HB 13-17
HC 1735-16
XREF HC 3409-15

NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND
versus
VERIGY ENTERPRISES (PVT) LTD
t/a PICCOLA ROMA
and
ISMAIL MOOSA LUNAT
and
PHANGIWE SIYANDA
and
CLAUDIO ANDRIANI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 JANUARY 2017 AND 2 FEBRUARY 2017

Opposed Application

N Mazibuko for the applicant
Ms H Makusha Moyo for the respondents

MATHONSI J: The applicant seeks summary judgment against the four respondents after they elected to contest a claim for eviction from stand No. 16440 Bulawayo Township also known as Shop 14/15Ascot Shopping Centre, Corner Leopold Takawira Avenue and George Avenue Bulawayo (the premises), payment of US$18 605-34 together with interest being rent arrears, holding over damages and costs of suit.

In HC 3409/15 the applicant sued out a summons against the respondents for the afore-mentioned relief. It averred in its declaration that on 1 October 2012 it had entered into a lease agreement with the first respondent for the lease of the premises at a rental of $750-00 a month plus value added tax of 15%. In terms of the lease agreement the first defendant would be liable for maintenance and operating costs as set out in the lease agreement its share being 1,99% in respect of the costs of maintaining and operating the entire complex. It would also be liable for electricity and water charges.

The applicant further averred that the second, third and fourth respondents bound themselves as sureties and co-principal debtors for the payment by the first respondent of all the monies due in terms of the lease agreement. The first respondent breached the lease agreement by failing to pay rent and other charges as a result of which it was, as at 1 November 2015, in arrears in the total sum of $18 605-34 which amount despite demand the first respondent had failed to pay. Finding itself with no other solution the applicant prayed for relief aforesaid.

All the respondents entered appearance. In their joint plea while admitting the terms of the lease agreement, they averred that they were never served with statements of account showing what they owed in respect of owners charges. While admitting that they had not paid monthly rentals in full as they only paid what they could afford, as *Ms Moyo* who appeared for them put it during arguments, the respondents denied being in breach of the lease agreement or neglecting to render due payment. They clearly contradicted themselves.

The second and third respondents also denied binding themselves as sureties and co-principal debtors in *solidium* with the first defendant, even though they signed the joint suretyship document.

They obviously sought to take advantage of the fact that only the name of the fourth respondent was entered on the first page of that deed and not theirs.

The four respondents also filed a counterclaim. They averred that in terms of clause 30 of the lease agreement they were entitled to free and unrestricted use and enjoyment of the leased premises which provision the applicant breached by misrepresenting that the bar business of another tenant which is nearby would be compatible with their restaurant business when it was not as the noise caused by bar patrons was chasing away the respondents' own customers. A car wash business operating at the car park was consuming excessive water. Loud music from the bar was negatively affecting their own business, the applicant did not adequately clean the outside, did not provide adequate security at the car park and did not cut down trees in the car park thereby making the surrounding area unattractive.

As a result of all that the investment of $140000-00 the respondents put in their restaurant business could not be recouped and as such they are entitled to damages in that amount from the applicant. In my view a counterclaim has never been more bogus.

Believing that appearance and the filing of a counterclaim were done for dilatory purposes the applicant has made this summary judgment application. The applicant insists that the respondents have not a *bona fide* defence given the blatant breaches of the lease agreement which they have even admitted. The lease agreement contains "a non-variation clause." For that reason the respondents cannot rely on whatever perceived undertakings allegedly made by the applicant's agent to attend to certain complaints which would not have varied the original terms of the agreement.

In addition, the lease agreement also has a provision to the effect that even where there is a dispute between the parties the first respondent is obliged to continue rendering payment to the landlord in terms of the lease pending resolution of the dispute. The moment the first respondent failed to pay in terms of the lease, it committed a breach entitling the applicant to cancel the agreement and retake possession.

The summary judgment application is opposed by the respondents. The essence of the opposition is that they have a *bona fide* defence. Such defence exists in the sense that the applicant did not seek a cancellation of the lease agreement in the summons and declaration. For that reason the applicant cannot lawfully seek eviction when the lease remains in subsistence. Accordingly the summons does not disclose a cause of action.

Secondly, the claim for eviction against the second, third and fourth respondents is incompetent given that only the first respondent is in occupation of the premises. Thirdly the applicant is itself in breach of clause 30 of the lease agreement thereby making it impossible for the first respondent to carry on a profitable business as stated in the plea. Fourthly the applicant has not attached invoices relating to the operating costs and other charges.

It has been stated repeatedly that summary judgment is an extra ordinary remedy in the sense that it denies a party who has shown an inclination to defend a claim the opportunity to do so. In my view it is that aspect of the remedy of summary judgment which is its strength. This is because it summarily denies a *mala fide* defendant the chance to waste the court's time and to abuse the process of the court at the expense of a genuine litigant whose case is otherwise unarguable both in fact and in law. See *Bulawayo City Council v Dicks Auto Parts (Pvt) Ltd* HB 245/16.

In order to defeat an application for summary judgment the respondent must set out a *bona fide* defence which, if established at the trial, would entitle the respondent to succeed. The defence must be stated with sufficient clarity and completeness to enable the court to determine whether the opposing affidavit discloses such *bona fide* defence. See *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-G. A defence which is stated in a manner which is needlessly bald, vague or sketchy is indicative of lack of *bona fides*. See *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 238H, 239A.

Applying the above legal principles it is clear that the applicant is standing on very firm ground. For a start, the only reason why a property owner would want to lease out his or her property is in order to make money from rentals. It certainly is not for philanthropic purposes as very few such people are in charitable business. For that reason, the payment of rent bellies the lease agreement. A *fortuori,* failure to pay rent goes to the very root of the lease agreement and vitiates it bringing the entire edifice tumbling to the ground.

In this matter it is common cause that the first respondent has not paid some of the rentals. Where it has paid it has admitted not paying in full for one reason or the other. There is nowhere in the lease agreement entered into between the parties where the first respondent is empowered to pay what it can afford as rent or to withhold part of the rent because of a grievance. Quite to the contrary withholding rent by the tenant is in breach of clause 1.3 which is of mandatory application. It provides:

> "The tenant shall not withhold rent for any reason whatsoever, unless with the prior consent of the Landlord."

The first respondent has not suggested that such prior consent was obtained. It has been half-heartedly argued that by allowing the tenant to pay as it pleased over a long time without litigating, the landlord must be taken to have acquiesced and is therefore estopped from litigating now. There is no substance in that argument apart from the fact that it is not available to the respondents in light of the provisions of clause 40.1 which reads:

> "The failure by the Landlord to exercise any right shall not be deemed to be a waiver of any of his rights in terms of this agreement and the acceptance of any overdue rent shall not constitute a waiver of any right which the Landlord has to cancel this Lease arising out of such breach or late payment of rent."

In any event, the summons for eviction was issued on 17 December 2015 at a time when the applicant alleges that rental even for the months of November and December 2015 had not been paid. Such non-payment entitled the landlord to litigate at the time that it did. In addition, I am not in the least persuaded that before seeking eviction the landlord was required to first cancel the agreement. It is trite that an eviction summons is sufficient notice of a cancellation. The first respondent was in breach by failing pay rent adequately and was therefore not a statutory tenant.

I now move on to deal with the respondents' counter claim. I have said that it is bogus. Honestly how does one even begin to understand where the damages stem from and how the sum of $140-000-00 is arrived at? It is said to be an investment in the business. It is not stated what form of investment it is. Is it money expended in developing the premises? Is it in respect of advertisements? In my view this is the kind of defence referred to *Hales* v *Doverick Investments (Pvt) Ltd, supra* as being "needlessly bald, vague or sketchy." It cannot, with respect, defeat an application for summary judgment where the applicant's claim is unassailable.

Mrs Moyo for the applicant submitted that summary judgment should be refused in order to protect the respondents' counterclaim. She relied on the authority of *Truter* v *De Genaar* 1990 (1) SA 206 to the effect that a counterclaim ought to be decided *pari passu* with the main claim. I agree with *Mr Mazibuko* for the applicant that there is no similar provision in our law. I am therefore unable to follow that decision which is only persuasive authority not binding on me. Therefore the counterclaim is only relevant to the extent that it constitutes a defence to summary judgment or may point to a triable issue. As I have said, it cannot defeat the application.

Finally there is the issue of the liability of the second and third respondents who deny having signed a suretyship agreement. In my view that is trifling in the extreme. The starting point, as *Mr Mazibuko* correctly noted, is that in terms of clause 39 of the lease agreement;

> "In the event that the Tenant is a private incorporated company, it is a condition precedent to this agreement that at the time of signature thereof the Tenant shall furnish the Landlord with the written deeds of suretyship and co-debtorship signed by at least 2 (two) of the directors of the Tenant (or, in the event that the Tenant has only one director, that person plus one other person of equivalent financial means), binding themselves jointly and severally to the Landlord and as co-principal debtors with each other and as

co-sureties for each other and renouncing the benefits of excussion and division in respect of all the obligations owed to the Landlord by the Tenant in terms of this Agreement."

That provision is very important to understand the intention of the parties. Apparently the parties would not have concluded the lease agreement with only one surety as the respondents have sought to argue. At the time they signed the lease agreement the second and third respondents also appended their signatures to the surety deed and inserted their particulars like residential addresses and identity numbers. What was not done was for them to enter their respective names as the fourth respondent did in the first page.

It is not for the court to make an agreement for the parties. However from the foregoing facts it cannot be disputed that the second and third respondents intended to stand as sureties. The applicant understood them to be such and the parties were at *ad idem* in that respect. Their self-serving denials now must be understood for exactly what they are, the rantings of debtors trying to avoid liability. Nothing more needs to be said about that. They are simply liable.

In the result, it is ordered that:

1. Summary judgment be and is hereby entered against the 1st, 2nd, 3rd and 4th respondents jointly and severally (in the case of claims sounding in money, the one paying, the others to be absolved) as follows:

    i. An order for the eviction forthwith of the 1st Respondent and all those claiming through it from Stand No. 16440 Bulawayo Township also known as Shop No 14 and 15 Ascot Shopping Centre, Corner Leopold Takawira Avenue and George Avenue Bulawayo be and is hereby granted.

    ii. The Respondents shall pay the applicant forthwith the sum of US18605-34 together with interest thereon on each monthly amount aggregating thereto at the rate of 2% above the minimum lending rate of the applicant's bankers calculated from the date each amount became due to the date full of payment.

iii. The Respondents shall pay holding over damages in the sum of US$862-50 per month plus rates, electricity, water and other operating costs accruing from the 1st of December 2015 to date of eviction of the 1st Respondent.

iv. The Respondent shall pay legal costs on an attorney and client scale together with collection commission alternatively shall pay the higher of the two.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners
Lazarus and Sarif, respondents' legal Practitioners