HB 375/17
HC 522/17
X REF HC 297/16

S. L. KEEN & COMPANY (PVT) LTD

Versus

EMCEE COLLEGE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 SEPTEMBER & 30 NOVEMBER 2017

Opposed Application

S. Mlambo for the applicant
K. Ngwenya for the respondent

TAKUVA J: This is an application for summary judgment in terms of o10 r64 of the High Court Rules 1971. Applicant issued summons under cover case number HC 297/16 against respondent for the recovery of arrear rentals, cancellation of the lease agreement between the parties, eviction of respondent from plaintiff's premises, hold over damages and costs of suit.

The key facts, the bulk of which are common cause are that the defendant, a private college conducting business in academic and professional training has been in occupation of the plaintiff's premises being number 29 Fort Street, corner 1st Avenue, Bulawayo since 2006. The lease agreement has since expired. In view of these developments, the parties met on 15 December 2010 and drew up a memorandum of agreement which is an addendum to the lease agreement referred above. The memorandum is filed of record as Annexure A on page 10. Just like any lease agreement between landlord and tenant, Annexure "A" stipulated the monthly rental as US$1 143,00 with effect from January 2011. It also spelt out the parties' rights in the event of breach and more importantly defendant acknowledged being indebted to the plaintiff in the sum of US$18 055,00 being unpaid rental arrears for the year 2010. Defendant made the following undertaking in the agreement.

> "The tenant undertakes to pay 40% of the amount due (being US$18 055,00) at least within four (4) weeks of schools opening for term 1, 2011 including current January rental of US$1 143,00".

Despite putting pen to paper defendant did not keep its side of the bargain, choosing instead to pay what it wanted when it wanted.

Following repeated breaches of the acknowledgement of debt, plaintiff issued summons claiming the following:

"(a) Confirmation of the cancellation of the lease agreement between plaintiff and defendant;
(b) An order directing the defendant's eviction from number 29 Fort Street, corner 1st Avenue, Bulawayo and all persons claiming occupation or title through defendant;
(c) Payment in the amount of US$62 292,00 for outstanding rentals agreed to be owing as at February 2016;
(d) Interest on the outstanding rentals at the prescribed rate from March, 2016 to date of payment;
(e) Holdover damages equivalent to the monthly rental of US$1 143,00 from February 2016 to date of defendant's eviction;
(f) Costs of suit."

Defendant entered appearance to defend and a plea in which it completely denied owing the plaintiff any monies in respect of rentals let alone in the sum of US$62 293,00. Further defendant denied that parties agreed to a monthly rental of US$1 143,00, stating instead that the agreed rentals were pegged in South African Rands at the rate of ZAR8 000,00 per month. Defendant denied breaching any terms of the agreement and thus argued that there was no basis for cancelling the lease agreement. Also, defendant disputed the legal basis for plaintiff's claim for holdover damages of US$1 143,00 on the basis that the parties had agreed on a monthly rental of ZAR8 000,00.

Finally, defendant disputed the issue of costs and filed a counter claim based on the 2010 agreement whose existence it has persistently denied. The counter claim is in the sum of US$44 00,00 being expenses incurred in making the building user friendly as a college.

The issue for determination is whether or not the respondent has a *bona fide* defence to the plaintiff's claim.

The law

Order 10 rule 64 states:

"(1) Where the defendant has entered appearance to defend to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
(2) A court application in terms of sub-rule (1) shall be supported by an affidavit made by the plaintiff or any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.
(3) A deponent may attach to his affidavit filed in terms of sub-rule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.
(4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto."

An illustration of what amounts to a *bona fide* defence was set out in *Kingstons (Pvt) Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 45 (S) at p 451F-H in the following words:

"In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence or a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which, if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*. The defendant must take the court into his confidence and provides sufficient information to enable the court to assess his defence. He must not contend himself with vague generalities and conclusory allegations not substantiated by solid facts."

See also *Brygen Motels (Pvt) Ltd* v *Pure Treatment Investments (Pvt) Ltd* HB-120-16 where the court said;

"In the instant case, the respondent has not denied that it breached the lease agreement. The respondent avers that it disputes the amount of arrear rentals. If respondent had a *bona fide* defence, the court would have been duly <u>furnished with documentary proof to establish that respondent had paid all the rentals on time.</u>" (my emphasis)

What is critical in such applications is for the court to inquire into whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded. The court also inquires whether on the facts so disclosed the defendant appears to have, as to either the whole or part of a claim, a defence which is *bona fide* and good in law.

In casu, the respondent does not have a *bona fide* defence to the applicant's claim for the following reasons:

Firstly, despite making an undertaking in writing to pay 40% of the arrear rentals for 2010 within 4 weeks of opening schools in term 2011, respondent made no payments thereafter, save for the five payments in 2012 totaling US$10 000,00. On this point alone, the respondent's defence cannot be said to be genuine.

Secondly, despite respondent's bold and bald denial in its opposition, respondent has only attached proof of payment as follows:

(a) Five payments of US$2 000,00 each in 2012 totaling US$10 000.
(b) $2 100,00 paid in February 2013
(c) $2 000,00 paid in May 2013
(d) $2 000,00 paid in February 2014
(e) No payments were ever made for the years 2015, 2016 and 2017.

Quite clearly, the total amount paid by the respondent from its own papers is US$16 100,00 as at February 2014. What should be noted here is that as at February 2016 and in terms of the calculations in exhibit I and the agreement of the parties, the respondent owed a whopping US$62 292,00. It is therefore false and misleading for the respondent to claim that it was up to date in its rent payments. The facts that it has presented defeat its defence completely and one wonders where the respondent gets the audacity to state that it is not in breach of the lease agreement. Failure to pay rent in full and on time is a breach of a lease agreement unless the lease permits such failure.

Thirdly, respondent's contention that the rent was pegged in ZAR is nothing but a smoke screen designed to mislead the court. Respondent has not only failed to produce a lease agreement showing the level of rentals in South African rands but the receipts it has produced are in US dollars making a mockery of this submission. It is not surprising that the respondent has not been able to state the exchange rate that they used to convert the ZAR8 000,00 to US dollars.

Fourthly, respondent's challenge of the figures of US$62 292,00 and US$1 143,00 is *mala fide* in that these figures emanate from the agreement that he freely and voluntarily signed. He is therefore bound by his signature – see *George* v *Fairmed (Pvt) Ltd* 1958 (2) SA 458 (A) at 472A. Consequently, there is no dispute in the rentals to be paid monthly as the agreement is crystal clear. This agreement is relevant and material in this case in that it is where respondent acknowledged the nature and extent of its indebtedness.

Finally, in response to a letter of demand dated 17 March 2017, respondent surprisingly replied;

> "It is also our firm belief that it is not necessary to engage in costly, prejudicial and certainly embarrassing legal processes. The school is not prepared for that. We hope your client will exercise the necessary indulgence and allow for the following through with the practical aspects of our meetings in the interest of all stakeholders." (my emphasis).

What I find inconsistent with this response is that, in that letter, the respondent had just been accused of falling behind in its rentals to the tune of US$88 445,00. Obviously, the natural reaction of an innocent party would have been, hey call off the dogs, we are not in arrears here is our proof of payment.

As regards the counter claim, it is strange that respondent's claim is based on the 2010 agreement that he has discredited and disowned. In any event, the claim arises from costs incurred in the installation of fittings and fixtures in the building for the sole benefit and convenience of doing business by the respondent. The memorandum of agreement does not have a provision allowing for compensation to the respondent in the event that the lease agreement is

terminated. On the contrary it permits the applicant to appropriate these developments and assets in order to defray all arrear rentals. In my view, the counter claim has no merit and has only been raised to cloud issues.

The respondent has failed to disclose the nature of its *bona fide* defence and the material facts on which the defence is based. On the other hand, the applicant has verified the cause of action. That cause of action has been substantiated by proof that the applicant's claim is unimpeachable.

In the circumstances, it is ordered that:

1. The lease agreement between the parties be and is hereby cancelled.
2. Respondent be and is hereby evicted and all those claiming occupation through it from number 29 Fort Street and corner 1st Avenue, Bulawayo.
3. Respondent to pay applicant the sum of US$62 292,00 for arrear outstanding rentals agreed to be owing as at February 2016.
4. Respondent to pay interest on outstanding rentals at the prescribed rate from March 2016 to date of payment.
5. Respondent to pay holdover damages equivalent to month rental of US1 143,00 from February 2016 to date of eviction.
6. Costs of suit.

Majoko & Majoko, applicant's legal practitioners
T. J. Mabhikwa & Partners, respondent's legal practitioners