THE TRUSTEES OF ALEXANDRA CLUB

versus

PATHFINDER INTERNATIONAL (PVT) LTD

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 27 March 2012 and 6 June 2012

**CIVIL ACTION**

*I. Mabulala* for the plaintiff

*Ms C. Tawanda* for the defendant

MUTEMA J: The plaintiff’s claim against the defendant is for the cancellation of the verbal lease agreement in respect of two tennis courts situate at Alexandra Club, eviction of the defendant therefrom, holding over damages of $460 per month from August, 2010 to date of eviction plus costs of suit. The claim is premised upon the following:-

The defendant was renting two tennis courts from plaintiff’s premises since 1997, initially under a written lease agreement and subsequently under a verbal lease agreement from 2005. The essential terms of the current lease agreement are:-

a) that the defendant rents the premises for purposes of conducting

the business of motor vehicle sales,

b) that the rent shall be in the sum $400 plus $60 for legal practitioners’

administrative charges per month,

1. that the rentals are payable monthly in advance on or before the 7th day of each month.

The defendant breached the lease agreement in that it paid the July, 2010 rent late, on 21 July instead of on or prior to 7 July, 2010 and also that it defaulted in paying the August, 2010 rent. The plaintiff issued its summons on 27 August, 2010.

Three issues were referred to trial, viz:

1. what were the essential terms of the verbal lease agreement between the

parties?

1. whether the defendant breached the lease agreement in any way,
2. whether the plaintiff is entitled to cancel the lease agreement, eviction of defendant and payment of holding over damages?

The plaintiff led evidence from one witness, Mathew Mtunzi. His evidence is this: he is the plaintiff’s club Manager. In April, 2002 the parties signed a written lease agreement which was supposed to endure for ten years but “expired” in 2005 by mutual agreement on account of hyperinflation. The parties verbally agreed that from 2009 the defendant would pay rent in advance of $200 per month per tennis court which meant that the defendant would pay a total of $400 per month for the two tennis courts. That rent would be paid by the first of each month, the latest being by the 7th of the month.

He said the defendant has habitually failed to pay rent on time, paying as and when it felt like. The plaintiff never received rentals for July and August, 2010. He denied the defendant’s averment contained in paragraph 3.3 of its plea that “rent was payable whenever possible on or before the last day of the month in which the rent was due.” He also denied the averment in paragraph 3.5 of the plea that “the parties further agreed that the defendant would have on or before the 20th of each month to clear its rent arrears for the previous month.”

He also explained that the defendant was paying rent late and the plaintiff would accept late payments because the money belonged to it, not that it was by arrangement. Arrear rentals were cleared in October, 2011, after sixteen months and he was unsure whether that payment included the July, 2010 rentals.

He said the plaintiff still persisted with the claim for holding over damages as even the March, 2012 rental had not been paid. He was not aware that the August, 2010 rent was tendered to plaintiff’s legal practitioners who refused to accept it. He produced exhibits 1,2 and 3 - letters by the plaintiff’s legal practitioners to the defendant demanding payment for the rent. The plaintiff thereafter closed its case.

The defendant called two witnesses. The first was Andrew Magirazi, the defendant’s chief executive officer.

He averred that the defendant paid its rentals in full and that whenever arrears were incurred it was due to negotiations regarding the amount. The July, 2010 rent was fully paid to the plaintiff’s legal practitioners. The rental payment stalemate dates back to beyond July, 2010 which resulted in negotiations with the plaintiff’s legal practitioners whereupon it was suggested that the rent would be paid to plaintiff’s legal practitioners in the amount of $400 representing rent and $60 representing collection fees. He produced exhibit 4 – a letter to the defendant by the plaintiff’s legal practitioners showing that $460 was paid to them for the July, 2010 rent though the letter alleged that rent had been increased to $600. He referred to exhibit 3, a letter from the plaintiff’s legal practitioners alleging falsely that outstanding arrears were, as at 16 August, 2011, in excess of $11 385-00. He also produced exhibit 5, a letter he wrote in response to exhibit 3, containing a counter calculation of outstanding rentals from August, 2010 to the tune of $6 440,00 which the plaintiff’s legal practitioners accepted thereby rubbing off the allegation that rent for July, 2010 had not been paid. Non-payment of rent was not willful but was occasioned by the plaintiff who was refusing to accept payment. He said the defendant thereafter paid off all the outstanding amount for 16 months and was issued with a receipt for the payment which means that the defendant is fully paid from August, 2010.

The second witness was Aleck Chakanyuka who is the defendant’s manager. He was seated in Court from the onset of the trial – the defendant’s legal practitioner explaining that as this was her first trial, she was not aware that the witness was not supposed to be in Court until called to testify.

His evidence, to be treated with caution, was that in August, 2010 he went to pay the August, 2010 rent to the plaintiff’s legal practitioners, who refused to accept it. He tried to talk to Sophie, the plaintiff’s legal practitioners secretary who promised to speak to her boss but he was advised that the rent could not accepted.

The defendant’s current legal practitioners then later engaged the plaintiff’s legal practitioners and it was agreed that the outstanding rent be paid. In December 2011 $2 300-00 was paid towards advance rentals of five months at the rate of $460 per month. The defendant then closed its case.

I am constrained to remark here that had the agreement between the parties been handled professionally as well as the pleadings, the Court would not have been presented with such blurred evidence by both parties. It is now my singular unenviable task to try to unravel the mystery in an endeavour to find where the probabilities lie.

In its submissions, the defendant relied on *Stracon Development (Pvt) Ltd v Gruer* 1990 (1) ZLR 354 (HC) which held that a lessor who, notwithstanding underpayment of rent by a lessee, accepts further underpayments in respect of succeeding months, evinces an election not to cancel the lease on the grounds of the earlier underpayments and cannot thereafter seek to cancel the lease on the same set of facts covering the same period.

It also relied on *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (HC) which held that despite the existence of non-waiver and the non-variation clauses, the lessor must, if there is a late or partial payment, make his election within a reasonable time, and at the latest when the next payment is tendered. Failing such an election, the acceptance without reservation of a subsequent payment must be taken as an election not to cancel on the grounds of the past breach and a condonation of the breach (though the landlord would retain the right to recover the unpaid rent due). To allow the landlord to accept the late or partial payments for a long time and rely on a breach which had occurred months previously as grounds for cancellation would be most unfair.

The other cases relied upon by the defendant are *TM Supermarkets (Pvt) Ltd v* *Chadcombe Properties (Pvt) Ltd* 2010 (1) ZLR 196 which held that “……the lessor cannot straddle both options of formally demanding and accepting the late payment of rent on the one hand and then claiming the right to terminate the lease on the other..” and *Masukusa v Tafa* 1978 RLR 167 (A) where the principle was stated that the lessor must, if there is a late payment make his election within a reasonable time at the latest when the next payment is tendered failing which acceptance without reservation of a subsequent payment must be taken as an election not to cancel on the grounds of the past breach.

In paragraph 3 of the written closing submissions. The defendant’s counsel made the following startling statement:

“ It is submitted that the plaintiff failed to prove on a balance of probabilities that the defendant at the time the summons was (sic) in arrears which constituted a breach. At the time of issuance of summons the plaintiff had already accepted the July 2012 (sic) rentals therefore waivering (sic) his (sic) right to issue summons for cancellation based on the particular rental as it had already been paid. This principle was enunciated in the case of *Masukusa v Tafa* 1978 PLR (sic) (A)”.

Clearly the facts of the instant case are not supported by that principle. I shall revert to this quoted paragraph later on.

As I observed above the agreement between the parties was shambolic in that when the written one extinguished itself before it ran its full life due to a conspiracy of economic factors exitant at the time, the parties desisted from amending it in writing. Instead they amended it verbally. The verbal agreement was silent regarding existence of a non-waiver or non-variation clause.

Regarding when payment of rent was due the parties were at a divergence. The plaintiff averred that rent was payable monthly in advance on or before the 7th day of the month. On its part, the defendant averred that the agreement was that rent was payable

“ whenever possible on or before the last day of the month”, or “before the 20th of the month.” I am constrained to believe the plaintiff’s version on this respect on the grounds that:-

1. It is improbable that a landlord would agree that rent would be payable

whenever possible on or before the last day of the month;

1. the defendant was dithering on this aspect, giving two conflicting versions for

it, viz the one above and the other that rent was payable before the 20th of the

month;

1. the plaintiff’s witness said the time line within which rent was due was which

parties agreed verbally remained the same as the one in the original written

agreement. This was not refuted and only a feeble and non-committal cross-

examination was mounted regarding this witness’ evidence. He remained

unshaken.

The crux of the suit hinges on the alleged breach of the lease regarding non-payment or late payment of the rent. Regarding this, the defendant in paragraph 3 cited *supra* harped on the July, 2012 (supposed to be 2010) rental arguing that by the time the summons was issued that rent had already been paid hence by accepting the rent the plaintiff had

waived its right to issue summons for cancellation of the lease based on the alleged late payment.

The *ratio* in the *Parkview Properties* case *supra* is premised on the *ratio* in *Masukusa v Tafa* *supra.* The issue in these cases was whether a landlord could successfully invoke a non-waiver and non-variation clause where the landlord had previously accepted late payments of rental without reservation and had not made his election to cancel the lease within a reasonable time and at the latest when the next payment is tendered. The answer was found to be in the negative. In other words, an attempt by a landlord to go back in time to previous months’ defaults after acceptance of subsequent timeous payments (even late payments) enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord, notwithstanding the provisions of a non-waiver and non-variation clause in the lease agreement.

In *National Social Security Authority v Alec* *Ryals and Skotril (Pvt) Ltd* *and Alec* *Kaguru* HH 236-2010 I had occasion to deal with facts falling on all fours with those *in casu*. At page 4 of the cyclostyled judgment I observed that:

“However, the *Parkview* case *Supra* is distinguishable from the present case. What was held therein does not detract from the operation of the non-waiver and non-variation clauses for where the lessee again makes late payment the following month, and the lessor cancels within that month or before any remedy of the breach is done, the lessee cannot, because of these clauses be heard to argue that previous late payments have been accepted in circumstances amounting to waiver or estoppel. To hold otherwise would definitely yield iniquitous results.”

In the instant case paragraph 5 of the plaintiff’s declaration avers thus;

“ The defendant breached the contract in that:

1. It was late in paying the July, 2010 rent. The rent was paid and accepted

without prejudice to the landlord’s right to cancel the lease on 21st July 2010,

instead of a date prior to 7th July 2010.

1. The defendant has defaulted in paying the August 2010 rent.”

What is important regarding the July, 2010 rental payment on 21 July, 2010 is that it was paid late and was accepted “on a without prejudice basis”- see exhibit 4. It therefore cannot be said that this late payment was accepted without reservation to enable the defendant to successfully invoke the *ratio* in the *Masukusa v Tafa* *supra*. Even if this could be held in the defendant’s favour, the defendant would still be non-suited on the basis of the fact that the summons was issued on 27 August, 2010 when the August rent had still not been paid by the cut off date of the 7th of the month or 20th (if one goes by defendant’s argument).

The *ratio* in the *Tafa* case *supra* would not help the defendant. The scenario falls on all fours with that in the *Alec Ryals* case *supra*. In the event the defendant breached the lease agreement, by failing to pay rent timeously and the plaintiff was entitled to cancel the lease while the defendant was still *in mora.* The averment by the defendant’s witnesses that the August, 2010 rent was tendered and refused by the plaintiff’s legal practitioners is fallacious because having accepted the late payment for July, 2010 on 21 July, 2010 it is highly improbable that the legal practitioners would refuse to accept the following month’s rent. In any event, as late as September, 2011 the plaintiff’s legal practitioners were still willing to accept payment of arrear rentals including the August, 2010 one as evinced by exhibit 2. Even if the August, 2010 rent was later paid in 2011 it was long after issue of summons for breach and its acceptance cannot cure the breach committed in 2010.

In the event I find that the essential terms of the verbal lease agreement between the parties were that the defendant was to pay rent in advance by the 7th of the month in the amount of $460.00 per month (by August, 2010); the defendant breached the lease agreement by not paying the August, 2010 rent on due date and the plaintiff is perfectly entitled to cancel the lease agreement, evict the defendant and payment of holding over damages if any. In the event judgment be and is hereby entered for the plaintiff in terms of the summons.

*Mabulala & Motsi*, plaintiff’s legal practitioners

*Kanyenze & Associates*, defendant’s legal practitioners