

TROTS INVESTMENTS (PVT) LTD

APPLICANT

AND

MAMBIRO FIBRE (PVT) LTD

RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 JUNE 2011 AND 16 JUNE 2011

Mr N. Mlala for applicant
Mr N. Mazibuko for respondent

Opposed application

MATHONSI J: On 30 September 2010, the applicant, through its legal practitioners, addressed a letter to “Mambiro Fibre” which reads in part as follows:

“RE: 3 MONTHS NOTICE TO VACATE WAREHOUSE NO. 9 WELLBECK ROAD THRONGROVE, BULAWAYO.”

We refer to the above matter and advise that we represent our client Trots Investments (Pty) (sic) Ltd.

Our client informs us that you are the tenants at its premises at the above address, and currently in occupation of the said premises. We advise that our client is in need of its premises for its personal use to house its Earth Moving Equipment. In terms of the rent regulation (sic) you are accorded (60) sixty days notice from 1st of October 2010 to vacate the said premises for our client’s personal use and thus you must vacate before midday on 31 December 2010.

We hope you will find the above in order.

Yours faithfully
(Signed)
CHEDA AND PARTNERS”

That letter obviously has its problems in that although the heading gives 3 months notice to vacate, the body of the letter gives 60 days notice. As if that was not enough, there is

also a contradiction in that if the 60 days were to run from 1 October 2010 it would expire on 29 November 2010 and not 31 December 2010.

Assuming there was a typing error and that 60 days was meant to read "90 days", as *Mr Mlala* for the applicant would like us to believe, the notice period would run from the date the letter was served on the recipient. It is not clear when the said letter was served because Mr Samuel Mambiro who occupies the premises in question says the letter was received in the third week of October 2010. If that is the case, and the applicant did not dispute it, the 3 months notice would certainly not expire on 31 December 2010 but much later than that.

For that reason the notice, in its present form is defective. The situation is also compounded by the fact that on 29 November 2010, before the notice period had expired, the applicant launched this application seeking the following order;

"IT BE AND IS HEREBY ORDERED THAT:

1. The three months notice given the Respondent by the Applicant to vacate No. 9 Wellbeck Road, Thorngrove be and is hereby confirmed.
2. The Respondent be and is hereby ordered to comply with notice and vacate the premises mentioned above by 31 December 2010.
3. Failure to comply with paragraph 1 (sic) above the Deputy Sheriff, Bulawayo be and is hereby ordered to evict the respondent and all those claiming through it immediately."

The applicant sought to justify approaching the court before the notice period had expired by saying in paragraph 8 of the founding affidavit of Titus Ncube that:

"The action of the Respondent has raised eyebrows, in that its conduct is likely to be interpreted as when the time for vacation lapses, the Respondent will not vacate the premises."

It is not clear what the applicant expected the tenant to do after receiving the notice. The letter itself did not demand anything of the tenant except to vacate when the time came. Before that time came, the applicant had already rushed to court.

I agree with *Mr Mazibuko* for the Respondent that the application was made prematurely and at a time when the applicant did not have a cause of action against the tenant. As stated by KORSAH JA in *Ngani v Mbanje and another; Mbanje and another v Ngani* 1987 (2) ZLR 111(S) at 115 A –C:

“It is clear from the record that the notice of motion proceedings, initiated by the respondents on 27 April 1987 were commenced before their right to eject the appellant on 1 May 1987 accrued to them. Therefore the respondents had no cause of action against the appellant at the time the initiating process was filed at the registry, and the fact that the application was entertained some six days after a right of action had accrued to the respondents does not affect the relative positions of the parties at the time of commencement of the action. ‘There can be no action before anything is due and owing’. *Voet*, Book 5, 1.27. It follows, therefore, that the Respondents had no right in law to launch proceedings for the ejectment of the appellant before the expiry of the period stipulated in the agreement of sale: *South African Hotels Ltd v Wienburg* 1950(1) SA 516(C) at 520.”

There was no basis at all for the applicant to file a court application the way he did on 29 November 2010. It had given notice to vacate which had not expired and therefore it had no cause of action to litigate at the time. It matters not that the notice has since expired and the respondent has not vacated because the application before me must be looked at as at the time it was instituted. If at that time, the applicant had no right of action, the inquiry should end there. The applicant’s action cannot be validated in retrospect.

Therefore the point taken by the respondent in limine on the lack of a cause of action goes to the root of the application which for all intents and purposes was a nullity. The cause of action could only accrue to the applicant at the time the respondent was required by the notice to vacate. In November 2010, the applicant did not have a right to eject the respondent and therefore had no business issuing this application.

No amount of flummery with legal niceties such as ‘declarator’ as argued on behalf of the applicant will change that position. A party does not approach the court seeking confirmation of a notice to vacate rented premises. The courts do not regulate the parties’ day to day activities of that nature and cannot be called upon to confirm the validity of a notice letter written by a landlord.

It is a serious abuse of court process. I therefore uphold the objection in limine.

Having come to that conclusion, I find it unnecessary to deal with the two other points taken in limine on behalf of the respondent namely that the applicant has sued a non-existent entity Mambiro Fibre (Pvt) Ltd and that insufficient notice was given. I must mention though that those points are also well founded.

In the result, the application is dismissed with costs.

Cheda and partners, applicant's legal practitioners

Messrs Calderwood, Bryce Hendrie and partners, respondent's legal practitioners.