

FORT GROUP ENTERPRISES (PVT) LTD

VERSUS

BRIGHT INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 10 MARCH AND 17 MARCH 2011

Mr N. Mlala, for the plaintiff

Miss J. Gororo, for the defendant

CIVIL TRIAL

CHEDA J: This is a civil trial. On the 23rd of March 2010, plaintiff issued out summons against defendant wherein it claimed the following:

- “a) An order confirming the cancellation of the agreement of lease between Plaintiff and Defendant jointly or individually on account of failure to pay rent and operating costs at all or within 7 days of due date.
- b) An order that the Defendant and all those claiming through it vacate stand number 44 Lobengula Street, Bulawayo.
- c) If the Defendant does not vacate within 48 hours of service of this order, the Deputy Sheriff, Bulawayo be and is hereby allowed to evict the Defendant and all those claiming through it.
- d) An order that the Defendant pays a sum of ZAR75 000.00 being the rental due as at 28 February 2010.
- e) An order for payment of hold over damages at ZAR11 000.00 per month or ZAR 366.60 per day from 1 March 2010 to date of eviction.
- f) An order that the Defendant pay costs of suit on attorney-client scale.”

The facts and background of this matter are that both parties are registered companies in terms of the laws of Zimbabwe. On the 1st of September 2009 Plaintiff leased out its property being No. 44 Lobengula Street to defendant for the payment of R11 000 being rent per month. Defendant's defence was that the agreement is not valid as plaintiff used undue influence over

it which resulted in it agreeing to pay rentals of R11 000 per month. It was further its argument that the said agreement was a ploy to unlawfully increase rent.

Plaintiff led evidence from Mr Simbarashe Nopi who is the Administration Manager. His evidence was that the two parties entered into a lease agreement which was due to expire on the 31st of December 2009 and he signed on behalf of the plaintiff while Mrs Phillipa Toriro signed on behalf of defendant. It was his evidence that rent was agreed to, at R11 000 per month and no duress or influence was made to bear on the defendant. It was further his evidence that defendant only paid a full payment for the month of September 2009. The said payment was as per the lease agreement the parties had signed, but, thereafter its payments were less and far between. In other words the rentals were erratic. Plaintiff had asked for \$200 per month but it was negotiated and the parties finally agreed on the figure of R11 000 which was agreed to amicably. Defendant's payment pattern, to them, was a breach of the agreement and they handed them over to their legal practitioners for the recovery of rent and cancellation of the lease agreement. Before their legal practitioners had acted on their instructions, they were summoned to appear before the Rent Board. The parties appeared and were advised to attempt an out of court settlement. This was after the Rent Board was advised by plaintiff that the rentals issue had been referred to their legal practitioners.

His evidence was very straight forward and simple to follow. I find that this witness was honest and stood his ground under cross- examination. Plaintiff then closed its case.

Defendant opened its case by calling its chief executive officer Mrs Phillipa Toriro. Her evidence was that prior to the signing of the lease agreement, the property was being leased by Tip-Top Fish & Chips which was being operated by her mother. Both Plaintiff and Tip Top Fish & Chips' directors are the same people and they are family members including Mrs Toriro. This business ran into financial problems in paying rent which resulted in plaintiff cancelling the then lease agreement and defendant then took it over.

It was her evidence that indeed, she, on behalf of defendant entered into a lease agreement with plaintiff, but, it was not freely entered into as plaintiff had insisted that in order for them to open the premises they should sign a new lease agreement. It is, this pre-condition, which, according to her was undue pressure on defendant. It is further her evidence that when she went to sign the lease agreement, her object was to take it to the Rent Board as evidence that plaintiff had illegally increased rent.

She admitted that defendant had been erratic in its payment and even to date they were five months in arrears. Asked by plaintiff's legal representative why defendant was not paying rent, her explanation was that its Chinese client had not paid them for the November and December 2010 services.

Defendant also called Systa Denga. Her evidence was very brief. She told the court that she was present when Mr Nopi came to lock the premises. She knew nothing about the lease agreement as she was only a witness. Her evidence therefore did not add any probative value to the defendant's case. It therefore, warrants no comment save to say that Mr Nopi denied locking the premises.

The question that falls for determination is:

- 1) whether or not the lease agreement is valid or not and
- 2) If it is valid, whether or not defendant had breached it.

According to plaintiff the lease agreement was reached after negotiations and defendant then made its first payment in fulfilment of the agreement. This payment was not made without prejudice, in my view, it was, therefore, made in fulfilment of one of the terms of conditions of the agreement.

In order for a lease agreement to be valid, the following essential elements should be present:

- 1) the parties must agree on the purpose of the contract, i.e that the lessor is to give and the lessee to receive the lease and enjoyment of property, *see Kessler v Krogmann* 1908 TS 290 at 297.
- 2) The identity of the property, *see Kessler's case (supra)* and
- 3) Rent *merces* should be agreed upon, *see Neebe v Regulation of Mining Rights* 1902 TS 65 at 86 and *Uitenhage Divisional Unit v Port Elizabeth Municipality* 1944 EDL (I) at 10.

The parties agreed on the purpose of the contract i.e that the property was to be used as a restaurant. The property was known, therefore, the second and third requirements were fulfilled.

The question of rent should be agreed upon. There was to be consensus. It is plaintiff's agreement that rent was agreed upon while on the other hand defendant maintains that although it was agreed upon, it was under duress. Agreement may be express or implied. It is implied where the lessor informs the lessee the figure he is expected to let the property for and thereafter the lessee although not expressly agreeing to pay the rent stipulated by the lessor, occupies the property, *see Wepnener v Schraader* 1903 TS 629 and *Gibson and another v Sanders* 1915 EDL 174.

In *Casu* defendant led plaintiff to believe that the rent was agreed upon and confirmed this position by paying the first month's rent. At that stage there was no doubt that there was consensus and therefore the parties were at *ad idem*. The lease agreement was therefore lawfully put in place. In her own words, she admitted that she deliberately misled plaintiff. If she did so, surely, it will be improper to allow her to benefit from her own deceit.

When initially asked why she signed the agreement her answer was that she did so under duress, but, later, on she changed her mind and told the court that she signed in order to take the agreement to the Rent Board in order for them to take appropriate action against plaintiff. While giving evidence, she unwittingly revealed that she took one, a Mr Ndlovu who is a former employee at the Rent Board as her "legal adviser." Mrs Toriro did not strike the court as an honest witness, she was dodging questions and above all very evasive which made her a poor witness. She admitted that she misled plaintiff when she signed the agreement. I find that she is a stranger to the truth and the kind of person whose tongue the truth sits with a lot of discomfort. She cannot be believed and her evidence is rejected.

I find that the parties entered into a valid agreement as there was no undue influence being made to bear on defendant. Infact the former leasee, i.e Tip Top Fish & Chips of which she was also a director and / or share holder was erratic in its payments, this led to defendant taking over the premises.

She also argued that she was a statutory tenant under Statutory Instrument 676/1983 Commercial Premises (Rent) Regulations, 1983. In order for one to benefit under these regulations they should be paying rent. A leasee has no right to continue in occupation of the Landlord's property without paying rent. Even in a situation where rent is disputed the lessee is obliged to pay the minimum rentals which it views as fair. In *Surpline Investment D/L v Forestry Company of Zimbabwe* HH 70/2007 (cyclostyled) judgment, Mukarau JP also dealt with this principle.

It, therefore, stands to reason that defendant's failure to pay rentals as agreed upon in the lease agreement is clearly a breach of the said lease agreement. For that reason, the application succeeds and the following order is made:

- a) The lease agreement between the parties is cancelled.
- b) Defendant and all those claiming through it should vacate stand number 44 Lobengula Street, Bulawayo within 48 hours of service of this order.
- c) In the event that Defendant does not vacate the premises within 48 hours of service of this order, the Deputy Sheriff, Bulawayo be and is hereby ordered to evict the Defendant and all those claiming through it from the said premises.

- d) Defendant pays a sum of ZAR75 000.00 being the rental due as at 28 February 2010.
- e) An order for payment of hold over damages at ZAR11 000.00 per month or ZAR 366.60 per day from 1 March 2010 to date of eviction.
- f) An order that the Defendant pay costs of suit on attorney-client scale.”

Cheda and Partners, Plaintiff's Legal Practitioners

Messrs Marondedze Mukuku, Ndove & Partners, Defendant's Legal Practitioners