INMATE TRADING (PVT) LTD
versus
KENCOR MANAGEMENT (PVT) LTD
t/a NATIONAL TESTED SEEDS

HIGH COURT OF ZIMBABWE
MWAYERA AND MUNANGATI-MANONGWA JJ
HARARE, 1 March 2017

Civil Appeal

T Zhuwarara, for appellant
Ms *S Njerere*, for the respondent

MWAYERA J: On 1 March 2017 we upheld an appeal with costs and set aside the court *a quo*'s decision substituting it with dismissal of the plaintiff's claim. We made the following order. It is ordered that

1. The appeal be and is hereby upheld with costs.
2. The court *a quo*'s decision is set aside and substituted as follows, the plaintiff's claim is dismissed.

The reasons for our disposition are captioned herein.

The parties were in a tenancy relationship concerning certain piece of property known as 750 Lorraine Drive Bluffhill Harare. The parties fell out over intended rental increment. This led to the appellant vacating the premises and the respondent suing for outstanding rentals. The court *a quo* gave judgment in favour of the respondent thus prompting the appellant to lodge the present appeal. The appellant raised two grounds of appeal in a somewhat clumsy and argumentative manner. We discerned in summary the following grounds of appeal.

1. That the court *a quo* erred and misdirected itself at law in having correctly found on facts that the respondent repudiated the lease agreement by unlawfully increasing rentals and making the appellant's occupation unpeaceful, it held that the appellant's conduct to vacate after notice did not constitute acceptance of repudiation as it did not literally and with specific words state so.
2. The court *a quo* erred and misdirected itself at law in finding that, in response to breach or repudiation, appellant was enjoined to approach the commercial and industrial rent board.

It is apparent from the record of proceedings that the respondent on 22 January 2014 sought to increase the rentals by 30% from $1575.00 per month to $2047.50 with effect from 1 March 2014. The appellant was not agreeable to this and thus did not sign up an acceptance at the bottom of the letter. On 1 April the appellant in turn delivered to the respondent a notice of termination of the lease agreement stipulating that it would vacate premises at the end of April 2014.

This was not accepted by the respondent which then claimed damages for none payment of rentals for the remaining period of the lease. The court a quo ruled in favour of the respondent, leading the appellant to file the present appeal.

I must mention common cause aspects which were observed by the *court a quo*. It was clear from the record that the respondent unilaterally sought to increase rentals in material breach of the contract which specifically prohibited such increase until agreed dates. The parties had a fixed contract and same could not be terminated before its expiration or by effluxion of time unless there has been breach or repudiation. See *Mungadze* v *Murambiwa* 1997 (2) ZLR 44. In the present case the attempt by the respondent to increase rentals which was imposed on the appellant was a serious inroad to the lease agreement governing the relationship of the parties. Such conduct by the respondent amounted to clear intention to depart from the old contract. In fact the respondent went further to draft a new agreement showing it was no longer interested in abiding by the terms of the existing agreement. By demanding that appellant signs a new contract before expiration of the existing contract the respondent repudiated the lease agreement. See *Bravo (Pvt) Ltd* v *Swardhouse Multiredop Pty* HH 246/13. The respondent exercised their right to terminate the existing contract and in a clear unequivocal manner conveyed its decision to the

appellant. It has been stated that a party who exercises his right to terminate a contract must convey the decision to the other party see *Swart* v *Visloo* 1971 (1) SA 100 and *Jackson* v *Unity Insurance Co. Ltd* 1999 (1) ZLR 381. The respondent did precisely that.

The respondent's actions of unilaterally increasing rentals and drafting a new agreement amounted to repudiation of the existing contract. The respondent's conduct amounted to harassing and bullying appellant into signing a new agreement and thus made continued occupancy by the appellant difficult. It is clear from the record that had it not been for the respondent's breach the appellant would not have opted to vacate. To then seek, to penalize the appellant for the notice to vacate which was prompted by the respondent's repudiation of the contract would not be proper and would have no sound legal basis on which to stand. This is for the obvious reason that the appellant's conduct of giving notice was executed in clear response to repudiation by the respondent. It is our considered view that, failure to literally state so does not vitiate a clear acceptance of repudiation. The appellant sought to cancel the contract in response to breach of peaceful occupation occasioned by the respondent. That there was clause 10 in the lease agreement that ousted the appellant's right to cancel the agreement upon breach cannot stand in the circumstances of this case. Firstly because the respondent's conduct amounted to repudiation and the appellant was at large to accept repudiation or cancel the contract due to breach. Secondly that clause is clearly contrary to public policy and as such unenforceable. It remains clear in this case, the cancellation or repudiation was instigated by the respondent. The appellant's conduct was a reaction to the breach and repudiation by the respondent. The court *a quo* correctly accepted that the respondent's conduct amounted to repudiation of the contract. The court *a quo* however, took it that the manner the appellant expressed cancellation of the contract or acceptance of the respondent's repudiation was not proper as it lacked literally specifying the reasons for cancellation. It is this latter observation, which marks the point of departure which led to an order being erroneously granted in favour of the respondent.

The law is clear that upon cancellation of a contract what is central is communication of cancellation itself and not the reasons for cancellation. See *Zimbabwe Express Services (Pvt) Ltd* v *Naunetsi River Ranch Pvt Ltd* 2009 (1) ZLR 326 GARWE JA stated as follows

> "The position is now settled that Notice of Cancellation must be clear and unequivocal and takes effect from the time it is communicated to the other party …"

See also *Bravo (Pvt) Ltd* v *Wardhouse Multimedia Service Pvt Ltd and Anor* HH 246/13 wherein DUBE J emphasised that cancellation notice must be clear on the fact that the contract is being cancelled. In this case the respondent by seeking to unilaterally impose rental increment was in breach and by conduct sought to repudiate the contract and nothing could stop the other party, in this case the appellant, to accept the repudiation and cancel the contract by conduct. The tenancy contract was for business to be carried on. If the manner the respondent carried on unilaterally increasing rentals made it impossible to carry on business peacefully then the appellant by accepting the repudiation only needed to communicate such cancellation. This is precisely what the appellant did when it gave "Notice of Termination" of lease agreement and specified that it would vacate the premises at the end of April 2014 (p 98 of the record). Surely such communication is clearly spelling out the intention to cancel or in this case accept the repudiation. It is clear by such communication, headed, Notice of Termination and clear indication of when the appellant would vacate the premises, the appellant, made it clear the contract was being cancelled and brought to an end. There is no need to spell out reasons for such cancellation more so in circumstances of this case where cancellation was preceded by repudiation of the contract by the respondent. J.T.R. Gibson in *South African Mercantile and Company Law* 5th ed, Juta 1983 p 109 stated as follows:

> "Where one party repudiates the contract or is in breach of a material term the other party may if he so wishes, treat the contract as cancelled and sue for damages."

In this case the appellant's peaceful occupation was under threat from the respondent's unilateral increase of rentals and demand for acceptance of a new contract such that it was sufficient for the appellant to only communicate that the contract was cancelled.

The cancellation by the appellant in this case followed the repudiation by the respondent and the appellant did what was necessary in the circumstances. The appellant accepted the repudiation and rescinded from the contract.

The respondent had acted in breach of the contract by unlawfully seeking to unilaterally increase the rentals and bring a new contract. The increase was specifically prescribed by clause 7.2 of the lease agreement p 66 of the record.

The unilateral review of rent by the respondent constitutes breach of contract and that was further fortified by drawing up of a new contract. There was no question of determination of

what constituted fair rentals. To that extent therefore, the court *a quo* erred in stating that the appellant had to seek redress with the rent board as opposed to utilizing the remedy available that a party aggrieved by breach has a right to elect to cancel the contract or seek specific performance. The appellant rightly choose to accept the respondent's repudiation and thus communicated its resilation from the contract by communicating the cancellation.

The court *a quo* fell into the error of coming up with a conclusion not anchored on the evidence adduced. The court *a quo* accepted that the respondent repudiated the contract but concluded that the appellant was to remain in the contract and pay the respondent because of failure to give reasons for cancellation of the contract. This is a misdirection warranting interference by the court of appeal. The decision reached by the court *a quo* is not supported by the evidence on record. The grounds of appeal raised are sustainable and the appeal has merit.

The respondent unilaterally sought to increase rentals and came up with a new contract in a clear move of repudiation. The appellant decided to accept the repudiation and thus communicated cancellation of contract in a clear and unequivocal manner which does not call for any penalty. Accordingly the appeal is upheld with costs.

The court *a quo*'s decision is set aside and substituted as follows:

The plaintiff's claim is dismissed with costs.

MUNANGATI-MANONGWA J agrees

Messrs Nyamayaro, Maskanxza & Bakasa, appellant's legal practitioners
Honey & Blackenberg, respondent's legal practitioners