:

(a) by its letter dated 24th August 2016 applicant waived any claims to rentals and rates.

(b) On the 10th November 2017 applicant purported to offer the respondent the right of first refusal to purchase the property.

(c) applicant never supplied the respondent with account details into which rentals would be paid.

(d) respondent submits that the rentals have always been tendered subject to set-off as *per* correspondence between the parties, long before the summons were issued and that in that regard, the applicant simply has no cause of action for failure to pay rent.

Respondent argues that the application for summary judgment is without merit and amounts to an abuse of court process and harassment of the respondent.

WHETHER THE APPLICATION FOR SUMMARY JUDGMENT IS JUSTIFIED

For the application for summary judgment to succeed the applicant must establish that the case against the respondent is unassailable and unanswerable. The requirements for a successful application for summary judgment was enunciated in the case of *Merchantile Bank Ltd* v *Star Power CC & Anor* 2003 (3) SA 309, which was emphasised in *Nyamweda* v *Benza and Ors* HH 238-18 where it was stated thus:-

"The defendant must therefore be condemned to pay plaintiff's claim unless the defendant can show the existence of a triable issue based upon a dispute which is bona fide in nature, to have been contrived for the purpose of temporizing. The procedure casts upon the defendant the onus of disclosing a defence which is sound in law and which is based on apparently bona fide proportions of fact."

It is my view that the bundle of correspondence between the applicant and respondent shows that on the one hand the applicant asserted that arrears existed in respect of rentals. The respondent avers that he owes no rentals and is therefore not in breach. It has not escaped the court's notice that there are several disputes of facts in this matter which are not capable of resolution on the papers.

In a letter dated 10th November 2017 applicant's legal practitioner addressed a letter to respondent's lawyers in the following terms:-

"We refer to previous correspondence regarding this matter.

Without prejudice to our client's rights it has decided to try to settle this matter amicably if at all possible.

As you are aware your client has in the past admitted that he is renting the property and he is prepared to pay a certain amount of rental every month. In addition he has alleged that he has a right of first refusal.

Whilst our client disputes that your chair has a right of first refusal, he is prepared to allow your client at this juncture to exercise that right. In this regard our client has received an offer to purchase the rights to the property, subject of course to the necessary consent being obtained from the City of Bulawayo. Our client has received

an offer from this third party to purchase the rights for the sum of US$300 000.00 in a lease to buy arrangement.

In view of this our client is now prepared to offer to sell its rights in the property for the same amount subject to the following conditions:-

1. That your client pays the rental arrears he himself admits he owes.

2. That he agrees to the purchase price of US$200 000.00.

3. That he agrees to a lease to buy arrangement.

……..”

In response to this offer, and in a letter dated 8th January 2018, Messrs Calderwood Bryce, Hendrie & Partners, legal practitioners for the respondent stated thus:-

“…….

With respect to what you call rental arrears, it is our view that your client needs to make up its mind as to its position. By way of a letter dated 24th August 2016 you specifically waived the so-called rental arrears. We therefore do not see on what basis you now insist on payment of the said arrears. If your client wants ours to resume payment of the rental/membership fees on monthly basis as previously agreed then it should say so.

Regarding the purported US1000 rental offer made by an unnamed third party, we wish to point out that our clients have been using a small portion of the whole complex. Essentially aside from the communal arrears of the club our clients are

restricted to the use of the training hall and the bar. In the current economic environment, there is no way the use thereof can be as much as US$1000 per month.

Again, your client needs to decide whether it accepts that there is a right of first refusal or not. You may not purport to dispute that right and offer it at the same time. It is either one or the other. Further you need to clarify exactly what your client is offering when it says "rights to the property." The property belongs to the City of Bulawayo and your client only has a 99 year lease in respect thereto. That being the case, your client needs to clarify what exactly it is that it is proposing to sell our client and how a lease to buy agreement can be concluded in view of the fact that your client does not own the property but leases it.

……."

What is clear from this exchange between the parties is that a number of significant factors are in dispute. The fact that arrears exist is in dispute. The applicant has since abandoned its claim for any arrear rentals. Applicant seeks to pursue its claim for eviction based on breach of the lease agreement. The issue of the right of first refusal remains unresolved on the papers filed of record.

The law on summary judgment is settled in our jurisdiction. The procedure is employed where a plaintiff who believes that the defence proffered by a defendant is not *bona fide* and has been entered essentially for dilatory purposes. Such a plaintiff is entitled to summary judgment to avoid the inevitable delays that arise from going to trial.

See: *Chiadzwa* v *Paulkner* 1991 (2) ZLR 33; *Chrisnar (Pvt) Ltd* v *Stutchbury and Anor* 1973 (1) RLR 277 at 279; and *Jena v Nechipote* 1986 (1) ZLR 29 (S).

DISPOSITION

The applicant has not shown that its claims are unassailable. There are material disputes of facts which remain unresolved. The respondent has raised a *bona fide* defence to the claim for eviction.

Accordingly, and in the result the application for summary judgment is dismissed with costs.

Messrs Webb, Low & Barry Inc Ben Baron & Partners, applicant's legal practitioners

Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners