TARVEST TRADING (PVT) LTD
T/A SUNSET MBARE
versus
SOUTHEY ROAD INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 18, 19, 27 May 2015 & 5 June 2015 & 30 September 2015

Trial Matter

W Nyakudanga, for plaintiff
E Mutandiro, for defendant

TSANGA J: The plaintiff, *Tarvest Trading* (Pvt) Ltd, issued summons for a claim of US$82.800.00 as damages for alleged breach of a lease agreement. It also sought interest calculated at the prescribed rate from date of summons to date of payment. Costs of suit were claimed on a higher scale. In its declaration it averred that the breach arose from the defendant's failure to give it three months' notice to terminate the lease agreement. Instead just two weeks' notice was given.

According to the plaintiff the lease was initially entered into some time in 2005 with *Southey Road Investment* (Pvt) Ltd when plaintiff's Director, Francis Mutyavaviri was then trading as *Sunset Mbare* – a trade name it was using at the time as it was not yet registered. Under the lease agreement, *Sunset* rented premises at No. 4 Chaminuka Street, Mbare Musika which it ran as a supermarket. This lease was renewed in 2010 and was supposed to expire in May 2015. As a result of the breach in the form of inadequate notice given in December 2013, plaintiff alleged that it suffered the following as damages:

- Mandatory notice pay calculated at three months' salary for 23 employees amounting to US **$20 000.00**.
- Mandatory one month relocation expenses for 23 employees amounting to **$6 000.00.** **(**This claim was however, abandoned at the trial).

- Loss of profit for 17 months unexpired portion of the least at $3000.00 a month amounting to **$51 000.00;** or, alternatively key money in lieu of goodwill; alternatively, compensation for deprivation of opportunity to sell business as a going concern in the sum of **$50 000.00**
- Breakages of products and equipment due to a hurried eviction amounting to **$5 000. 00.**

The defendant entered an appearance to defend. In its plea denied liability on several grounds. Firstly, on the basis that its lease agreement in 2005 was with an entity called *Lucky 7 Supermarket* and that the plaintiff, as *Tarvest Trading* was illegally sub-letting from *Lucky 7 Supermarket*. Secondly, it denied liability on the basis that the illegal tenant was in any event struggling to pay rentals hence entitling defendant to evict the plaintiff.

Thirdly, its defence was that the illegal tenant in any event agreed to vacate the defendant's premises after it emerged that it was subletting and had no capacity to negotiate with the defendant. The defendant therefore prayed for the dismissal of plaintiff's claim with costs.

The two issues which fell for trial were firstly, whether or not the plaintiff and Defendant entered into a lease agreement of the said premises, and, secondly, whether or not the defendant is liable to pay the amount claimed in the summons and costs.

Whether there was any agreement between disputants

Mr Francis Mutyavaviri who gave evidence as plaintiff's director explained that following the signing of the initial lease as Sunset Mbare, he had in 2006 signed up with *Jaggers Wholesalers* which was then sponsoring a franchise called *Lucky 7*. His evidence was thus that when he renewed the lease agreement in 2010, it was *Lucky 7* which was reflected in the lease since that was the franchise name that his supermarket business was now using. Indeed the lease agreement is between *Southey Road Investment (Pvt) Ltd* represented by John Tsindi Chiweshe as the lessor, and *Lucky 7* represented by Mr Mutyavaviri as lessee. However, he further explained that when *Jaggers Wholesalers* was liquidated in 2010, he subsequently registered a new franchise, called *Savemor*. In addition in 2012 he registered *Tarvest Trading* for fiscal requirements and the business under which he was trading then became *Tarvest Trading (Pvt) Ltd* as *Savemor,* Sunset Mbare. It was his position that the

defendant was at all times kept abreast of these developments although the defendant denied being aware of them.

Despite defendant's denial of being aware of the changes to plaintiff's franchise name or corporate status, the evidence by both directors showed that at no point other than at these proceedings had the issue of the name change and status of the lessee been an issue. In any event *Lucky 7* as a franchise no longer existed and therefore the defendant must at least have known of this change. More so the letter of eviction dated 17 December 2013 was addressed to *Tarvest Trading* T/A as *Sunset Mbare*. This letter, asking the tenant to vacate by 31 December, is instructive in so far as it outlines very clearly the reasons for the termination of the lease. These have nothing to do whatsoever with any perceived illegality of the plaintiff's tenancy but everything to do with the dissatisfaction on defendant's part with the current payment arrangement. In the letter the defendant furthermore thanks the plaintiff for its valued tenancy albeit lamenting inability to continue with the arrangement in light of the problems encountered by the plaintiff regarding payment. It is therefore imperative in my view that this court keeps in mind the true gist of the dispute between the parties. It was never at any time spurred by the illegality of the plaintiff as a tenant in the sense that the Defendant now alleges. This is a dilatory defence which detracts from the main issue which is the eviction of the plaintiff its rent payment pattern.

I am satisfied that although the renewed lease agreement was entered into with *Lucky 7* as the trading entity represented by Mr Mutyavaviri as lessor, changes took place as explained by plaintiff affecting the name of the trading entity. The defendant was informed and was most certainly aware at all times of the changes in franchise. *Lucky* 7 had been merely a trade name and not a separate legal persona. As plaintiff's director had originally entered into the lease agreement as an unregistered company the significance of registration of *Tarvest Trading (Pvt) Ltd* was that the entity could now sue and be sued as a separate legal persona.

The real dispute therefore is whether the lease agreement was illegally terminated given the reasons outlined by the defendant in its letter of December 17 and whether the plaintiff suffered the damages it claims as a result. I deal first with plaintiff's evidence of its loss before addressing the overall issue of the legality of the termination and whether the defendant is liable to pay anything to the plaintiff.

Plaintiff's evidence of its loss

It is trite that were damages are claimed these cannot be speculative and that real evidence must be produced to support a claim. It is also trite that there can be no liability for extra ordinary damages unless that kind of loss was in the contemplation of the parties at the time of making the contract.

In support of its claim for the three months' notice for 23 employees, which it put at $20 000.00, Plaintiff tendered its fiscal receipts for tax payments to the Zimbabwe Revenue Authority (ZIMRA). These were challenged by defendant on the on the grounds that they were generalised and did not show the individual earnings of the employees. Also tendered in support of this claim was an arbitration award for four employees only namely Amos Savanhu and Daniel Kumonyera for $1110.00 each and Tinashe Magwenzi and Philemon Chindedza for $744.00 each. As such, defendant's position was that besides these employees, the plaintiff had also not proven that it owed the 23 employees notice pay. Instead, defendant asserted that as the plaintiff was running other supermarkets, he had simply redistributed his employees to his other business outlets. I agree that the evidence in support of this claim could have been more cogent. In any event whether the proven amount arising from the arbitral proceedings, or any other amount would be due to the plaintiff, depends on this court's finding of whether the defendant was indeed in breach of the contract.

Regarding the claim for **$51 000.00** for loss of profit or alternatively key money in lieu of goodwill; or alternatively, compensation for deprivation of opportunity to sell business as a going concern in the sum of **$50 000.00**, the plaintiff was unable to produce audited financial statements to support his claim. He was challenged in cross examination regarding the claim. His explanation for the absence of credible supporting evidence was that the files which would have proven that this was the profit he had sustained during the lease were with ZIMRA. Plaintiff was also unable to produce any evidence to show how he had arrived at the figure for good will and key money. Whilst he claimed to have bought the business from a sitting tenant for $60 000.00 at the time the lease first came into being, there was nothing to support this claim. There was notably no credible independent evidence produced to assist this court in the event of reaching a conclusion that any damages are due for lost profits.

Equally the plaintiff also did not produce supporting evidence for breakages of products and equipment due to a hurried eviction amounting to $5 000.00. Material to this claim however, is the fact that the lease was specific that the lessor would not be responsible

for any damage to the lessee's goods for reasons such as rain, wind, hail lighting or fire among others **or through any other reason whatsoever.**[1]

The legality of the termination

The legal position regarding termination of a lease is scenario dependent. Where a lease is for a fixed period then it would ordinarily terminate at the end of the stipulated lease period, all things being equal. If the agreement provides for notice of termination, then the lease can be terminated according to the notice period that is stipulated in the agreement. Where the agreement is silent as to such notice period, then what constitutes reasonable notice will be circumstantial. In addition to termination by effluxion of time, and termination by notice, a lease can also be terminated by cancellation particularly where there has been breach. Given that the major obligation of a tenant is to pay rent, failure to pay is one such valid ground for termination by cancellation. Furthermore, a lease can also be terminated by death of either party subject to the provisions of their agreement.

In casu the parties' agreement catered for several of the above scenarios. The lease was for a period of five years, renewable annually subject to agreement.[2] Renewal of the lease was to be done three months prior to the expiration of the lease.[3] As regards termination by notice prior to the expiration of the lease, it was a term of the written agreement that either party would give three months' notice.[4] The lease also provided for breach, capturing as it did that should the lessee commit a breach in terms of the agreement or **fail to pay rent by due date,** the lessor would notify the lessee, who would have 7 days to rectify the anomaly. I place emphasis on this condition since the termination was spurred by this reality.

A repetition of the delay would result in the cancellation of the agreement. Under such circumstances, the lessor would be entitled to immediate possession of the said premises without prejudice to the claim for damages. Also material was the inclusion in the lease that the lessee was not to cede, transfer or sublet the leased premises nor give up occupation for any reason whatsoever.

Turning to the termination dispute, which is factually laden, it was common cause that the plaintiff's original rental was US5 000.00 per month. It was also common cause that the representatives of the parties as lessor and lessee, had an extremely healthy relationship

[1] Clause 5 (a)
[2] Clause 1 of agreement
[3] Clause 4 (i)
[4] Clause 4(ii) and 4(iii)

which both characterised it as akin to that of father and son who valued their relationship. Furthermore they were agreed that against a virtually trouble free 8 year business relationship, the facts which contributed to the termination of the lease arrangement spanned no more than the last six months of the period prior to termination. Both were largely in agreement that it was from June 2013 that the plaintiff as lessee begun to show signs of stress in meeting its rental obligations on time. On the 20th of August 2013 the plaintiff's Director wrote to the defendant indicating that as a result of illegal tuck-shops that had sprung all around his business area, sales had been affected by as much as 45%. Whilst hoping that the City Council would redress the situation by removing the illegal traders, in light of reduced sales, the plaintiff requested permission from the defendant to be authorised to pay the rent in staggered instalments. These would be $2 000.00 on the 1st of each month; then $1500.00 on the 10th of each month; and another $1 500.00 on the 21st of the month. This was agreed to by the defendant as lessor in writing. It is also common because that following this modified arrangement, plaintiff admitted that he had great difficulty adhering to payment according to the altered terms as the financial challenges did not abate. Thus the plaintiff's Director again wrote to the defendant's director on the 21st of October 2013 giving a more detailed account of the bleak scenario on the ground. An issue is whether by this letter, given its contents and its thrust which will be explained below, the plaintiff was the one who in fact gave the lessor notice of its intention to terminate the agreement as way back as October 2013.

The opening sentence of that letter read:

> "It is with a heavy heart that we write to inform you that we may have to put up the business for sale".

Its thrust was to vividly chronicle a quantitative spectacle of the reduction in sales over a nine month period. It also alerted the lessor to the possibility of being unable to pay rent even in the modified amounts as per their agreement. Of specific relevance to the lease agreement in this regard paragraph 4 of the letter read as follows:

> "Our last letter to you was a request to spread rent payments, **but now we face the possibility of failing to honour it**. We would have wanted to plead for a rent reduction to even $3 000.00 but have to respect that this income is your livelihood too. At $5000.00 the rent now represents over 5% of revenue due to a decline in sales against a standard of 2% sales"

The concluding paragraphs were more direct and cut to the chase regarding the fact that plaintiff **was** in fact putting up the business for sale. It is instructive to the dispute and reads as follows:

> "Without an end in sight to the disruptive development of the tuck-shops, **we have to** put the business up for sale and use the proceeds to pay off suppliers, staff and service providers. Of course we will be advising you of the developments as we search for a buyer.
>
> Thank you so much for being the gentlemen you are, always professional and accommodation. You embraced me as your son and I can only hope we will re-unite again soon."

It was also common cause that the rent was reduced from $5000.00 to $4000.00 a month at the end of November 2013. Still the plaintiff had difficulty paying the reduced rent. The lessor explained in his evidence that the lessee would at times bring as little as $500.00 and then bring another $1000.00 and so on. It was his evidence that the chronicity in the pattern of delays in making payments merely increased with rentals for a particular month being paid well after that month had passed. His conclusion was that it had become clear that the lessee could not be relied on as long term tenant although after receipt of the letter from plaintiff of 21 October 2013, the decision had been to let the plaintiff accomplish what he said he wanted to do - that is to sell the business. More significantly, defendant's position was that it was the plaintiff who had basically terminated the lease as there was no other way of reading his letter. Therefore according to the defendant, asking the plaintiff to vacate was essentially a reflection of a mutual agreement that the tenancy had in fact come to end merely hastened by his failure to pay rent on time. His evidence was also that the plaintiff was now subletting the premises as indicated by the fact that he sent people to negotiate a further reduction in rent who said they had taken over the premises as plaintiff was now concentrating on his other businesses. Importantly the lease agreement did not permit subletting. As the rent could not be reduced any further, repossession of the premises was according to the defendant the only viable step given that they had already bent double to accommodate the plaintiff.

Even though the letter of 21 October 2013 was not time bound, I do agree with the defendant that the letter was effectively a termination by notice to the lessor coming from the lessee. He had told that lessor that he had to sell and had already warned that he was not even sure whether they would be able to meet rentals. Since the agreement was clear regarding the notice period to be given, it can therefore be said that the notice period was effectively 3 months from the date the letter was written.

However, the plaintiff during this period was still obliged to honour the terms of their modified agreement on rent payments. He was still obliged to meet his rent obligations on time. It is this that he failed to do and that led to the notice to vacate coming from the

defendant. Neither of the parties however produced documented evidence of when payments were made or received. Crucially, that plaintiff was clearly failing to payment timeously was admitted by the plaintiff. It matters not that he would eventually, through whatever morsel payments, make up the amount due. Failure to pay rent timeously amounts to a major breach that justifies cancellation of the contract. (See *Parkside Holdings* v *Londoner Sports Bar* HH 16/05 and *Bravo Pvt Ltd* v *Wordhouse Multimedia Pvt Ltd* HH 246/13 citing *Parkview Properties Pvt Ltd* v *Chimbanda* 1981 ZLR 409).

In casu, the lessor had already 'bent double' to accommodate the plaintiff when approached with requests for elastic payment of the rent and indeed also later for a rent reduction. Financial inability to pay cannot be an excuse for a pattern of late payment of rent. The lessor has his own rights and obligations to meet. As such, rent which is paid outside the dates that the parties have agreed is a late payment. Indeed this pattern of behaviour constitutes a nuisance to a lessor. A lessor cannot be expected to countenance a situation where he has to 'wait to exhale' for his rent, not knowing when it will be paid. The plaintiff's own response to the notice to vacate accepted that the situation was untenable. As he put it:

> "It is your prerogative to protect your interests, a fact that is not in dispute."

In my view it is plaintiff's overall response to the notice to vacate which is equally informative to the resolution of this dispute. Besides not disputing that the payment arrangement was indeed not sustainable, notably the plaintiff's focus was on his own proposal sell the business. The plaintiff's proposals were separate proposals altogether to allow him to salvage something from his investment. While he highlighted the obstacles that would arise from the short notice, his proposals to the landlord had absolutely nothing to do with the rent obligations under the lease agreement and the modified payment arrangements.

In his evidence the defendant had notably stated that at the time the letter of 17th December was written, there were rentals due from the plaintiff for part of November and December, 2013. He said these rentals were later paid off when plaintiff surrendered some of its assets to the defendant when the lease was terminated. I believed the defendant in this regard even if the letter to vacate did not stipulate an arrearages. Indeed if plaintiff knew that he did not owe anything and that he did not have arrears, this would have been evidence that he would have been eager to place before the court.

Turning to the lessor's termination letter, this effectively gave the plaintiff 14 days' notice to vacate. The lease agreement required 7 days' notice for rectification of any breach.

This letter did not ask for rectification within the time period but asked plaintiff to vacate within the 14 day period which was what remained for that month. On receipt of the 14 day notice period the plaintiff, knowing that he owed monies, could have more directly addressed any anomalies regarding payment within a seven day period and contested the eviction. Instead he put forward his own business proposals for which the defendant was absolutely under no obligation to accommodate. Furthermore, he voluntarily left of his own accord - a sign of his virtual acceptance of a situation which he himself has put in motion as way back as October 21 2013. This court is unable to find on the facts that the notice to vacate was not justified by the totality of the circumstances pertaining to the case. The plaintiff's claim that he was illegally evicted and that various damages are due to him is therefore totally lacking in merit

Accordingly, the plaintiff's claim is dismissed with costs.

TK Hove and Partners, plaintiff's legal practitioner
Chakanyuka & Associates Attorneys, defendant's legal practitioners