

THE B.S LEON TRUST
versus
DR JOHN CHAMUNORWA MANGWIRO

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 12 September 2017 & 18 October 2017

Trial

Ms D. Hoffmeyer, for the plaintiff
A. Muchadehama, for the defendant

MATANDA-MOYO J: The plaintiff, a trust formed in accordance with the laws, of Zimbabwe, approached the court for the relief of:

1. eviction of the defendant from a portion of Lot 5A Mayfield comprising of “former mushroom ward, physiotherapy room, bathroom and offices situate at the B.S Leon Retirement Village, 1 Monavale Road, Milton Part, Harare;
2. payment of arrear rentals by the defendant in the sum of \$23 500-00 at the time of the claim;
3. holding over damages in the sum of \$4000-00 per month from May 2015 to date of vacation;
4. interest on the above amounts at the prescribed rate from date of summons to date of payment in full; and
5. costs of suit on attorney-client scale.

The plaintiff alleged that the defendant occupied the above rooms at the plaintiff’s retirement home in Milton Park in terms of a lease agreement entered into between the parties, sometime in December 2010. At the time rentals were pegged at \$1000-00 per month. In January, 2012 rentals were increased by consent to \$4 000-00 per month. It is plaintiff’s case that from January 2014 the defendant failed to pay full rentals. The defendant did not pay anything towards rentals as from December 2014 to April 2015 resulting in the defendant cancelling the lease and demanding vacation of the premises. The defendant failed to vacate the premises resulting in the plaintiff seeking the above relief from this court.

The defendant opposed the granting of the relief sought on the basis that he did not owe any arrear rentals as stated by the plaintiff. According to the defendant it is actually the plaintiff who was overpaid. The defendant whilst accepting that a lease agreement was entered into by the parties in December 2010, however denied that he took occupation of the said rooms at that time. The defendant averred in his plea that he had been there way before 2010. He indicated that in terms of the 2010 lease agreement he was to pay rentals in the sum of \$1 500-00 per month. Whilst admitting to parties engaging for purposes of rental increments, the defendant denied that any agreement was reached. He thus disputed that there was an agreement between the parties to raise rentals to \$4000-00 per month. The defendant denied to having breached any terms of the 2010 lease agreement. It is his case that without that breach the plaintiff is not entitled to the relief claimed. He urged this court to dismiss the plaintiff's claim with costs on a higher scale.

At the pre-trial conference the following issues were referred to trial:

- (a) whether or not there is an existing lease agreement between the parties and, if so, how much rentals is defendant obliged to pay in terms of that agreement;
- (b) whether or not defendant is in breach of the lease agreement and if so in what way; and
- (c) the remedy for such breach if any.

Subsequent to the Pre-Trial Conference the parties filed a statement of certain agreed facts. In terms of that statement the parties agreed that they entered into a lease agreement in terms of which rentals were pegged at \$1 500-00 per month as from 1 December 2010. The defendant vacated the premises in April 2016. The parties agreed that they deliberated towards increasing rentals and that the defendant paid \$4000-00 per month towards rentals for the rest of the year 2013. The parties agreed to vary the issues for referral to:

- (a) whether rent was increased in January 2012 initially to \$4500-00 and then reduced to \$400-00 with effect from September 2012 after the removal of the service of the nurse aides; and
- (b) whether defendant owes holding over damages in the sum of \$4000-00 per month.

Mrs Martine Fay Fox testified on behalf of the plaintiff. She is the chairperson of the Managing Committee of the plaintiff. It was her evidence that the plaintiff is a Trust set up to look after the elderly and the mentally challenged. The trust owns some premises in Milton Park. She testified that on 1 December 2010 the plaintiff entered into a lease agreement with

the defendant (who is a medical practitioner) whereby the defendant leased certain rooms and facilities at the institution. The defendant also agreed to using plaintiff's nurse aides. Rentals were pegged at \$1 500-00 per month. Through this witness, minutes of the Executive Committee held on 30 September 2011 were produced. Under item Finance it was noted:

“It was agreed that Dr Mangwiro rent to be revised in December and it was also recommended that Dr Mangwiro installs his own separate ZESA metre.”

Following such meeting this witness would meet and discuss with defendant to review the rentals. Defendant did not object to such increments. On 23 November 2011 she wrote to defendant that rentals had been increased to \$4500 per month as from 1 January 2012. She testified that the defendant agreed to that sum and signed the letter to show his consent. The letter was produced before the court. This witness also produced a schedule showing that from January 2012 the defendant started paying rental of \$4500 per month up to August 2012. From September 2012 this witness testified that they removed from the agreement provision of nurse aides to the defendant. The rentals automatically reduced to \$4000 after removing the \$500 which was the fee for providing nurse aides. The defendant agreed to this arrangement and started paying \$4000 rentals per month from September 2012. From February to March 2014 he paid between \$4000 and \$5000 per month. Thereafter payments were erratic up to the point when defendant failed to pay even a cent towards the rentals. From April 2015 he failed to pay. The defendant vacated the premises in April 2016. This witness insisted plaintiff is entitled to judgment in terms of the summons.

Under cross examination this witness conceded that she became chairperson of plaintiff whilst defendant was already on the premises. The defendant before this witness' appointment as chairperson dealt with the previous chairperson.

This witness admitted she had no knowledge of the terms of defendant's use of plaintiff's property before 2010.

She was taken to task on why in her Summary of Evidence she had said rentals were \$1000 yet in oral testimony she said \$1500. She explained that the \$500 was for the services of the nurse aides supplied to defendant by the plaintiff. Otherwise actual rentals were \$1000.

She also admitted that the defendant would supply meat and chemicals but rarely so. She agreed that when rentals were raised the defendant still had other obligations as per the lease agreement. She maintained the increment was reasonable.

The defendant gave evidence. He testified that he moved onto the premises in question in 2003 in terms of a verbal lease agreement. He was providing medical services to the patients

of B S Leon in exchange for occupying the premises. In 2009 defendant started paying rentals in the sum of \$200. In 2010 he was made to sign a lease agreement and rentals were \$1500. An attempt to increase rentals was made but the matter was never finalised. No agreement was reached. The letter he signed was only an acknowledge of receipt. He testified that he believed an increment to \$4 500 was unfair considering the other help he was offering to the plaintiff if quantified those extras came to between \$6 000 - \$7 500 per month. He testified that he vacated the premises in April 2016 as an expression of displeasure. Asked why he began paying \$45000 in May 2015 this witness explained that he was simply paying rentals of \$1500 per month in advance. He said it was actually the plaintiff who owed him and not the other way round.

Under cross-examination he admitted that of \$18 000 rentals charged in 2011 he paid \$17 050. In 2012 of the \$52 00 rentals charged he paid \$50 720.00. Asked why he started paying the increased rentals he answered it was part of charity work. He insisted he owed nothing and cancellation of lease was unwarranted. His moving out of the premises was as a result of the harassment he suffered from plaintiff's representative.

ANALYSIS OF EVIDENCE

The parties agreed that rentals were \$1500 per month as at December 2010. The parties also agreed that deliberations were conducted for rental increase to \$4500 per month and that subsequent to the letter signed by the parties the defendant commenced paying the \$4500 rentals per month.

Parties differed on whether they consented to the increase of rentals; with the defendant insisting there was never a consent. The defendant in his testimony, despite having agreed that rental increases were discussed tried to change that version and said no discussions were held. He later changed to say discussion was held but that he vehemently refused to any increases in rentals. I failed to buy his version as his conduct immediately thereafter contradicted his story. Immediately after signing the letter which informed him of the rental increases, defendant started paying rentals as stated in that letter. I do not therefore agree that the signature appended by the defendant on the letter represented an acknowledgment of receipt of letter. I agree with plaintiff's version that the signature represented consent to that increase. The defendant did not challenge the plaintiff's averments that similar premises were attracting more rentals. I am satisfied that from January 2012 rentals were increased to \$4 500. From September 2012 the defendant started paying \$4 000 per month. The schedule submitted and accepted by both parties clearly showed that. The plaintiff's witness explained that it was because of the removal of the services of the nurse aides that rentals fell to \$4 000 from September 2012. The defendant

admitted that the services of the nurse aides were indeed terminated thereat. The defendant accepted that he stopped using services of plaintiff's nurse aides in September 2012. That concession bolstered the plaintiff's version of events.

Once it is accepted that the rentals payable from September were \$4 000 per month it should also be accepted that for all the subsequent months the defendant ought to have paid that amount as rentals. Evidence submitted showed that defendant was in arrears of \$23 500 as at April 2015. When the plaintiff cancelled the lease in April 2015 it was entitled to holding over damages from May 2015 up to April 2016 when the defendant vacated the premises.

The Law

The law applicable here is the Law of Contract: whether there was an agreement between the parties to raise rentals to \$4 500 per month from January 2012. In arriving at a decision the court has to look at whether there was a meeting of the minds of plaintiff and defendant on the matter. In the case of *Jordaan v Trollip* 1960 PH A25 (T) the court said

“Although the minds of the parties must come together, courts at law can only judge from external facts whether this has not occurred. In practice, it is the manifestation of their wills and not the unexpressed will which is of importance.”

WESSELS JA in *SAR & H v National Bank of SA Ltd* 1924 AD 704 at 715 said;

“The Law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of the contract.”

The concept of meeting of the minds does not only take into consideration the mental state of the parties but also the persons' conduct. UCHENA JA in the case of *Telecontract (Pvt) Ltd t/a Telco v Sporrow Hawllier (Pvt) Ltd t/a J & J Transport* SC 41/2017 quoted with approval the words of Blackburn J in *Smith v Hughes* (1871) LR 6QB 597 that;

“If, whether a man's real intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducts himself would be equally, bound as if he had intended to agree to the other party's terms.”

The plaintiff counsel also referred me to the case of *Jones Anglo African Shipping Company* 1936 (1972) SA 827 at 834 where the court held that;

“In the interpretation of a contract the general rule is that the court should determine what the true intention of the parties was. As regards to apparent agreement it has come to be accepted that a contract can also come into existence in the absence of actual agreement. If one of the parties conducts himself in a manner that make the other party believe that he is agreeing to a proposed term of contract.”

Coming to the facts of this matter the question to be answered is whether the parties had a meeting of the minds in so far as raising rentals was concerned. The answer is in the positive. The parties discussed the matter. After defendant signed the letter increasing rentals, he immediately started paying rentals as per that letter. The conduct of the defendant clearly showed that he had accepted such increases.

I am of the view that the defendant has failed to raise any reasonable defence to the claim and I accordingly find in favour of the plaintiff. Coming to the issue of costs this was a matter where defendant should have consented to judgment. The defendant’s defences were only raised as a way of delaying payment. The defendant was not genuine at all. During discussions defendant had even offered a payment plan which was rejected by the plaintiff. Considering that plaintiff is a charitable organization, who has been put out of pocket by pursuing litigation, it is only fair in the circumstances that defendant pay costs on a higher scale. In the result I order as follows;

Plaintiff’s claim succeeds and defendant is ordered to pay to the plaintiff;

1. \$23 500 being arrear rentals up to April 2015.
2. \$4 000 per month holding over damages from May 2015 to 22 April 2016.
3. Interest at the prescribed rate on the above amounts from date of summons to date of payment and
4. Costs of suit on a legal practitioner and client scale.

Matizanadzo & Warhurst, plaintiff’s legal practitioners
Mbidzo Muchadehama & Makoni, defendant’s legal practitioners