PARK STREET PROPERTIES (PVT) LIMITED
versus
MOTTSTREET ENTERPRISES (PVT) LIMITED
and
TABETH TAWONAMESO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24-25 October 2017 and 20 December 2017

Civil trial

Z Chadambuka and *G Ndlovu*, for the applicant
B C Madanhe, for the defendants

MUREMBA J: The plaintiff and the first defendant entered into a lease agreement in terms of which the first defendant occupied the plaintiff's premises being number 2 Park Street, Harare. The second defendant bound herself as surety and co-principal debtor to the plaintiff for the due and faithful performance by first defendant of all its obligations in terms of the lease agreement.

It is the plaintiff's averment in the declaration that the first defendant breached the lease agreement by failing to pay rent and operating costs as agreed thereby accumulating arrears. As a result of the breach the plaintiff cancelled the lease agreement and demanded vacant possession of its premises together with payment of all arrears for rent and operating costs. Notwithstanding this demand the first defendant failed or neglected to comply.

The plaintiff averred further that in terms of clause 8 (a) of the lease agreement, the parties agreed that in the event of the plaintiff requiring the premises for the purpose of rebuilding, modernisation or refurbishment, it would give the first defendant 3 months written notice to cancel the lease. The first defendant was given written notice to vacate the premises on the additional basis that the plaintiff wished to refurbish and redevelop the premises, but the first defendant has persisted with its occupation of the premises. Wherefore the plaintiff prays for:

a) "Confirmation of cancellation of the agreement of lease entered into between the plaintiff and 1st defendant in terms of which plaintiff leased to 1st defendant its premises being 2 Park Street, Harare.

b) An order for the ejectment forthwith of the 1st defendant, its sub-tenants, assignees, invitees and all other persons claiming occupation through it from its premises being 2 Park Street, Harare.

Further, plaintiff's claim against 1st and 2nd defendants jointly and severally, the one paying the other to be absolved, as follows,

c) Payment in the sum of US$4,823.33 being US$655.00 and US$4, 168.33 for rent and operating costs respectively, together with interest thereon at the prescribed rate from date of summons, to date of payment in full.
d) Payment of holding over damages in the sum of US$3, 200.00 per month together with interest thereon at the prescribed rate from 1st May 2015 to date of 1st defendant's ejectment.
e) Costs of suit on legal practitioner and client scale."

The defendants in their plea averred that the lease agreement was later novated to allow the first defendant to carry out improvements on the leased property on the understanding that the first defendant would have a right to lease the premises for a period of at least 25 years reckoned from year 2006. They denied that the first defendant had breached the contract by falling into arrears in respect of rent and operating costs. They averred that the first defendant was up to date with all its payments. The defendants averred that the plaintiff's purported cancellation of the lease agreement was unlawful and was thus rejected by the first defendant which requested that the matter be referred to arbitration in terms of the lease agreement.

The defendants further denied that the leased property requires rebuilding modernisation and redeveloping. They averred that the building is in a sound state after they improved, extended and refurbished it in 2006 at their expense and with the consent of the plaintiff. The defendants averred that the plaintiff is seeking to terminate the lease agreement so that it can unduly benefit from the improvements which were done by the first defendant. The defendants averred that the first defendant's continued occupation of the premises is not unlawful as it has now become a statutory tenant and the plaintiff is not suffering any holding over damages as the first defendant is paying rentals on due dates.

The first defendant's claim in reconvention

The first defendant averred that by written agreement signed in 2006 it leased from the plaintiff a commercial property at 2 Park Street, Harare, measuring approximately 45 square metres. During the same year, the plaintiff represented to the first defendant that it would be granted a long lease of at least 25 years if it improved, modernized, refurbished and or extended the leased premises. The first defendant was induced by the plaintiff's aforesaid representation to carry out extensive improvements, refurbishments and or extensions which resulted in the creation of additional shops and the face lifting of 4 other offices. When the plaintiff made the

aforesaid representation it knew that it had no intention of allowing the lease agreement with the first defendant to run for 25 years. In or about September 2014 and after realising that it could now get a higher return from the improvements done by the first defendant, the plaintiff gave notice of its intention to terminate the lease agreement under the pretext that it needed to carry out extensive renovations on the property.

The first defendant averred that if the plaintiff's claim for cancellation of the lease agreement is upheld by this court, it will suffer damages as follows. US$1 800.00 per month being the additional cost of leasing similar premises in Harare multiplied by 16 years being the unexpired portion of the lease agreement. Alternatively, the plaintiff stands to be unjustly enriched by the improvements the first defendant made in an amount to be arrived at on the basis of the same calculation made above i.e. US$1 800.00 per month multiplied by 16 years. Wherefore the first defendant prays for judgment against the plaintiff for payment of

i) damages at the rate of US$1800.00 per month with effect from date of cancellation of the lease agreement to 31 December 2031.
ii) costs of suit on the legal practitioner and client scale.

In its replication the plaintiff denied that the lease agreement the parties entered into was novated in the manner alleged or at all. It denied entering into any agreement with the first defendant for it to improve the plaintiff's property and thereafter have a right to lease the premises for a period of 25 years. The plaintiff maintained that first defendant breached the terms and conditions of the lease by failing to pay rent in full thereby accumulating arrears. The plaintiff denied that the first defendant refurbished the property in the manner alleged or at all. It averred that it requires the premises in order to conduct extensive redevelopment and to modernize its premises with a view to improving the value of its building.

The plaintiff's evidence

Jeffrey John Fredrick Goss (Mr. Goss), the director of the plaintiff testified as the sole witness. His evidence was as follows. The first defendant is a tenant of the plaintiff in a subsection of the building at 2 Park Street, Harare. The property is managed by Robert Root (Pvt) Ltd (Robert Root) a letting agent. He produced the lease agreement that the plaintiff and the first defendant signed in 2012. He personally signed on behalf of the plaintiff on 18 January 2012. The first defendant signed on 10 January 2012. From January 2012 the rental was US$2

000.00 per month. In terms of the addendum to the lease agreement the rent was increased to US$2 220.00 per month with effect from September 2013.

Mr. Goss said that in 2014 the directors of the plaintiff held a meeting and decided that the property needed renovating and redeveloping since it was now run down and shabby and had not been renovated for over 30 years. He said that as a result Robert Root wrote a letter on 2 September 2014 to the first defendant's directors giving them notice that the lease would not be renewed beyond its expiry date on 31 December 2014. The letter was also advising the first defendant to vacate the premises by that date. It was stated in the letter that this constituted a formal notice of 3 calendar months in accordance with the lease agreement. It was stated that the reason for the notice was because the entire property was required for the purpose of redevelopment. This letter was produced as an exh on page 4 of exh 1B. It should be noted that the letter did not say anything about the first defendant being asked to vacate because it had breached the lease agreement by failing to pay rentals and rates. It was Mr. Goss' evidence that the plaintiff needed to pull down the whole property and build a state of the art retail and office complex. He however said that the plan was still at concept stage and had not been taken any further because the plaintiff wanted to first of all get vacant possession of the property.

Mr. Goss disputed that the plaintiff and the first defendant had entered into a long term lease agreement of 25 years. He said that he never heard about it yet he had been involved in the management of the property for over 10 years. He said that the first time he heard about it was when the pleadings of the present matter were being filed. He said that in the response to the notice to vacate, the first defendant never raised this issue of a 25 year lease agreement. The response was produced as an exh on page 5 of exh 1B. In that response the first defendant stated that it had been leasing the premises since 2006 and felt that it needed to meet the landlord (the plaintiff) and discuss some issues which it needed clarity on before it could agree or disagree to vacate the premises. The first defendant stated that the notice to vacate had not been very clear on whether or not the landlord wanted it to vacate, redevelop the premises and then call it back after redevelopment. The letter was written on 17 September 2014. Mr. Goss further said that the first defendant's erstwhile lawyers B Matanga IP Attorneys wrote a letter dated 11 March 2015, but in that letter they never raised the issue of the 25 year lease agreement. This letter was produced as an exh on page 16 of exh 1A. In that letter the then first defendant's lawyers said that it appeared that there was a possibility for the parties to engage each other and resolve the impasse without igniting an unnecessary legal wrangle which would be detrimental to the commercial interests of both parties.

Mr. Goss said that he personally handed over the management of the property to Robert Root in 2005. He further stated that on p 6 of the lease agreement in para 4 from the bottom it is stated that,

> "This lease constitutes the whole of the agreement between the parties **and supersedes any other prior agreements;** any variations or collateral agreements, unless in writing signed by both parties, shall be of no force and effect."

Mr. Goss said that even if it was true that there was an oral agreement about a 25 year lease that the parties had entered into in 2006, it was superseded by this signed lease agreement. He was shown a plan which the defendants intended to produce. He commented that he only became aware of it 10 days before trial commenced. He confirmed that on the ground at the property there was a structure which had been put up which resembled this plan, but it was not quite accurate. He said that he sent Robert Root to the City of Harare to search for the plan in question, but there was no such plan. However, with no confirmation from a witness from Robert Root and the City of Harare, this piece of evidence remains hearsay evidence.

Mr. Goss said that by way of a letter dated 16 April 2015 the plaintiff cancelled the lease agreement for non-payment of rentals. At that time the amount of rentals owing was $655.00. The letter was produced as an exh on p 6 of exh 1B. He further explained that the ledger account on p 3 of exh 1B showed that the rent that was owing from the previous year of 2014 was $1 385.00. On the 1st of April 2015 the outstanding balance stood at $2 855.00. Some payment was then made leaving a balance of US$655.00 as at 16 April 2015. For this reason the lease agreement was cancelled. In the letter cancelling the lease agreement it was stated that the lease cancellation did not negate the notice to vacate which had been given on the 2nd September 2014 on the basis that the plaintiff wished to undertake redevelopment at the premises. The first defendant was warned in that letter of 16 April 2015 that plaintiff's lawyers were being instructed to commence legal action for its eviction from the premises and for the recovery of the amount that was outstanding.

As for the operating costs Mr. Goss said that the ledger was on the lower panel of page 3 of exh 1B. He said these costs comprised bills of electricity, water and rates. These are calculated as a fixed percentage which is proportional to the amount of space the first defendant occupies. The proportion is 39.82%. At the beginning of 2015 there was an opening balance of US$3 044.22 brought forward from the previous year of 2014. On 10 April 2015 the amount had risen to $4 168.33 and this is the amount that was outstanding on 16 April 2015 when the notice of the cancellation of the lease agreement was given. He said that the ledgers for both

the rent and operation costs have a debit column showing the amount of rent or costs charged to the first defendant monthly. There is a credit column which shows the amounts received from or paid by the first defendant. There is a balance column which shows the outstanding amount or the amount that remained unpaid. Mr. Goss said that the operating costs ranged between US$600 and $900 per month and the calculation is based on the bills received from the service suppliers. Mr. Goss said that on page 10 of exh 1A there is a ledger showing that as at 7 September 2017 the rental arrears stood at $2 289.54. The amount of $2 200 continues to be debited to the rent account monthly and the payments that the first defendant has been making to continue to be credited. The ledger shows that the first defendant has indeed been paying rentals monthly, but it has been making under payments. Mr Goss said that on page 13 of exh 1A there is the ledger account for the operating costs. As at 5 September 2017, the balance stood at US$16 965.09. These costs continue to be calculated at the rate of 39.82% per month. On page 7 – 8 of exh 1A there is a deed of surety ship which was signed by the second defendant.

In respect of the claim in reconvention Mr Goss said that he was not aware of any developments that were effected by the first defendant on the property. He said that the premises are in a filthy and unhygienic state. The first defendant is not even in occupation of the premises but has put in some subtenants who are all little retail operators. The plaintiff's witness said that the plaintiff never agreed to the first defendant subletting the premises. He further said that the plaintiff never agreed to any of the so called improvements which the first defendant claims to have effected.

During cross examination Mr. Goss said that the first defendant took occupation of the premises in 2006 but the written lease agreement was signed in 2012. He said that he discussed it (the written lease agreement) with the agent Robert Root before it was signed by both parties. He said that when Robert Root on behalf of the first defendant and the plaintiff discussed and entered into an oral lease agreement in 2006 he was not involved in those discussions. Mr. Goss said that he had no evidence which contradicts that verbal conversation which the first defendant says took place. He further stated that he has no knowledge of who made the developments which are on the property which correspond with the plan the first defendant has in its possession. He said he does not know if those improvements were made by the first defendant as it avers. He said that he does not know when these improvements were made. He admitted that he had not placed before the court any water bills or electricity bills from which the operating costs were calculated. He admitted that the plaintiff's claim for operating costs is

based solely on the ledger accounts which were generated by the plaintiff's agent, Robert Root. He was questioned why he had not produced the actual bills. In response he said that it was because the first defendant had not been denying the outstanding amount of the operating costs. He said that the date on the plan the defendant intended to produce was 16 May 2006. He said that the plaintiff is claiming US$16 965-09 for operating costs. He said that if the first defendant can prove that it invested capital into the property the plaintiff can consider paying compensation but no such proof was ever presented.

During re-examination Mr. Goss explained that the additional construction on the property that the defendant says he made is a building made up of 4 spaces occupied by 4 different subtenants whose doors are roller shutters like garage doors. He said that these spaces are a health hazard as they are in a terrible state. He said that he did not know what the state of the property was when the first defendant took occupation in 2006 since it was Robert Root that was in charge. He said that he would not know if this additional construction was already there or not.

The defendants' evidence

Hillary Asoegwu (Hillary) testified as the sole witness for the defendants. He said that he is a co-director of the first defendant together with the second defendant who is his wife. He said that in 2006 they were looking for a place to do business and they saw the plaintiff's property. There was just a toilet and a garage in the form of a shed where one or two cars could park. Robert Root was managing the property. The defendants negotiated and made their intentions to put up a structure at the property known. Mr Gomba of Robert Root said that he wanted to communicate that, but did not disclose to whom. He asked them to come back after 5 days, which they did. Hillary said that they had wanted not to be charged rentals for some years in order to compensate for their capital injection in erecting the structure but that proposal was not accepted. Instead it was agreed that the first defendant would be allowed a long period of lease, 25 years to be precise, while paying rent on a monthly basis. However, the agreement was not reduced to writing. Hillary said that he personally negotiated for that lease agreement. After the parties were agreed the first defendant drew a building plan and commenced construction around March or April 2006. They erected 4 shops from scratch as appears on the plan, about 7m x 4m in size. He said that the first defendant took occupation around June or July 2006 because it had brought in a lot of workforce which quickly did the construction.

About the 2012 written lease agreement, Hillary said that they were just called to Robert Root offices to sign it because the country was now in the US dollar era. It was said that signing the lease agreement was just a formality. The second defendant was just asked to affix her signature. She just signed it in trust, not aware of the contents thereof. He said that when they received the notice to vacate the property on 2 September 2014, they wrote back seeking audience with the plaintiff because they wanted to know what would become of them since their period of lease of 25 years had not yet expired. He said that this request was not responded to. He said that the defendants had not been aware that the issue of the 25 year lease had been omitted in the written lease agreement. He said that it is the first defendant which is operating all the 4 shops and in so doing it sells different products in the 4 shops. He said that they are not doing anything not authorised by the City of Harare. He said that they continue to pay rent. About the operating costs he said that until 14 September 2014 they were not querying the operating costs. However, after that date they started asking for the actual bills which supported what they were being charged as the costs they were now asked to pay had sky rocketted. He said that the water bill is $100-00 most of the time. Electricity is prepaid and they use about $600-$800 per month in buying tokens on their own. He said that the operating costs that they were being charged were not fixed and Robert Root would just give them high bills the way it pleased without any justification. He said that this is why they began to query the costs and asked to see the actual bills from the service providers.

About the claim in reconvention Hillary said that the first defendant was claiming $1 800/month because if it moves out it will need US$1 800/month to pay for rentals to operate elsewhere. He said that it was not true that the plaintiff wanted the property in order to remodel it, but it wanted to lease it to another company namely Colcom. Hillary said that Colcom had promised to pay more than what the first defendant is paying in terms of rent. He said that the first defendant used quadrillions to erect the shops in 2006 and thus he would not know the equivalent of the amount in US dollars. He said that the premises are not a health hazard as it is the City Council officials only who can say the property is not in accordance with health standards. He produced the building plan that was used to construct the 4 shops as exh 2.

During cross examination Hillary was referred to a clause of the lease agreement on p 4 of exh 1A which says that in the event that the landlord gives notice of cancellation of the lease for purposes of rebuilding, refurbishing or modernisation, the tenant shall, within 30 days following the date of delivery or posting of such notice, give written notice to the landlord of

his acceptance of the notice and his undertaking to vacate the leased premises or his rejection of the notice and grounds of his objection. In the event that the tenant fails to give the notice he shall automatically be deemed to have irrevocably accepted the landlord's notice of cancellation and to have irrevocably undertaken to vacate the leased premises on the applicable date. Hillary admitted that the first defendant did not give any notice in line with this clause either accepting or rejecting the notice of cancellation. He said that the first defendant wrote saying that it wanted a meeting with the plaintiff to discuss the issue because this is how the parties had always operated all along. He said that that meeting was not held. He said that they did not give a notice as required in terms of the lease agreement because they did not know much about the contents of the lease agreement as they had not read them. Hillary said that when they went to Robert Root to sign the lease agreement it is the second defendant who went inside the premises to sign whilst he remained in the car. He admitted that the first defendant did not give an account of how much money it spent in constructing the 4 shops. He said that this was so because the defendants are fighting to stay at the premises and not to recover the money the first defendant used in constructing the shops. He said that if the first defendant moves out to new premises it will be paying rentals of US$1 800-00 per month. He said currently it is paying $2 200-00/month to the plaintiff.

Analysis of Evidence

The lease agreement that is binding between the plaintiff and the first defendant

What is clear from the evidence led by the defendants which evidence the plaintiff did not dispute is that between 2006 and 2012 there was an oral lease agreement which bound the 2 parties. As to the exact terms of that lease agreement, it is only Hillary who knew them as he claims to be the one who entered into that agreement on behalf of the first defendant. Mr Goss for the plaintiff would not know the terms thereof because it was not him who entered into that lease agreement on behalf of the plaintiff, as it was Robert Roots which was managing the property. A witness from Robert Roots would have shed light on this issue. However, it was not until the defendants' case that Hillary mentioned expressly the name of the person that he had discussed the oral lease agreement with at Robert Roots. The name is Mr Gomba. In the summary of evidence the name was not mentioned. Even during the cross examination of Mr. Goss the name was never mentioned to him. If the name had been mentioned, maybe the plaintiff would have led evidence from Mr Gomba since it is him who is said to be aware of this 25 year lease agreement.

Be that as it may, it is not disputed that in January 2012 a written lease agreement was then signed by and between the parties with Robert Roots still managing the property. The second defendant signed the lease agreement on behalf of the first defendant. Despite this she did not testify during this trial. That she signed the written lease agreement without being aware of the contents is not something that she testified to herself. However, by affixing her signature on the document, the second defendant chose to bind the first defendant. No evidence suggests that she did not sign the lease agreement freely and voluntarily except that she did not read it first before signing it. It being an agreement which was signed freely and voluntarily it is sacrosanct. Courts have a duty to uphold the sanctity of contracts and enforce them. In terms of the law of contract, the principle of *caveat subscriptor* postulates that a signature appended on a written contract binds the signatory to the terms of the contract, whether or not he has read and understood the contract. See R H Christie *Business Law in Zimbabwe* 2nd ed @ p 64, and *Muchabaiwa* v *Grab Enterprises (Pvt)) Ltd* 1996 (2) ZLR 691 (S).

This is so even if it is obvious to the other party that he has not read the document. R H Christie *Business Law in Zimbabwe* 2nd ed @ p 64. The principle does not apply if the signature was obtained by misrepresentation, fraud, duress or undue influence or if the contract is vitiated by illegality or mistake. R H Christie *Business Law in Zimbabwe* 2nd ed @ p64. In the present matter these factors do not arise. Hillary said that when the second defendant signed the contract she was aware that she was signing a lease agreement, it is just that she did not read it as the relationship between the parties had always been based on trust. There is therefore no reason why the first defendant cannot and should not be bound by this written lease agreement. At p 6 of exhibit 1A there is a clause which states that this lease agreement constitutes the whole of the agreement between the parties and supersedes any other prior agreement, any variations or collateral agreement unless in writing signed by both parties, shall be of no force and effect. This clause means that even it is true that there was a prior 25 year lease agreement that the parties entered into in 2006, it was superseded by the written lease agreement of 2012 that the parties subsequently signed. The 25 year lease agreement is therefore of no force and effect now.

Confirmation of cancellation of the lease agreement and the request to evict the first defendant

The evidence by the plaintiff's witness, Mr Goss shows that the plaintiff cancelled the lease agreement by way of a letter dated 16 April 2015 which was addressed to the first defendant. The basis of the cancellation of the lease agreement was that the first defendant was

in arrears of rentals in the sum of US$655-00 as at that date according to the letter. In his oral evidence Mr Goss said that the first defendant was also in arrears of operating costs as at 16 April 2015.

It was the first defendant's defence that when the lease agreement was cancelled it was not in breach as it had not fallen into arrears. The ledger that was produced by Mr Goss indeed shows that as at 16 April 2015 the defendant was in arrear rentals of $655.00. The ledger shows that the first defendant was generally in the habit of making delayed payments of rentals by paying after the first day of the month, contrary to the terms of the agreement which said that rent should be paid in advance on the first day of each month. This $655.00 had actually been carried over from the previous month of March 2015. The ledger of operating costs also shows that the first defendant was in arrears of operating costs in the sum of US$4 168.33 as at 16 April 2015. Whilst the defendants were disputing the figure of the operating costs, they did not dispute the figure of the rental arrears and that it was overdue as at 16 April 2015. Non-payment of rent entitled the plaintiff to cancel the lease agreement in terms of a clause on p 6 of the lease agreement.

In his closing submissions Mr *Madanhe,* counsel for the defendants submitted that the first defendant should not be evicted from the premises because it was never afforded an opportunity to remedy any alleged breach as required by a clause in the lease agreement. Let me hasten to point out that Mr *Madanhe* was bringing in a new issue in the closing submissions which issue was never raised in the pleadings and during trial. I will therefore disregard the issue. As a result, since the first defendant was in breach of the terms and conditions of the lease agreement by failing to pay rent in the sum of US$655.00 as at 16 April 2015 and the plaintiff having cancelled the lease agreement on that basis, I will thus confirm the cancellation because it was properly done.

About the notice of 2 September 2014 to the first defendant to vacate the premises by 31 December 2014 for the reason that the plaintiff needed to redevelop the premises, it is an issue that was later overtaken by events of 16 April 2015 that I have already discussed above. After 31 December 2014, the first defendant remained in occupation until the plaintiff cancelled the lease agreement on 16 April 2015 on the basis that the first defendant had breached the lease agreement by failing to pay rentals. So the notice to vacate of 2 September 2014 was rendered a non-issue. It is therefore unnecessary to make a determination on it.

Since l have confirmed the cancellation of the lease agreement, I will thus order the first defendant's eviction from the plaintiff's premises.

Amendment of the plaintiff's claims

In the summons the plaintiff claimed US$655 for arrear rentals and US$4 168.33 for operating costs. At the commencement of trial its counsel, Mr *Chadambuka* in his opening address said that the plaintiff was going to apply to amend the figures considering that the amounts have since increased from the time the summons was issued. He said that the plaintiff would address this through the evidence it was to lead. However, he did not make the application to amend the figures at that stage. He went on to open the plaintiff's case and led evidence on the new figures from Mr Goss. It was only in the written closing submissions that he submitted that in light of the passage of time the plaintiff was praying that its prayer be amended to read:

> "Payment in the sum of US$19 254.63 being US$2 289.54 and US$16 965.09 for rent and operating expenses respectively, together with interest thereon at the prescribed rate from 7 September 2017 to date of payment in full."
>
> Payment of holding over damages in the sum of US$3 200 per month together with interest thereon at the prescribed rate from 1 October 2017 to date of first defendant's ejectment."

Mr *Madanhe* for the defendants did not address this issue in his closing submissions. An application to amend pleadings should be properly made even if the rules say that it can be made at any state before judgment. This does not mean that the application can be made in the closing submissions as part of the submissions as what Mr *Chadambuka* did in the present matter. Being an application it should be made as such. The application not having been properly made, I will not grant it. I will determine the plaintiff's claim as it appears in the summons.

Arrear rentals

A claim of US$655.00 was made. The ledger produced by Mr Goss clearly shows that as at 16 April 2015 the first defendant had a debit balance of this amount. The defendants neither disputed the amount nor adduced evidence which disputes this amount. I will thus grant the amount as claimed.

Operating costs

In the summons the plaintiff claimed US$4 168.33 to have been outstanding as at 16 April 2015. In their plea the defendants averred that they had always queried the operating costs and asked the plaintiff to provide detailed accounting in respect of the amounts. Even

during trial Hillary continued to challenge the amounts. To prove these costs Mr Goss relied on the ledger that was prepared by Robert Roots on the basis of the utility bills received from the service providers. What is apparent from the ledger is that the amounts fluctuate on a monthly basis, understandably so since these are dependent on the utility bills which naturally fluctuate monthly depending on usage. Since the defendants disputed the accounting right from the start in their plea the plaintiff ought to have produced the utility bills which are the foundation or basis of the ledger account. In the absence of these bills it cannot be said that the plaintiff proved its claim on a balance of probabilities. In view of the foregoing, in respect of this claim I will grant absolution from the instance in favour of the defendants.

Holding over damages

In terms of the addendum to the lease agreement which the parties signed in 2013, the agreed rental with effect from September 2013 was US$2 200.00 per month. This means that the first defendant is liable to pay this amount monthly for as long as it remains in occupation of the premises from the time the summons was issued. In its summons the plaintiff made a claim of US$3 200 per month, but in leading evidence Mr Goss did not justify the extra $1 000 per month. I suppose it was meant to cover operating costs, but no evidence was led to show that operating costs are US$1 000/ month.

In view of this I will award holding over damages in the sum of $2 200 per month.

The first defendant's claim in reconvention

I have already made a finding above that the lease agreement that binds the parties is the written one that the parties signed in January 2012. The oral one which the defendants seek to rely on in alleging that the parties agreed on a 25 year lease agreement if ever it was entered into in 2006 as the defendants allege, it was superseded by the written one of 2012. For this reason I will dismiss the first defendant's claim in reconvention for damages in the sum of US$1 800-00/month multiplied by 16 years being the unexpired portion of the lease agreement being the cost of leasing similar premises.

In the alternative, the first defendant in its declaration averred that if the plaintiff's claim for cancellation of the lease agreement is upheld, the plaintiff stands to be unjustly enriched at the expense of the improvements the first defendant made on the property in an amount to be arrived at on the basis of the same calculation as above i.e US$ 1800-00 per month multiplied by 16 years. Unjustified enrichment like contract and delict is a source of obligations. See

Jacques Du Plessis *The South African Law of Unjustified Enrichment* p 1. The purpose of imposing liability under unjustified enrichment is to correct a gain by obliging the defendant to return or surrender enrichment to the plaintiff. In other words the purpose is to provide restitution to the plaintiff. The purpose is not to balance out a loss with an award of damages. See Jacques Du Plessis *The South African Law of Unjustified Enrichment* p 1. To succeed in his claim the plaintiff must meet the following requirements:

1. that he (plaintiff) was impoverished.
2. that the defendant was enriched.
3. that the defendant's enrichment was at the plaintiff's expense.
4. that there is no legal ground or justification for retention of the enrichment. See Jacques Du Plessis *The South African Law of Unjustified Enrichment* p 2.

For improvements made to a property, what has to be determined is the extent the defendant was enriched and the extent of impoverishment to the plaintiff. In determining the plaintiff's impoverishment the plaintiff is only entitled to his actual expenditures and not to any profit for his labours. See Jacques Du Plessis *The South African Law of Unjustified Enrichment* p 269. In *casu* although the first defendant made an averment that the plaintiff will be unjustly enriched at the expense of the improvements it made if it is evicted, the first defendant did not make a claim for it to be restituted for the improvements it made. The amount being claimed is based on what the first defendant perceives to be the amount of money it will need to pay for rentals for the next 16 years if it moves to some other leased premises. This is not how the quantum of enrichment is calculated. This formula will not award restitution to the first defendant for what it expended in effecting the improvements it alleges it made. The first defendant should have provided either proof of its actual expenditures in effecting the improvements or it should have furnished a market related value after having had a valuation of the improvements. Having not provided either of this, the first defendant did not prove on a balance of probabilities the extent the plaintiff was enriched and the extent of its own impoverishment.

In the result, I will grant absolution from the instance in respect of this alternative claim based on unjust enrichment.

Costs

In terms of the lease agreement the lessor is entitled to costs on a higher scale in the event of incurring legal costs. The parties agreed to this. I will thus so order.

Conclusion

It be and is hereby ordered that:

1. (a) The cancellation of the lease agreement entered into between the plaintiff and the first defendant in terms of which the plaintiff leased to first defendant its premises being 2 Park Street, Harare is confirmed.
   (b) The first defendant, its sub-tenants, assignees, invitees and all other persons claiming occupation through it are ejected forthwith from 2 Park Street, Harare.

2. The first and second defendants shall pay to the plaintiff jointly and severally, the one paying, the other to be absolved:
   (a) US$655.00 being arrear rentals with interest thereon at the prescribed rate from the date of summons to date of payment in full.
   (b) Holding over damages in the sum of $2 200/month together with interest thereon at the prescribed rate from 1st May 2015 to date of first defendant's ejectment
   (c) Costs of suit on the legal practitioner and client scale.
3. Absolution from the instance is granted in respect of the plaintiff's claim for operating costs in the sum of US$4 168.33

Claim in reconvention

4. (a) The first defendant's main claim for damages that are equivalent to the cost of leasing similar premises is dismissed.
   (b) Absolution from the instance is granted in respect of the first defendant's alternative claim for unjust enrichment.

Gill, Godlonton and Gerrans, plaintiff's legal practitioners
Mangeyi Law Chambers, defendant's legal practitioners