

BRYGGEN MOTELS (PVT) LTD

Versus

PURE TREATMENT INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 16 NOVEMBER 2015 & 19 MAY 2016

Opposed Application

M. Ncube for the applicant
S. Nkomo for the respondent

MAKONESE J: This court application is made in terms of rule 64 (1) of the High Court Civil Rules, 1971, seeking summary judgment in favour of the applicant. The applicant claims the following.

- (a) an order confirming cancellation of the lease agreement between the parties.
- (b) payment of arrear rentals in the sum of US\$18 133,03.
- (c) eviction of the respondent together with all those claiming through it occupation of the leased premises.
- (d) payment of hold-over damages in the sum of US\$3 500,00 from the date of issue of summons to date of eviction.
- (e) costs of suit.

The respondent opposes the application for summary judgment and asserts that the claim is not unassailable and that there is a bona fide defence to the claims.

Factual background

The background to the applicant's claims is that on 23rd October 2014 applicant and respondent entered into a lease agreement in terms of which the applicant let to the respondent the business premises consisting of three bars, namely, Terrace, Corner Bar and Brass Rail Bar

situate at Selborne Hotel, Bulawayo. The following terms and conditions of the written lease agreement are pertinent to the present application:

- (a) Clause 1 stipulates that the lease period was to commence from 1st October 2014 to 30th October 2015.
- (b) Sub-clause 3.1 stipulates that monthly rental in the sum of US\$3 500 exclusive of VAT is payable in advance by the 7th day each month.
- (c) Sub-clause 27.1 stipulates that notwithstanding the provisions of clause 3 of the lease for the first four months from October 2014 to February 2015 the monthly rental is US\$2 000 and that the lessee shall make an initial payment of US\$5 500 by the 31st October 2014.
- (d) Sub-clause 19.1 stipulates that should the lessor fail to pay rentals on the due date or commit any breach of any term or condition of the lease, then the lessor shall have the right to forthwith cancel the lease and re-take possession of the leased premises without prejudice to any amount due and payable to the lessee.
- (e) Clause 12 stipulates that any indulgence shown by the lessor by accepting late payment of rentals shall not be regarded as a waiver by the lessor of its rights under the lease.
- (f) Clause 26 stipulates that the written lease agreement constitutes the whole agreement between the parties and no representations not stated in the lease shall be binding on the parties and any variations not reduced to writing and signed by both parties shall be of no force or effect.

It is not disputed that respondent breached sub-clause 27.1 of the lease by failing to pay the sum of US\$5 500 by the 31st October 2014. The respondent further breached sub-clause 3.1 by failing to pay monthly rental in advance by the 7th of each month. The respondent had accumulated rental arrears in the sum of US\$18 133,03 by the 15th May 2015. This fact is verified by the schedule of payments in paragraph 7 of the plaintiff's declaration. On 20th November 2014 the applicants' legal practitioners addressed a letter to the respondents in the following terms:

HB 120/16
HC 1921/15
X REF HC 1386/15

“Pure Treatment Investments (Pvt) Ltd
46 Lawley Road
Suburbs
Bulawayo

Dear Sirs.

RE: BREACH OF CONTRACT: CANCELLATION OF LEASE AGREEMENT

We write you at the instance of our client Byrggen Hotels (Pvt) Ltd whose representative advised us that you have not paid rentals for two months and you have fallen into arrears in the sum of US\$4 000.

You are in breach of contract and we have instructions to notify you, as we hereby do, that the lease agreement is terminated forthwith in terms of clause 19.1. You are directed to render vacant possession of the premises to our client and pay the sum of US\$4 000 plus our costs failing which legal action shall be taken against yourselves without notice. This will be at a cost to your pocket.

Be guided accordingly.

Yours faithfully

CALDERWOOD, BRYCE HENDRIE & PARTNERS”

This letter of demand was responded to swiftly by respondent's legal practitioners who replied on 21 November 2014 in the following terms:

“Messrs Calderwood Bryce Hendrie & Partners
Bulawayo

RE: PURE TREATMENT INVESTMENTS (PVT) LTD v BRYGGEN HOTELS (PVT) LTD

We refer to the above matter and to your letter dated 20th November 2014, which has been handed to us for our attention and reply.

HB 120/16
HC 1921/15
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On a strictly without prejudice basis our client accepts that it has fallen into rent arrears. Such default will be made good in full or in part on or before the end of November 2014. We note from your letter that you advise that the lease agreement has been terminated forthwith and that our client must vacate the premises, this extraordinary measure appears to be anchored on clause 19.1 of the lease agreement between the parties. This clause in our view, with respect, is violent and in any event it does not give your client the right to evict ours without due process of law. In any event clause 3.3 provides that in the case of a default our client shall be given two months written warning, this procedure has not been followed. ...

Our client operates a business and it is common knowledge that the business environment in this country is operating far below expectation and the environment is tough such that targets are rarely realised, if at all. Our instructions are that your client as not helped our client's situation, as we lay out below.

Our client has been unable to use to maximum benefits the Brass Rail Bar because of a roof leak, there is also a leak at the Corner Bar and the Terrace bar. These leaks prevent our client from putting these bars into maximum use, thus affecting his revenue turnover. During the course of November electricity was cut at the premises, due to no fault of our client, as a result, our client was thrown out of business for one and half days. This incident affected our client in a big way, such that he lost business. Your client must accept and take responsibility for these incidents that have negatively affected our client's business.

Having said all this, our client still wants to continue with the lease agreement. As said *supra*, the default shall be made good on or before the end of the current month. May your client also attend to the defects outlined above.

Yours faithfully

DUBE-BANDA, NZARAYAPENGA & PARTNERS”

It is clear that the respondents did not at the outset dispute that they owed arrear rentals. In another letter addressed to respondent's legal practitioners on 1st April 2015, the respondent was advised of the applicant's decision to cancel the lease agreement by reason of breach of the terms of the lease. The respondent continued to blame the harsh economic environment in a letter dated 25th April 2015. The respondent alluded to the xenophobic attacks in neighbouring South Africa which they claimed led to cancellation of musical shows and loss of anticipated

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revenue. In subsequent correspondence, respondent sought to have the amount of rentals reduced. This request was refused and arrears on rentals escalated.

On 28th April 2015 the applicant's legal practitioners addressed a letter to the respondent as follows:-

"Pure Treatment Investments (Pvt) Ltd
t/a Sekunjalo
46 Lawley Road
Suburbs
Bulawayo

Dear Sirs,

RE: TERMINATION OF CONTRACT

We thank you for your letter of the 2nd instant received on even date.

Our client's instructions are that there is no error in calculation. In fact the receipts show that you have paid US\$13 500,00 and not US\$19 500 as suggested in your letter. Find attached hereto copies of the receipts of payment for the period in question.

Further, we are advised that you have not paid the April rentals. Furthermore, your response failed to address the other issues raised in our letter in respect of stolen drinks, insulting customers and reimbursement of customers.

We shall proceed to issue summons on the basis of breach of contract.

Yours faithfully

CALDERWOOD, BRYCE HENDRIE & PARTNERS

This letter elicited a venomous response from the respondents who on 19th May 2015 addressed the following letter to the applicant's legal practitioners:-

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HC 1921/15
X REF HC 1386/15

“Calderwood, Bryce Hendrie & Partners
Bulawayo

ATTENTION: MR Z. NCUBE

Dear Sir,

“Erstwhile Legal Practitioners”, the term you coined befits your status too well.

We are not amused by your stupid and silly accusations you come up with at any given opportunity seeking to divert attention from real issues. First it was the issue of “stolen” drinks and then “the abuse of clients” now authoring threatening letters to your client. Stop being over-zealous and acting like a crazy headless chicken, we are not criminals please treat and respect us as such.

We know they call you Taliban but do not behave like ones to us. Maybe this is why your clients refer you as that “useless one”. Get your act together and behave like a learned legal practitioner. If there are any threats or your clients are being abused simply make a police report. We expect better behaviour from you.

Yours faithfully

PURE TREATMENT SERVICES”

From the tone of this letter which clearly did not address the issue of the arrear rentals and the alleged breach of contract, the applicant and respondent were not resolving the dispute. It is my view that the respondents were needlessly abusing a legal practitioner doing his job.

Summons were issued against respondents on 12th June 2015 and appearance to defend was filed. The application for summary judgment was lodged on 20th July 2015.

WHETHER THE RESPONDENT HAS RAISED A *BONA FIDE* DEFENCE

The central issue for determination is whether the applicant’s claims are unassailable or put differently, whether the respondent has raised a *bona fide* defence to the claims. The cancellation clause in the written lease agreement, sub-clause 19.1, confers upon the applicant

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the right to cancel the lease and evict the respondent from the leased premises, in the event of the respondent failing to pay monthly rental on due date or committing a breach of any of the terms of the lease. Any failure by the respondent to pay monthly rental on due date or any breach of any other term of the lease would trigger the process of cancellation of the written lease. The respondent has not disputed that it breached sub-clause 3.1 and 27.1 of the lease agreement by failing to effect the initial of US\$5 500 by 31st October 2014. The accumulation of rental arrears totalling US\$18 133,03 as at 15 May 2014 is irrefutable proof that respondent violated the terms of the lease agreement, thereby entitling the applicant to exercise its right to cancel the lease.

I must point out that the harsh economic environment leading to the late payment of rentals is moral issue for the parties. The court notes that the prevailing economic situation affects those in Zimbabwe in business across all the financial and industrial sectors. In my view this moral issue does not absolve or indeed exonerate parties from complying with contractual obligations. Such an approach would lead to chaos in business and many would seek to escape from their obligations on the flimsiest of excuses.

In the opposing affidavit deposed by Dave Ncube on behalf of the respondent, the deponent contends that there are triable issues and that the matter should proceed to trial because of the following defences raised in pleadings:-

“19.1 The respondent disputes the amount claimed by the applicant as arrear rentals.

19.2 Respondent’s failure to pay monthly rentals timeously was explained to applicant and applicant condoned.”

The defences raised by respondent in the opposing affidavit are not *bona fide* and cannot defeat the applicant’s claim for summary judgment. The Supreme Court in: *Kingstons (Pvt) Ltd v Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) had occasion to outline the nature of defences that ought to be raised to successfully oppose summary judgment, as follows:- (per head note)

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"In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a bona fide defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a bona fide. The defendant must allege facts which if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of bona fides. The defendant must take the court into its confidence and provide sufficient information to enable the court to assess the defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts."

At page 452E the court went on to state that:-

"Care must be taken, in a suit for ejectment, not to elevate every alleged dispute of fact into a real issue which necessitated the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact, thereby delaying the resolution of the matter to the detriment of the lessor."

In the instant case, the respondent has not denied that it breached the lease agreement. The respondent boldly avers that it disputes the amount of arrear rentals. If the respondent had a *bona fide* defence, the court would have been duly furnished with documentary proof to establish that respondent had paid all the rentals on time. The respondent alleges, without substantiating, that applicant condoned the breach and late payment of rentals. The correspondence between applicant and the respondent proves beyond dispute that the respondent blamed his problems on the economic conditions prevailing in the country. In any event the written lease agreement provides that any indulgence which may be shown to the lessee by the lessor shall not be taken as a waiver of the lessor's rights to cancel the agreement by reason of a material breach of the terms of the lease.

See the case of *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (SC).

I have no doubt that the respondent failed to raise a *bona fide* defence to the applicant's claims. Respondent's perceived defence carries no prospects of success if the matter were to proceed to trial. The alleged defences raised in the respondent's opposing affidavit cannot be

proved at trial. In *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at page 253E-F MALABA (J) (as he then was) held that:-

"Where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts, which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts with sufficient clarity and in sufficient detail to allow the court to decide whether if these facts are proved at trial, this will constitute valid defence to plaintiff's claim. It is not sufficient for the defendant to make vague generalizations or to provide bald and sketchy facts."

It is my view that the respondent failed to establish a *bona fide* defence to plaintiff's claims. His defence is nothing more than a general and vague assertion. In such a scenario it is only appropriate to grant the application for summary judgment. In the result, the following order was made after hearing argument from both parties:-

1. Summary judgment with costs at an attorney and client scale be and is hereby entered in favour of the applicant against the respondent for payment of the sum of US\$18 133,03 plus interest thereon at the prescribed rate of 5% per annum calculated from the date of issuing summons to date of payment in full.
2. Eviction of the respondent and those claiming through it occupation from the premises, the Terrace Bar, Brass Rail Bar and Corner Bar situated at the Selborne Hotel, Conner George Silundika and Leopold Takawira, Bulawayo.
3. Payment of holdover damages was US\$3 500 exclusive of VAT from the date of issuing summons to date of eviction.

Messrs Calderwood, Bryce Henrie & Partners, applicant's legal practitioners
Messrs Mlweli Ndlovu & Associates, respondent's legal practitioners