ZIMBABWE INTERNATIONAL TRADE FAIR COMPANY

VERSUS

VIKING PLASTICS

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 5 APRIL 2012 AND 12 APRIL 2012

Mr P. Ncube for applicant
Mr Sibanda for respondent

Opposed Application

MAKONESE J: The Applicant seeks an order for summary judgment against the Respondent. The facts of the matter are that on or about the 5th April 2004 the parties entered into a lease agreement whereby Applicant leased to respondent a portion of the Zimbabwe International Trade Fair (hereinafter called ZITF) grounds, being site number B1, B2 and part B4 (hereinafter called "the premises"). The lease agreement stipulated that it commenced on the 1st of January 2004 and would expire on the 31st of December 2009. The Respondent would pay annual consideration (hereinafter called "rent") for the right to exhibit at the annual Zimbabwe International Trade Fair and for occupation of the premises. The Applicant had the right to increase the rent annually by not less than 25% of the rent due in the preceding year. In the event that Respondent duly complied with all the terms and conditions of the lease agreement and gave three (3) months written notice of its intention to renew the lease before its expiry, the Applicant would renew the lease for a further (5) five years. At the beginning of 2009 the Zimbabwean currency was multi-currenced and in or about March of that year the currency was dollarized. The parties' agreement which had been in Zimbabwean dollars became moribund. As such for the agreement to be meaningful, the rent had to be paid in foreign currency. The Applicant negotiated the rentals with its tenants including the Respondent. In or about March 2009 the Applicant wrote a letter to its tenants, including the Respondent in which the Applicant advised the respondent of the rent that had been

negotiated and agreed upon of US$4012-00. It requested that payment be made by the end of June 2009. In response to the aforesaid letter and on the 28th April 2009, the Respondent wrote a letter to the Applicant whose subject was "payment of rentals" in which letter the Respondent stated that it was unable to make "the necessary payments----before the deadline". The Respondent then requested that it pays the same in (3) three equal instalments. At that stage the Respondent did not dispute the new rental and clearly from its request to pay the balance in (3) three equal instalments the Respondent was fully aware of how much it had to pay. The Respondent, however, failed to pay the balance owed in 2009 and for the year 2010 and 2011 paid nothing towards the rentals in breach of the lease agreement. The Respondent does not deny that it owes the Applicant rentals. The Respondent argues that there is no lease agreement between the parties relating to the new lease agreement which was unsigned. The Respondent further argues that the Applicant is in breach of the written lease in failing to fix the rentals. The Respondent contends that the parties ought to have appointed an Arbitrator to fix the rentals because the parties themselves had failed to agree on a suitable rent for the premises. The Respondent's position is that summary judgment could only be entered if the Respondent had failed to pay the rental as agreed or as set by the Arbitrator.

It is common cause that the written lease expired at the end of 2009 but the Respondent has remained in occupation of the premises without paying any rentals. The Respondent has clearly violated the terms of the lease agreement.

It is now settled law that the special procedure for summary judgment was conceived so that a *mala fide* Defendant might be summarily denied the benefit of the *audii alteram parten* rule.

See the case of *Chrisma (Pvt) Ltd vs Statchbury and another* 1973(1) RLR 277.

In the case of *Niri v Coleman and others* 2002(2) ZLR 580 (H) at page 584, CHINHENGO J stated as follows:-

> *"In summary judgment proceedings the defendant has to show that he has a good bona fide defence to plaintiff's action. All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is a mere*

possibility of his success, he has a plausible case, there is a triable issue, or there is a reasonable possibility that an unjustice may be done if summary judgment may be granted."

In the above cited case the court further stated that question to answer is whether the Defendant has raised a *prima facie* defence, which if proved at trial would constitute a good defence to plaintiff's claim. The defence itself must be *bona fide* and valid at law.

See also the case of, *Stationery Box (Pvt) Ltd vs Natcon (Pvt) Ltd and another* 2010(1) ZLR 227(H) where MAKARAU JP, as she then was stated at 230 as follows:-

"The test to be applied in summary judgment applications is clear and settled in the authorities. The Defendant must allege facts which if he can succeed in establishing them at trial, would entitle him to succeed in his defence. Obviously implied in this test but oft overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts he alleges, fascinating as they may be, and which he may very well be able to prove at the trial of the matter, do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

In casu, in the opposing Affidavit the Respondent alleges that Applicant is mixing up issues, namely:

(a) issues relating to the lease agreement that commenced in January 2004 and culminated in December 2009 that being the old lease.

(b) issues relating to the lease agreement that should have been signed on 1st of January 2010 and expiring (5) five years later, hereinafter referred to as the new lease agreement.

The Respondent goes on to state that issues and correspondences that relate to the past years and then the old lease have, by design been interpreted and extended by design to relate to the new lease agreement. The Respondent then makes references to other tenants on the properties and argues that if Applicant was sincere, it should have agreed that an Arbitrator be appointed to fix the fair rentals for the premises. The Respondent further contends that the old lease agreement had no spill-over clause after its termination. One can hardly understand what the Respondent's defence actually is due to its vagueness. In

paragraph 6 of its opposing Affidavit, the Respondent states as follows:

> *"Respondent admits that it owes money to the Applicant. Respondent denies that it owes money in sums claimed. Respondent avers that, and makes a prayer accordingly, the amounts due to be referred to an independent Arbitrator, and the respondent be ordered to pay in terms thereof*."

It is clear from the above that the Respondent's defence is vague, confusing and lacks sufficient detail to conclude what exactly is the basis of the defence.

A defendant who raises a vague and confusing defence does so at the risk of having summary judgment being entered against them, the reason being that this only leads one to the conclusion that the defendant in fact, has no defence to profer. The Respondent would as in this case be clearly trying to buy time.

The Respondent does not seem to have a *prima facie* defence to Applicant's claims and the defence does not seem to be *bona fide.* The Respondent failed to pay its rentals in full for the year 2009 not to mention that it has not paid anything at all for the years 2010 and 2011 through to 2012. The Respondent stated that it was not certain of the amounts due as rentals and that it did not agree with the amounts charged, but if it were so, it would have requested to split its payments of the remaining balance into three equal payments after it had already paid US$1003-00. If in fact the Respondent objected to the rent being charged it would have stated so after receiving the invoice in 2009 and the matter would have been referred for arbitration at that time, instead it wrote to the Applicant seeking indulgence.

I find that the Respondent had consented to the new rent by its own conduct. It is an accepted position of out law that an acceptance to an offer can be done tacitly. In the present case there is no doubt that the Respondent by its conduct accepted the new rent as it went on to request to pay in instalments.

The lease agreement signed by the parties, which the Respondent refers to as the "old lease" provided that Applicant had the right:-

> "to terminate the agreement in the event of the exhibitor failing to pay any rental or other sum payable in terms of the agreement within thirty days (30) of the due date."

The same agreement also stipulated that each year rent would become due on the 31st of January. The Respondent is clearly in serious arrears. The Respondent in my view, is not being candid with the court and is opposing this application merely for dilatory purposes and nothing else. I also observe that, in any event, the agreement between the parties expired in December 2009 and was never renewed. The Respondent did not meet the requirements necessary for the renewal of the lease. The Respondent's right to renew the lease would only materialise if it complied with the terms and conditions of the agreement, and one of the conditions was that rent should be paid on or before the 31st January of each year. The Respondent did not pay such rentals at all. The other requirement was that the Respondent should give three months notice in writing of its intention to renew the lease before the expiry of the lease. The Respondent did not do so and even after the Applicant sent the agreement to the Respondent, Respondent failed or neglected to sign the agreement. The Respondent admits and accepts that the lease expired. The Respondent is aware that the lease expired and that in the absence of a renewal of such agreement its basis of occupying the property falls away. The position simply is that for a tenant to be in lawful occupation of a premise it should either be a holder of a valid lease agreement or would be a statutory tenant.

It is quite evident that by its own admission, the Respondent accepts that there was no valid lease agreement between the parties after 2009. The lease agreement had expired and the Respondent failed to meet the requirements for the renewal of the lease even after being provided with the lease agreement the Respondent did not sign the agreement and continued to default in the payment of rentals. The only other reason and basis a tenant would continue to occupy premises after the expiry of a written lease would be if the tenant remains in occupation as a statutory tenant. In such event the tenant would continue to pay its rentals and observe all the terms and conditions of the lease agreement. In the instant case the Respondent did not only fail to pay the rentals after the expiry of the lease, but even during the currency of the written lease. The Respondent remains in default.

A tenant cannot remain in occupation of premises without paying consideration for them. Indeed, even where there is a dispute on the amount to be paid, the tenant should pay what it considers to be a fair rental.

See the case of: *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd and another* 2009(2) ZLR 446(H). In this case MTSHIYA J held at page 455 as follows:

> *"--- my view is that, as long as the defendants wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was reasonable rent—"*

In *casu,* the Respondent has not paid any rent since 2009. It has advanced an unconvincing defence which is not bona fide. In simple terms his defence is not honest but extremely vague.

On the basis of the aforegoing, I find that the Applicant's claim is clearly unanswerable.

In the result, I make the following order:-

(1) That the cancellation of the lease agreement between Applicant and Respondent in respect of a portion of the Zimbabwe International Trade Fair Grounds, being site numbers B1, B2 and part of B4 be and is hereby confirmed.

(2) That the Applicant's hypothec in respect of the lease be and is hereby confirmed.

(3) That the Applicant be and is hereby authorised to evict forthwith the Respondent, together with its subtenants, assigness, agents, invitees and all other persons claiming occupation through it from the premises, being site numbers B1, B2, and part of B4.

(4) That the Respondent pays to the Applicant outstanding rentals in the sum of US$11633.00 together with interest thereon at the rate of 5% per annum from 1st September 2011 to date of final payment.

(5) That Respondent pays holding over damages equivalent to the annual rental of US$4958-00 for its occupation of the premises for the period beyond 2011.

(6) The Respondent shall bear the costs of suit.

Coghlan and Welsh, applicant's legal practitioners
Messrs James, Moyo-Majwabu & Nyoni, respondent's legal practitioners