

LEWIS NDHLOVU
and
CHIPO NDHLOVU
versus
SUSAN HARUPERI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 January 2014 & 11 February 2015

Opposed Application

J W Nyamakura, for the applicants
V Mkwachari, for the respondent

MATHONSI J: On 16 April 2014 the 2 applicants instituted summons action against the respondent for an order of cancellation of a lease agreement entered into between the parties on 5 December 2013 in terms of which the applicants leased out to the respondent certain premises being stand 531 Nikolova Crescent Borrowdale Brook, Harare on certain terms and conditions, and the eviction of the respondent. They also sought an order for arrear rentals, a late payment fee, electricity bill and other levies. The basis of the claim was that the respondent defaulted in paying rentals resulting in arrears accumulating to a sum of \$13600.00, she failed to pay levies of \$500.00, electricity bill of \$601.00 and was therefore liable in terms of the lease agreement to pay a 10% late payment penalty.

The respondent entered appearance to defend and in due course, a plea in which she effectively only contested the penalty stipulation relating to late payment of rentals was filed. She averred in para(s) 2 to 4 of that plea that:

“2. Ad para 4

The terms of the lease agreement are noted and defendant pleads that the terms mentioned under subpara 4.4 which provided for late payment penalty fee of 10% over and above the claim of interest in subpara 4.5 contravenes the Contractual Penalties Act in that such penalty stipulation is out of proportion to any prejudice that would have been suffered by the plaintiffs. Enforcement of that penalty stipulation will result in plaintiffs being unjustly enriched

3. Ad para 5

The defendant pleads that her failure to pay the rentals for the period in question is due of (*sic*) the fact that there was a robbery at the leased premises and her merchandise valued at \$17 000.00 was stolen. The said robbery/theft was reported to the police and pending investigations. It is from the stolen merchandise that defendant realised the money for rentals and derive her livelihood. The defendant is making frantic efforts to settle the debt from other sources.

4. Ad para 6-7

This is disputed. The defendant has since paid the electricity bills and levies which are now up to date”

The applicants were obviously not impressed by that plea, and believing that appearance has been entered for purposes of delay, they launched the present application for summary judgment on the basis that the defendant does not have a *bona fide* defence especially as the respondent had previously acknowledged indebtedness. Not to be outdone the respondent filed opposition, maintaining her challenge to the penalty stipulation as stated in her plea. She went on to say that after the summons was issued against her, she paid certain sums of money to reduce the rent arrears and also paid the electricity bills and outstanding levies.

The applicant may have been correct in approaching the court seeking summary judgment for essentially 2 reasons, namely that on 29 August 2014, well after the proceedings were instituted, the respondent vacated the premises in capitulation and that the respondent paid \$5000-00 towards arrear rentals leaving a balance of \$8 600.00 which she admits she owes. She also paid the outstanding electricity bill, again a clear indication that the claim for that was well grounded. In fact, Mr *Mkwachari* who appeared for the respondent conceded that the only issue being contested is the 10% penalty for late payment of rent. Clearly therefore in respect of the other defences, the respondent was trying her luck. They will not detain us here.

The procedure for summary judgment was meant to eliminate bogus defences and those defences which are bad at law as to have no substance or merit: *Roscoe v Stewart* 1933 CPD 138. It is provided for in r 64 (1) of the High Court of Zimbabwe Rules, 1971 and in terms of subr (2) of that rule, it is made when the applicant harbours the belief that there is no *bona fide* defence to the action.

A respondent who is faced with such application must then disclose a defence and material facts upon which such defence is based with sufficient clarity and completeness so

as to persuade the court that if proved at the trial those facts will constitute a defence to the claim: *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) 239 A-B.

Not every defence raised will succeed in defeating a plaintiff's claim for summary judgment. The defendant must allege facts which, if established, would entitle him to succeed at the trial; *Kingstons Ltd v D. Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) 458 F-H; *Jena v Nechipore* 1986 (1) ZLR 29 (S).

The applicant claims a sum of \$1300-00 as a penalty for late payment of rent because the respondent, by her own admission, did not pay rent during the period extending from January 2014 up to the time the summons was issued in April 2014, a period of 4 months. It would be noted that the rent was payable monthly in advance. The respondent, who went into the agreement of lease with her eyes very wide open, argues that the penalty is oppressive and in breach of the Contractual Penalties Act [*Chapter 8:04*] and results in unjust enrichment given that the applicant is also entitled to levy interest on outstanding rentals.

Section 4 of the Contractual Penalties Act [*Chapter 8:04*] allows the court to act on a penalty stipulation if it appears to it that it is out of proportion. It reads:

- “(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.
- (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may -
 - (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
 - (b) grant such other relief as the court considers will be fair and just to the parties.
- (3)
- (4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other right-ful interest which may be affected by the act, omission or withdrawal in question”.

Section 5 of that Act disentitles a creditor to both the penalty and damages. It says nothing about a creditor's entitlement to both interest and penalty.

In fact nothing prevents a creditor from levying both the penalty and the interest on an outstanding debt. The respondent can therefore not rely on the existence of both the penalty and interest in the lease agreement of the parties.

Can she rely on the quantum of the penalty in raising a defence? Unfortunately the defence which the respondent tries to rely upon is unnecessarily bald, vague and sketchy. She has not submitted sufficient information to enable the court to assess the defence properly. These generalities and unsubstantiated facts will not help the respondent at all; *District Bank Ltd v Hoosain & Ors* 1984 (4) SA 544 (C) 547 G-H.

The applicant's claim for the penalty is premised on clause 4 of the lease agreement the relevant part of which states:

"If the rent or any other payment due is not received in full by the owner by the seventh day of the month, the Lessee agrees to pay (and accept that this fee is fair and reasonable) a late payment fee of 10% of the amount due as compensation for the cost of additional administrative work for that month arising out of the Lessee's delay. Reminder: the late payment of rent after the SEVENTH day of any month can result in the cancellation of your lease – See clause 17. In addition to the late payment fee the Lessor may at its sole discretion charge interest for every month on which the rent is outstanding at the rate at which the lessor's bankers charge on unsecured overdrafts" . (The underlining is mine)

It is significant to note that the respondent agreed in that agreement that the penalty was fair and reasonable and that the applicant has a discretion to levy interest over and above the penalty. What this means is that the respondent may well be estopped from contesting the penalty on the basis of unfairness and unreasonableness. She seems to have opted to challenge it on the basis that the applicants cannot have both the penalty and interest. This is despite the fact that clause 4 entitled the applicants, at their sole discretion, to both.

I fully subscribe to the views of JESSEL, M.R. in *Printing Registering Co v Sampson* 19 Eq 462 at 465 that:

"If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract".

A recalcitrant tenant who accepted to be bound by the terms of the lease agreement including the prompt payment of rentals in advance failed to abide by its terms. She accepted that in the event of failure to timeously pay rent, she would be subjected to both a penalty and interest on the outstanding rent. Having failed to pay rent on time and with the landlord now seeking enforcement of the agreement, she rushes to shelter under a provision in the Contractual Penalties Act which she has not adequately ventilated. In my view, this cannot succeed in defeating a summary judgment application as, first and foremost, courts of law should give effect to the sanctity of contract.

I conclude therefore that the applicant is entitled to summary judgment. Accordingly it is ordered; that;

1. The respondent shall pay to the applicant rent arrears in the sum of US\$8 600.00 including interest at the rate charged by the lessor's bankers on unsecured overdrafts from due date to date of payment in full.
2. The respondent shall pay the late payment fee of US\$1 360.00.
3. The respondent shall pay US\$500.00 being money for the outstanding Borrowdale Brook levies.
4. The respondent shall pay the costs of suit on a legal practitioner and client scale.

Mtewa and Nyambirai, 1st & 2nd applicants' legal practitioners
T H Chitapi & Associates, respondent's legal practitioners