

JESMAN GARMENTS (PVT) LTD
versus
TUMBLE PLASTICS (PVT) LTD
also known as FLEXIPLASTICS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 15, 22 & 23 May, 20 June 17, 5 July 2017

Civil Continuous Roll

Miss N.G Maphosa, for the plaintiff
W Nyika, for the defendant

DUBE J: The plaintiff issued out summons claiming outstanding rentals, holding over damages and monies outstanding from electricity consumption by its tenants. The brief background to his matter is as follows. The parties entered into a verbal lease in terms of which the defendant leased stand 17018 Graniteside, Harare, a factory from the plaintiff for the period 2003 to May 2014. The plaintiff claims that the defendant breached the lease agreement for the reason that it failed to pay rentals on time and settle the electricity bills in full. The plaintiff cancelled the lease agreement and gave the defendant notice to vacate the premises leading to the defendant vacating the premises. The plaintiff claims that when the defendant left the premises, it left them locked, floors dirty and huge boulders outside the premises. The plaintiff asserts that the defendant did not give it vacant possession of the premises resulting in it failing to lease out the premises in the state in which it was. The plaintiff claims \$800.00 in outstanding rentals, \$1 500.00 per month in holding over damages from June 2014 to December 2014 and from the date of summons to January 2015 to date of full vacation. It also claims \$9 207.15 being electricity bill the defendant purportedly failed to settle.

The defendant defends the claim. It denies that it owes any rentals. It admits that it is liable to pay a portion of the electricity it consumed but denies responsibility for the entire bill. It

denies that it did not give vacant possession of the premises it leased or that it left the premises inhabitable because the premises were dirty.

The following issues were referred to trial.

1. Whether or not the figure of \$9 207.00 is attributed to the defendant as outstanding electricity bills.
2. Whether or not the defendant should pay \$800.00 as arrear rentals.
3. Whether or not the defendant is liable to the payment of holding over damages in the sum of \$1 500.00 per month due to failure to give vacant possession to the plaintiff.

The Plaintiff called three witnesses in support of its case. The first witness is a director of plaintiff, Mrs. Esther Mutambara. Her evidence is as follows:-

Mr. Maguchu approached her with an offer to let the premises, a factory. The defendant leased the premises for about 10 years. It dealt in plastics. The defendant started experiencing challenges in paying rentals and would pay in dribs and drabs. The defendant was given 6 months' notice to vacate the premises. It was required to vacate the premises in June. It decided to leave on 15 May 2015 before the six months had elapsed. The defendant must pay full rentals for May 2014 because he never said that he would leave early and he did not leave the keys. She is not sure if the \$800.00 claimed is for the month of June or May. She is not sure how much the defendant paid at the time that he vacated the premises. The rentals were collected by her child.

The defendant left the place inhabitable. It left plastics in the premises and the premises locked. The defendant unlocked the premises in July but the factory was still not habitable because it was dirty, the walls dirty and there were paints on the floor. They asked the defendant to clean the place. He said he would come and never came. At one stage he sent an old man who failed to remove the dirt. The witness hired people who had to use chemicals to remove the dirt and paints. The defendant refused to remove the stones that were near the door that leads to the main entrance. She hired people to remove the stones and to paint the premises. The plaintiff was only able to get the place fixed and use it in September 2016. Prospective tenants refused the lease out the premises in the state in which it was. The plaintiff claims holding over damages of \$10 500.00 for the period May 2014 to September 2016 when she cleaned the premises. From October 2014 there was a tenant who kept his property there but he was not operating. The

factory was sold to the new tenants in October 2016. She cannot state how she comes up with the figure for holding over damages.

There is an electricity bill of \$9 207.17. The defendant shared the factory with two other tenants, Cotton West and someone who dealt in fridges. The people doing fridges did not use much electricity and paid about \$125.00 per month. Cotton West did not use much electricity either and made payments directly to ZESA. It was the responsibility of the defendant to collect money from the other tenants and pay the bills as he consumed more. The defendant had large machines and consumed more electricity.

Under cross examination, the witness maintained that the premises remained inhabitable after the defendant left. She testified that she did not remember when keys were brought back. It could have been in September. She insisted that the \$700.00 paid in May was arrear rentals for April and was not part payment for the May rentals. The witness tried to maintain her story during cross examination but the details of her version were scanty and confused. She was unsure about the exact dates when most events took place. She was unable to give a consistent story.

The plaintiff called Joshua Kashiri as its next witness. His testimony is as follows. He painted the walls of the premises. The floors were cracked and had dirt like grease stains. There were parts of the floor where there was burnt plastic. He had to remove the grease stains for the new paint to stick on. He did not work on the floor. The cracks on the floor needed to be repaired. He formulated the opinion that the rooms were not capable of being let out considering the dirt on the floors and walls. He was paid \$250.00. He also noted some stones stashed in sacks outside the premises. The witness maintained his story under cross-examination.

Lovemore Chireke was also called in support of the plaintiff's case. His testimony is as follows. He was hired by Mrs. Mutambara to carry 2 loads of small stones, the size of quarry stones which were stashed in sacks and piled at the premises with an 18 ton truck. There were more than 100 bags of stones. He also carried grass and some dirt from the premises. He was paid \$750, 00 and has no receipts. The witness maintained his version and was not meaningfully cross examined.

The defendant called Mr. Michael Maguchu as its first witness. He is a director of the defendant. The defendant leased the premises from 1 April 2003 to 15 May 2014. In January

2014 the defendant was given 6 months' notice to vacate the premises. The defendant moved out on the 15 May 2014 and paid \$700, 00 in rentals for half the month. He prepared his own receipts when he paid rentals because he was not given any receipts. He was not behind in his rentals. He paid the full rental of \$1 500, 00 for the month of April 2014. On vacation of the premises, the defendant left the keys with the person who received the May rentals. The premises remained accessible through other entrances. He denied that the plaintiff was denied access to the premises. The plaintiff could use the route that Cotton West used or its own entrance from its offices which allowed it access to its section. He denied that the defendant left the premises in an untidy condition to the extent that no tenant would want to use the premise in the state in which it was. He was never told that the walls were dirty and that the plaintiff repainted them. The defendant was directed to clean the premises after the round table conference was held. He denied that he was evasive culminating in failure by the plaintiff to advise him of the dirt in the premises. He denied that the floors were damaged.

There were 5 other tenants who leased the premises and used electricity. They are, Mr. Musindo who was involved in the ice-block business, a company called ABF that dealt with computer stationery and some printing. Mai Zhiki who had an industrial stove and cooked sadza and mazondo for sale using electricity. There was another tenant staying there using offices upstairs as his residence and he used electricity for stoves, geysers and other gadgets. Cotton West used a lot of electricity through use of its 50 horse power motor. The plaintiff's daughter also resided at the premises and used electricity but did not pay for it. He paid the bill especially whenever they were on the verge of being switched off. He paid in excess of \$8460.00 towards electricity while some tenants did not contribute anything.

There was no arrangement with the plaintiff that he collect the money from other tenants for payment of electricity bills at ZESA. Three of the tenants did not pay the electricity bills from the time that the defendant took occupation of the premises to the time it left. The defendant would pay the bills because it was in business and did not want to be switched off. He consumed about 30% of the electricity and hence paid much more than the others. The refrigerator people also consumed more or less the same amount. Cotton West initially refused to pay the bill charging that it paid electricity as part of its rentals. The other 3 tenants never furnished proof of payments they made. The defendant paid the bulk of the bill and does not owe anymore. Cotton

West used an iron to straighten their materials and used a lot of electricity. After summons was issued he did his own reconciliation of the monies he paid.

Under cross examination, the witness accepted that there were some stones that remained at the premises but maintained that there were only about 20 or 30 bags. Some of the stones had been used for plaintiff's pavement. He disputed that an 18 ton truck was required to ferry the stones. It could have been carrying some grass and dirt. He maintained that he cannot be held responsible for the entire bill when there are other tenants who used electricity and never paid for it.

The defendant called its machine operator, Morgan Mutanda in support of its case. He stated that sometime in September, October or November 2014, he and another guy were asked to go to the plaintiff's premises to clean some ink stains on the floor of the premises. Prior to them going to clean some three guys had gone there to clean the ink using thinners and scrapping utensils. He and another guy had to go and finish the cleaning because the first guys were recalled before they finished the work and did not thoroughly clean the premises. There was no need to clean the walls because they were clean. They cleaned the premises to the satisfaction of the security guards who were present.

The onus in a civil claim is on the plaintiff to prove his claim on a balance of probabilities. He cannot just assert things without proving them and hope that he will get an order in his favour. The onus of proof in a civil matter is less onerous as compared to that in criminal matters where one is required to prove a case beyond a reasonable doubt. Civil suits require to be proved on a balance of probabilities. The onus is on the plaintiff to show on a balance of probabilities that it is owed monies as claimed.

The evidence reveals that there were 5 other tenants and the plaintiff's own child who resided and used electricity at the premises. The questioned bill is a combined bill. There was no criterion over how the electricity bill was to be paid. The plaintiff was unable to say what percentages the defendant and others were required to pay or how the bill was to be apportioned. This makes it difficult for the court to establish if indeed the defendant has cleared his portion of the bill. It was not disputed that only three tenants paid the bills and the rest did not. In the face of evidence that there were many tenants as well as plaintiff's daughter using electricity, it follows that the bill was attributable to all of them. It is not legally tenable and fair to place

responsibility for the bill on the shoulders of only one person. Two other tenants also paid the bills in installments. Their liability for the outstanding bill was not established nor the extent of their contribution known. The extent of the defendant's payments was not measured as against the portion he was required to pay. It was never established if the amounts the defendant paid are sufficient to clear its usage of electricity. There is no reason if there were six parties who consumed electricity, why others who include the plaintiff's child should be exonerated from paying for electricity which they consumed.

It is a rule of thumb that a utility bill is proved by proof of consumption. Where a utility bill is attributable to several consumers it is incumbent to measure or agree on each person's consumption and attribute a portion of the bill to each person concerned. Each person should bear responsibility for its usage. A claimant who attributes a bill incurred by a number of people to one person, cannot be successful in that endeavor. He cannot be taken to have proved his claim. In the absence of a clear formula over how a bill is to apportioned, it becomes untenable to expect one person to pay it. The bill cannot be attributed to one person. I am not satisfied that the defendant is liable for the entire bill. The plaintiff has failed to prove its claim for the Zesa bill.

The plaintiff's contention that the responsibility to collect money for the bills from the other tenants was given to the defendant and that he was required to collect the monies and pay the bills and hence should shoulder the blame for the bill does not find favor with the court. It was not clearly shown that the defendant was given that responsibility. The fact that one has been made a caretaker of a premise or had the responsibility to collect money and pay for the bills and fails to collect the moneys does not make such a person liable for the bills. Even if it is accepted that the defendant had such a responsibility, he is not solely liable for the bill.

The defendant led evidence to show that it paid \$700.00 in rentals for half the month of May 2014. It refuses to pay rentals for the entire month for the reason that it had vacated the premises. The plaintiff's evidence of arrear rentals exhibits a lot of confusion on her part and a lack of seriousness. She did not remember how much the defendant paid when it vacated the premises because of lapse of time. She said that she thought the rentals were for June. Under cross examination, she said that she was claiming \$800.00 in rentals for May 2014. Later she testified that the \$800.00 was outstanding before May and that the \$700.00 paid was for the

month of April. She was unable to pinpoint how the said arrears arose. The plaintiff had no record of the payments made. There were no schedules of payments produced by the plaintiff. The plaintiff's witness had no idea how the claim for \$800.00 claimed arose. It became difficult to understand the basis of her claim. What she ought to have done is to call her daughter who was responsible for the collection of rentals to make clear her claim. The plaintiff's claim for arrear rentals was unsupported.

A landlord who fails to occupy or lease out his premises after a tenant has vacated the premises for the reason that the premises are inhabitable or that the tenant did not give him vacant possession is entitled to claim holding over damages for the period he is unable to access the premises or take occupation from the tenant. The damages claimable are calculated on the basis of the rentals payable by the tenant per month. The onus rests on the landlord to show that the premises were inaccessible or inhabitable for the period concerned.

The defendant denies taking with it the keys and contends that the keys were given to the person who collected the May rentals. That person was not called to rebut the defendant's assertion. That evidence went unchallenged. Even assuming that the defendant went with the keys any prospective tenant would have been able to access and utilize the premises because the premises could still be accessed through other entrances and the main door was opened from inside. I am not satisfied that it has been shown that the plaintiff was denied access to the premises because it was locked up.

It was not disputed that there was some cleaning of the premises that was required to be done and took place. The plaintiff testified that the place required to be painted as well. The cleanliness of the premises was indeed an issue between the parties. It was not very clear whether the cleaning took place before or after the round table the conference. It appears to me that the premises were indeed dirty and the plaintiff's claim that the premises were not habitable for some time has merit. It is this period when the premises were inhabitable that must be ascertained.

The plaintiff testified that she does not know how the figure of \$10 500.00 is arrived at. She seemed to be suggesting that the figure was agreed to at a conference the parties held. Where parties negotiate at or before a pretrial conference and agree to settle a matter by agreeing on monies claimed, they are free to enter into an order by consent at that stage. The negotiations are

conducted on a without prejudice basis. If the negotiations do not yield the desired result, any concessions made with respect to monies claimed cannot be a basis for a claim where the matter is referred to court unless an admission over what is outstanding is made. Where a claim is subsequently disputed, a claimant is still required to prove its claim by adducing evidence in support of the claim. The plaintiff was required to prove its claim.

The plaintiff did not adduce any evidence to show how the figure of \$ 10 500.00 was arrived at. The defendant's witness testified that he went with others to clean the premises around September, October or November 2014 after someone else had also done some cleaning at the premises. The security people who were present were satisfied that the place was clean. The defendant argued that the reason why the premises had no takers is because they were too expensive. The probabilities favour the defendant's version. I say so for the following reasons. The plaintiff testified that from October 2014 there was a tenant who kept his property in the premises but he was not operating from it. That person was able to use the premises in the state in which it was. It means that the premises were occupied for the purposes for which they were used. The plaintiff eventually sold the premises to the same tenant in October 2016. The person stored his goods there; he occupied the premises and ought to be treated as a tenant. This simply demonstrates that the place was habitable. It is for this reason that I must find that the plaintiff was entitled to rentals only up to the time the so called tenant took occupation of the premises.

In the result it is ordered as follows.

1. The plaintiff's claims for the electricity bill of \$9207.15 and arrear rentals of \$800.00 are dismissed.
2. The defendant shall pay to the plaintiff holding over damages of \$1 500.00 from June 2014 to October 2014
3. The defendant shall pay the plaintiff's costs

Sawyer & Mkushi, the plaintiff's legal practitioners
Messrs Muzenda & Partners, defendant's legal practitioners