NATIONAL SOCIAL SECURITY AUTHORITY
versus
P & P MOTORS (PRIVATE) LIMITED
and
PATRICK CHIRINDA
and
LAVENDER CHIRINDA

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 3 September 2012

Opposed Application

G S Georgiou, for the applicant
T Pasirayi, for the respondent

MUTEMA J: This is an application for upliftment of a bar. The three applicants herein are the defendants in the main matter while the respondent herein is the plaintiff. I will refer to the parties as the plaintiff and defendants for ease of reference.

The plaintiff and first defendant concluded a lease agreement on 2 April 2008 in terms of which the plaintiff leased stand 1373 situate at corner Sam Nujoma Street and Samora Machel Avenue, Harare to the first defendant. The second and third defendants bound themselves as sureties and co-principal debtors together with the first defendant. On 21 July, 2011 the plaintiff issued summons against the defendants alleging breach of the lease agreement by failing to pay rentals for the month of June, 2011 thereby accumulating arrears to the tune of US$926-11. In the summons the plaintiff claimed *inter alia* confirmation of the cancellation of the lease agreement between the parties, ejectment of the first defendant from the leased premises, payment of the arrear rentals and holding over damages.

On 18 August, 2011 the defendants entered appearance to defend the action. In an undated letter by the defendants' legal practitioners to the plaintiff's legal practitioners but received on 29 August, 2011, the following is stated:

> "… From our instructions and the correspondence we understand that there is no valid lease agreement and that therefore our clients are Statutory Tennants (*sic*) in terms of the Commercial Rent Regulations. Our clients in terms of s 22 (2) of the abovementioned Regulations in fact paid the sum of $926-00 being the June rental

> owed on the 7th June 2011 this is within time limits stipulated in the Regulations. Our clients are therefore not in breech (sic). We attach a copy of the receipt for the payment of the $926-00 for your records.
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> We have not had sight of the lease agreement and have not been able to obtain a copy from our clients. We would be extremely grateful if you could let us have a copy."

On 21 September, 2011 the plaintiff filed a notice to plead and intention to bar which was served upon the defendants' legal practitioners on 22 September, 2011. On 28 September, 2011 the defendants' legal practitioners filed a request for further particulars requesting for "signed copies of the surety allegedly signed by second and third defendants" as well as "a signed copy of the alleged lease agreement."

On 30 September, 2011 the plaintiff's legal practitioners replied to the defendants' legal practitioners' letter received on 29 August, 2011 *supra*. In the letter, the plaintiff was disputing the alleged statutory tenancy and pointing out the irregularity of the request for further particulars as the same was filed after service of the notice to plead and intention to bar. The plaintiff also gave the defendants up to 3 October, 2011 to file their plea or the bar would be effected. The copy of the lease agreement that was requested on 29 August, 2011 was also attached to the letter. That letter was received by the defendants' legal practitioners on 3 October, 2011 at 8.30 a.m. The bar was subsequently effected on 4 October, 2011.

On 6 October, 2011, a fellow legal practitioner with the defendants' legal practitioners wrote to the plaintiff's legal practitioners advising that the practitioner seized with the matter was in the United Kingdom on a medical visit and requesting for an indulgence to extend the time for filing of the plea to 12 October, 2011 when the practitioner dealing with the matter would have returned. On 10 October, 2011 the plaintiff's legal practitioners faxed a letter to the defendants' legal practitioners explaining that the indulgence sought in the letter of 6 October, 2011 had already been overtaken by the bar, that the plaintiff's case was unassailable for the rent for June was paid on the 7th instead of the 1st as required and that an application for upliftment of the bar will be opposed.

Essentially the dispute between the parties can be disposed of by answering two questions, viz:

1. Whether or not the plaintiff properly effected the bar on the defendants; and
2. Whether the defendants have a defence to the action.

Whether the plaintiff properly effected the bar on the defendants

In its argument that the bar was properly effected on the defendants, the plaintiff relied on the case of *Russell Noach* (*Pvt*) *Ltd* v *Midsec North* (*Pvt*) *Ltd* 1999 (2) ZLR 8 (H) as read with Order 12 r 80 of the High Court Rules 1971.

In *casu* there is no dispute regarding the fact that the defendants requested for further particulars after the notice to plead and intention to bar had been filed and served upon them by the plaintiff. In *Russell Noach* case *supra*, the respondent company instituted an action against the applicant claiming payment for services rendered. Shortly before the expiry of the time within which it was required to plead, the applicant asked for further particulars which were furnished. The time within which the applicant was required by the rules of the High Court to file its plea or make a request for further and better particulars expired and notice of intention to bar was given to the applicant. Instead of filing a plea within the four days allowed by the rules, the applicant filed what it called a request for further and better particulars. The respondent imposed the bar and applied for default judgment, which was granted. The applicant applied for rescission of the judgment, arguing that the respondent had no right to bar it from filing a plea before having supplied the further and better particulars it had requested. It was held that the respondent was entitled to ignore the request for further and better particulars. By failing to file a plea or request for further and better particulars timeously the applicant lost the right to dictate the next procedural step and so became liable to being barred. The power was then vested in the respondent to determine the next step. The applicant failed to do what was required of it by the respondent, which was to file its plea within four days. It had no right to file a request for further and better particulars. The request was invalid for being filed out of time, and improper, because it was not what it was required to do. The bar was thus properly imposed and default judgment properly obtained.

The defendants' argument in the case at hand is that the bar was improperly imposed on three grounds, viz;

(a) "the plaintiff's conduct in delivering up a copy of the lease only after formal request having previously ignored (sic) written requests for a copy of the lease and then expecting defendants to file a plea within a matter of hours whilst their legal practitioner was out of the country are (sic) again in the circumstances unreasonable" – para 9.3 of heads of argument;

(b) the *Russell Noach* case is distinguishable in that it dealt only with a request for further and better particulars that were filed out of time whereas in *casu* the defendants' request for further particulars was made timeously "within five days stipulated by the Notice of Intention to Bar i.e. on 29 September, 2011"; and

(c) that by furnishing copy of the lease agreement on 3 October, 2011 and insisting that the plea be filed on the same day, the plaintiff failed to comply with the High Court Rules in that it should have issued a fresh Notice of Intention to Bar and thus accorded the defendants at least another five working days within which to file their plea in line with the case of *Nangle & Anor* v *Aronowitz* 1949 SR 1949 (47); 1949 (2) SA 713 (SR) where HUDSON CJ at p 717 stated:

> "Now in this case it must be assumed that the applicants found themselves unable to plead to the declaration as served and for that reason required particulars to be furnished. It must be assumed also that in undertaking to furnish those particulars and in thereafter supplying them, the plaintiff impliedly admitted that the applicants could not plead properly to the declaration until the particulars asked for had been given. The declaration, therefore, as originally served on the applicants, was not complete. Particulars when given form part of a pleading and in a case such as this the particulars subsequently furnished formed part of the declaration on which the plaintiff – that is the respondent – would rely at the trial of the action.
>
> Any notice of intention to bar given before the particulars had been furnished therefore, must be premature, and the respondent's attorney could not properly bar the applicant for failure to plead by reason of a notice given on the 5th November when subsequent to that date he had admitted that the declaration was not complete and could not be pleaded to. The acquiescence in the request to furnish particulars, therefore must be taken to have invalidated the notice of intention to bar given on the 5th of November, and that being so before the respondent's attorney could properly bar the applicants he should have given a fresh notice of intention to bar within the prescribed time after delivery of the particulars; in other words, the declaration cannot be taken to have been properly served until the particulars were furnished, and the date of service of the declaration, for the purpose of r 5 of Order 10, is the date of delivery of particulars and not of service of the original declaration."

Regarding the first ground, this should not detain me. There was no formal request for further particulars that was ever made by the defendants to be furnished with a copy of the lease agreement. If anything that request was informal. The plaintiff was under no legal obligation to furnish what was asked for informally. It only supplied the copy out of courtesy, never mind at what stage of the pleadings, although dilatoriness in so doing must be frowned upon. That defendants' legal practitioner was out of the country on medical grounds when the document was supplied is neither here nor there in *casu* because when the notice to plead and

intention to bar was filed and served upon the defendants' legal practitioners, their said legal practitioner was still within the country – seven working days before his departure. In fact when he left the country the five day period given in the notice had already expired. The extension given up to 4 October, 2011 was a bonus.

As for the second ground advanced, viz, that the *Russell Noach* case is distinguishable, I have not found it to be so. It is not correct that the defendants' request for further particulars was filed timeously "within five days stipulated by the Notice of Intention to Bar." I must confess that what the defendants are trying to say here is incomprehensible hence it is difficult to make head or tail of the contention. The notice to plead and intention to bar does not call upon the defendants to file a request for further particulars within five days. It calls upon them to "file and deliver their plea or other answer to the plaintiff's claim within five (5) days … in default it is the plaintiff's intention to file a copy of this Notice with the Registrar as a bar." The defendants here completely went off tangent. In any event it is not legally correct to allege baldly that because the cited case was dealing with a request for further and better particulars while the case at hand deals only with a request for further particulars that *per se* makes the distinction. The underlying legal principle is exactly the same and applies to both scenarios with equal force. The argument therefore holds no water.

Regarding the third contention that the *Nangle* case *supra* applied in *casu*, this cannot persuade anyone. The quoted provision was read by the defendants in isolation and sought to be super imposed on the present case. This is a 1949 case decided when the rules of this court, in terms of the then Order 8 r 19 it was provided that before applying to the court by motion, the party desiring particulars may state by letter to the other party the nature of the particulars he required and call upon the latter to furnish the required particulars. The current rules do not unfortunately contain such a provision, which would have warranted the same interpretation, based on the defendants' letter of 29 August, 2011, informally requesting a copy of the lease agreement which the plaintiff subsequently supplied which would have grounded a similar argument that by so doing the plaintiff impliedly admitted that the declaration was incomplete or that that conduct amounted to acquiescence by the plaintiff thereby invalidating the notice of intention to bar filed on 21 September, 2011 and served on 22 September, 2011.

Whether the defendants have a defence to the action

Where an applicant in an application for upliftment of a bar has no defence, the courts have been loathe to grant the application: *The Civil Practice of the Supreme Court of South Africa*: Herbstein and Van Winsen 4th ed. at 556.

In *casu* the defendants aver that they did not breach the lease on the basis that the first defendant being a statutory tenant – the lease having expired on 28 February, 2011 – the rent was paid on 7 June, 2011 in compliance with s 22 (2) of the Commercial Premises (Rent) Regulations 1983 which provides that:

> "No order for the recovery of possession of Commercial Premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, whether by the effluxion of time or in consequence of notice given by the lessor shall be made by a court, so long as the lessee –
>
> (a) Continues to pay rent due, within seven days of due date; and
> (b) Performs the other conditions of the lease."

The plaintiff argues that the first defendant, by virtue of clause 2.3 of the "expired" lease agreement, does not fit the definition of statutory tenant. It remained a tenant in the ordinary sense as the lease continued with rent still being due in terms of clause 3 i.e. on or before the first day of the month. Since the June, 2011 rent was paid on 7 June, 2011 the first defendant breached the lease agreement thereby entitling the plaintiff to the relief it seeks in its claim.

Now the crisp issue for my resolution is whether the first defendant became a statutory tenant after 28 February, 2011. In terms of clause 1.3 of the lease agreement the lease period was for three years, commencing on 1 March, 2008 and terminating on 28 February, 2011. In terms of clause 2.2, at least six calendar months prior to the last day of the lease period, the lessee was supposed to advise the lessor in writing whether the lessee intended to vacate the premises on the termination date in which event the lessee would have undertaken to vacate on such date. In terms of clause 2.3, if the lessee failed to give notice as provided in clause 2.2, the lease would "continue from the termination date of the lease on the same terms and conditions other than the rent payable but subject to one month's written notice of termination on either side being given." Clause 3 required the rent to be paid on or before the first day of the month "throughout the period of this lease and any renewal and extension thereof."

Since the first defendant did not give the six calendar months' notice prior to 28 February, 2011 in writing advising the plaintiff that it intended to vacate the premises on 28

February, 2011 it is apparent that the lease continued in terms of clause 2.3 and rent remained payable in terms of clause 3. The lease is therefore still running and was to endure up to 28 February, 2014. For this holding I find solace in the case of *Heiko Peter Horstman* v *Garfield Investments* (*Pvt*) *Ltd* & *Godfrey Makoni* HH 217-10 which falls on all fours with the facts of the present case.

In the event, the first defendant is not a statutory tenant and therefore cannot shield itself by invoking s 22 (2) of the Commercial Premises (Rent) Regulations 1983.

The June, 2011 rentals were paid on 7 June, 2011. This was not on or before the first day of the month as required by clause 3 of the extended lease agreement. In the result the first defendant breached the lease agreement. In the premises, in terms of clause 15.1.1 the plaintiff is perfectly entitled to cancel the lease and retake possession of the premises. The plaintiff has accordingly shown good and sufficient cause for its claim while the first defendant has failed to establish any defence to the action.

In the event, the application for the upliftment of the bar cannot succeed and it is hereby dismissed with costs on the legal practitioner and client scale.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Scanlen & Holderness, defendants' legal practitioners