

BK INVESTMENTS (PVT) LTD
versus
CITMA COLLEGE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 21, 24, 25 & 26 October 2016, & 22 February 2017

Civil Trial

R Gasa, for the applicant
J Mandewere, for the respondent

FOROMA J: The plaintiff in this matter is the owner of a Commercial Premises called Silke House situated at the corner of 4th street and Robert Mugabe Road officially known as Stand 16920 Salisbury Township a portion of which is occupied by the defendant in terms of a lease agreement the terms of which are in dispute. It is important to give a factual background to the parties relationship as landlord and tenant as it is relevant in the resolution of the current dispute. Prior to entering into the current lease agreement the parties were involved in a lease agreement which was in fact oral and dated back to about 2006. The defendant fell into arrears of rent in or about 2010 resulting in the plaintiff's suing the defendant for *inter alia* ejectment, arrear rentals and operational costs under case number HC 8950/10. The defendant did not defend the plaintiff's claim with the result that the plaintiff obtained a default judgement on 14 February 2011 in this court. The defendant did not seek a rescission of the said default judgement. In terms of the default judgement under HC 8950/10 the defendant was ordered to pay:-

(1) The sum of US\$7 145-00 in respect of arrear rentals and operational costs with interest thereon at the prescribed rate from the date of summons to date of payment in full and holding over damages at the rate of \$3 300-00 a month from November 2010 to date of eviction and costs of suit. The lease agreement between the parties was also cancelled and the court ordered

the ejectment of the defendant and all those claiming occupation through the defendant from 1st floor Silke House No. 104 Robert Mugabe Way Harare. On obtaining the default judgement the plaintiff instructed its legal practitioners to execute the judgment resulting in the Deputy Sheriff of this court attending on the debtor on 19 April 2011 to eject the defendant from the plaintiff's premises aforesaid. The defendant's ejectment was stopped midstream. According to the Deputy Sheriff's return of service exhibited at the trial of the current matter the defendant's eviction was stopped in progress after the plaintiff and the defendant reached an agreement to stay execution. The foregoing background has been given as it will be relevant in determining as to which version of the lease agreement is the correct one given that the parties disagreed on that aspect *in casu*. It should be noted that although the present action concerns the same parties and also involves a claim for ejectment and arrear rent it pertains to a different rental period which is post the settlement of 19 April 2011 in case No. HC 8950/10. At the pre-trial conference of this matter the parties agreed on the following issues for determination at the trial:

- a) what is the agreed rent for the defendant in terms of the lease agreement?
- b) whether or not the defendant has failed to pay monthly rentals in terms of the lease agreement?
- c) what amount is owed by the defendant to the plaintiff as arrear rentals
- d) whether or not the plaintiff is entitled to an order for ejectment of the defendant from the leased premises.

Although these issues were agreed upon by the parties at the pre-trial conference they were not properly captured regard being had to the pleadings filed.

The plaintiff's declaration claimed in the prayer the following – payment of

- a) US\$13 150-00 being arrear rentals accumulated by the defendant at the plaintiff's premises from November 2011 to date (October 2012) which amount the defendant is refusing to pay.
- b) Interest on (a) above at the prescribed rate from the date of summons to the date of payment in full.
- c) Confirmation of the cancellation of the lease agreement entered into between the parties.
- d) An order of ejectment of the defendant and all those claiming occupation through it from 1st Floor Silke house No. 104 Robert Mugabe Way Harare.

- e) Holding over damages at the rate of \$4 945-00 a month from November 2010 to date of eviction.
- f) Costs of suit at a higher scale.
- g) Collection commission.

This prayer was based on a claim that the defendant had breached a written lease agreement a copy of which was attached to the declaration.

The gravamen of the defendant's defence as pleaded in the defendant's plea was that the defendant disputed that the lease agreement attached to the plaintiff's declaration was the operative agreement averring that the operative lease agreement was an oral agreement between a Mr Bhika the owner of the plaintiff company and Mr Madyara entered into in 1995 and 2006 which stipulated a rental of US\$1 000-00. The defendant further averred that the defendant had paid rental in advance for a period up to five years in terms of the verbal agreement with Mr Bhika. The defendant however did not indicate when the five year advance rental period was due to end neither did the plaintiff seek further particulars in this regard. In regard to the alleged written lease agreement attached to the declaration, the defendant pleaded that it was not binding on the defendant as it was executed by a person who purported to be Siziba when evidently it was not Siziba - in other words that Siziba's signature on the lease agreement was forged.

For reasons that are not altogether clear this matter was regrettably allowed to proceed to a full blown trial and yet a diligent analysis of the plea would have revealed that the defendant's had no *bona fide* defence to the plaintiff's claims. Thus the plaintiff could have easily obtained summary judgment as is demonstrated below.

It will be recalled that the plaintiff obtained default judgment for arrear rent on 14 February 2011. It will also be recalled that the said execution of the said default judgement was stayed in progress on condition that the defendant would (1) settle the monetary aspects of the judgement (2) pay the deputy sheriff's costs and the plaintiff's legal practitioners costs and enter into a written lease agreement with the plaintiff to regulate the rental agreement going forward. The defendant's defence that it had made advance rental payments for 5 years could not have made sense given that the defendant did not seek a set off or debatement of the sums allegedly paid in advance. It would appear that there was no advice on evidence taken before instituting the action by the plaintiff. The alleged defence of advance rental payments would not

have made sense bearing in mind that the defendant did not resist the plaintiff's default judgement for arrear rentals despite the claim that the plaintiff was holding to his credit 5 years advance rentals.

At the trial the plaintiff called one Motion Tupiri as its first witness. Motion Tupiri was Knight Frank Zimbabwe's Property Manager responsible for Managing Silke House. Knight Frank Zimbabwe managed Silke House on the plaintiff's behalf around 2010. Mr Tupiri testified that when he took over responsibility of managing Silke House in 2010 an oral lease agreement existed between the plaintiff and the defendant. At dollarization the defendant's rent was \$1 000-00 per month. The rent was increased to US\$3 300-00 per month as confirmed in the default judgement in HC 8950/10. Mr Tupiri also testified that the plaintiff agreed to a stay of execution of the order in HC 8950/10 on three conditions namely:

- (i) that the defendant was to pay the deputy sheriff's costs including his commission and all legal fees.
- (ii) that defendant was to clear all outstanding rent which the defendant did.
- (iii) that the parties were to enter into a written lease agreement to govern the lease going forward. This evidence was not seriously disputed by the defendant. Mr Tupiri's evidence was that the three conditions for a stay of execution were fully complied with resulting in the written lease agreement attached to the declaration coming into existence to replace the oral rent arrangement before then. He also pointed to various correspondence between the plaintiff represented by Knight Frank Zimbabwe and the defendant in respect of accrued arrear rent which put beyond doubt the acceptance by the defendant that the relationship of landlord and tenant between the plaintiff and the defendant was now governed by a written lease agreement. It will suffice to give one or two illustrations. On 1 October 2012 Mr Tupiri on behalf of Knight Frank Zimbabwe wrote to the Branch Manager of the defendant bringing to the defendant's attention that the defendant was breaching the lease agreement they had signed. The letter of 1 October 2012 to the defendant at 1st floor Silke house is quoted below:-

"Re: Canteen Operations at CITMA College

Your letter dated 1 October 2012 concerning the above subject refers.

Please note that you are in breach of the terms and conditions of the lease agreement that you signed. May we draw your attention to clause 17.16.4 which states that "The tenant shall not permit within the Building or leased Premises the cooking of food other than the making of beverages. You are therefore advised to stop forthwith this activity of cooking at the premises.

Failure to heed this warning will leave us with no choice but to institute legal action to cancel the lease agreement. Please note that legal fees will be charged on your account.

Unannounced inspections will be carried out at the above mentioned leased premises to confirm whether you have heeded this warning.”

On 2 October 2012 the defendant promptly responded to the plaintiff’s letter above quoted as follows:

“RE: canteen operations on college premises:

The above subject refers.

Following your correspondence dated 1 October 2012 which correspondence is in response to my own dated 1 October 2012 I wish to draw your attention to the cancelled clause 17.16.4 of the current lease agreement (a copy of the page containing the clause in question is attached for your convenient perusal). Subsequently, I believe this, therefore legalises our current canteen operations.

Yours faithfully

M. Muswere

Branch Manager.”

The page referred to in Mr Muswere’s response above is indeed p 13 of the written lease agreement and it contains a cancelled clause 17.16.4. as claimed by Mr Muswere.

On 22 March 2012 the defendant’s Financial Manger Mrs G. Chipunza addressed to Knight Frank Zimbabwe’s Mr Masuku a payment plan in regard to rent arrears that had accrued. The letter reads as follows:

“Dear Mr Masuku

This letter serves to inform you that we are proposing to make a payment plan for rent arrears of \$5 280-00. We intend to pay an instalment of \$2 093-00 per month and it will be cleared before the period of three months. We will be paying US\$7 038-00 per month inclusive of our monthly rent of \$4 945-00. Payment will begin end of this month March. We hope you will consider our proposal. For any further information please do not hesitate to contact the undersigned.

Mrs G Chipunza
cc Mr Machededze – Operations Director.”

It can be observed that the claim of rentals at \$4 945-00 is admitted by the defendant contrary to the \$1 000-00 claimed by the defendant at the trial.

Mr Tupiri's evidence was not seriously challenged. This court accepts it without hesitation.

Of significance is Mr Tupiri's evidence that at the time of signing the lease agreement, defendant's directors namely Alusha Madyara and Alton Madyara signed a deed of suretyship and co-principal debtorship in terms of which they bound themselves as sureties and co-principal debtors in favour of plaintiff on behalf of defendant and a Mr G Machedze certified a resolution passed by defendant authorising defendant to enter into a lease agreement with plaintiff.

Despite the overwhelming evidence showing that defendant freely and voluntarily entered into a written lease agreement with plaintiff defendant's only witness Mr Alusha Madyara tried to put up a spirited fight to deny the existence of the said agreement.

The defendant attempted to suggest in the defendant's plea that the person who signed the written lease agreement forged Mr Siziba's signature. This attempt dismally failed at the trial. A close analysis of the defendant's testimony betrays an abuse of court process. Despite the defendant suggesting in the plea that the person who purported to sign the lease agreement on behalf of Siziba was unauthorised, the defendant goes on to allege in the summary of evidence filed as part of pre-trial conference documents that the person who executed the lease agreement was unknown to defendant. Despite denying knowledge of the person who it was alleged signed the lease agreement Mr Alusha Madyara under oath had the audacity to insist that Alton Madyara his half-brother or cousin is the one who forged Mr Siziba's signature on the lease agreement. He went so far as to say that he was able to identify Alton Madyara's signature by virtue of the fact that they grew up together and so he knew his signature very well. Regrettably defendant's counsel appears to have bought into these obvious lies by trying to justify this claim (of the witness having grown up with Alton Madyara) as justification for it being unnecessary to call a handwriting expert to identify the signature on the lease agreement on behalf of the defendant.

Alusha Madyara was a hopeless liar who not only prevaricated but sought to deny documentary evidence originating from defendant. As a witness his evidence was demonstrably fabricated. His evidence was patently illogical and no more than a pack of recent fabrications which could not stand the test under cross examination. He was a very stubborn witness who

clearly did not take the court proceedings seriously. He was given to distorting the truth and he did not assist defendant's case at all. As a result wherever his evidence did not tally with the plaintiff's, his evidence is rejected outright in preference to plaintiff's witnesses testimony - see *Leader Tread Zimbabwe P/L v Smith* HH 131/03. The defence proffered by the defendant was clearly spurious. If as suggested by defendant in its plea the landlord and tenant relationship between plaintiff and the defendant was in terms of an oral agreement between the plaintiff and the defendant represented by Mr Bhika and Mr Madyara respectively it would be incomprehensible why Mr Bhika should now shift goal posts as suggested by Madyara given the alleged amicable relationship between them in the past. Besides the suggestion that the defendant was not in breach of the lease agreement since the defendant had prepaid rentals up to 2021 cannot be reconciled with the facts on the ground namely (i) defendant's failure to apply for a rescission of the judgment per HC 8950/10. (ii) Settlement of the entire default judgment debt by paying the amounts awarded under the default judgment despite the claim that the plaintiff held to his credit 5 years advance rent and renegotiating new terms of the written lease agreement produced by the applicant in *casu*. The suggestion of a pre-payment of rentals upto 2021 cannot seriously be made. In fact Mr Madyara was not constant on this either as he also testified the advance rent would expire in 2017. In any event such claims cannot prevail against the evidence showing admission of arrears of rent by the defendant through its officers as confirmed by written payment proposals aforementioned.

In the circumstances the court is satisfied on a balance of probabilities that plaintiff established that the defendant defaulted in its payment of the rentals in breach of the written lease agreement entered into between plaintiff and defendant exhibited in court. The defendant is therefore liable to plaintiff as claimed in the summons and declaration subject of course to the amendments made by the plaintiff.

It is accordingly ordered that:

- (1) The lease agreement entered into between the plaintiff and defendant be and is hereby confirmed as cancelled
- (2) The defendant and all those claiming occupation through defendant of 1st Floor Silke House No. 104 Robert Mugabe Way Harare be ejected from the said premises.

- (3) The defendant pay plaintiff the sum of US\$113 150-00 being arrear rentals and operational costs up to (October 2012.
- (4) The defendant pay holding over damages at the rate of \$4 945-00 per month from 1 November 2012 to December 2014 and at the rate of \$4 540-00 from 1 January 2015 to date of ejection.
- (5) Interest on both arrear rentals and holding over damages at 5 % *per annum* with effect from the date of summons to the date of payment in full.
- (6) The defendant pay costs of suit on the higher scale of legal practitioner and client.
- (7) The defendant pays collection commission in terms of the Law Society of Zimbabwe
By - Laws.

Gasa Nyamadzawo & Associates, applicant's legal practitioners
Kadzere, Hungwe & Mandevere, respondent's legal practitioners