BRIGHTLAND FARMING (PVT) LTD
versus
REDAN PETROLEUM (PVT) LTD
and
BEVERLEY CULVERWELL

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 13,15,17,24 July 2015, 1 October 2015 & 23 December 2015

Civil Trial

C M Jakachira, for the plaintiff
L Uriri, for the defendants

MTSHIYA J: On 6 February 2012 the plaintiff issued summons against the defendants claiming.

> "(a) The sum of US$1 300 000.00 as damages for restitution.
>
> (b) Interest on the said sum of $1 300 000.00 at the rate of 5% per annum from the 18th January, 2012, that being the date of demand, to the date of final payment.
>
> (c) Costs of suit"

It is common cause that the plaintiff, under a lease agreement between it and a company called Crestlane Investments (Pvt) Ltd, (Crestlane) operated "a bakery business under the style of Q-Tees Bakery at 65 Mutare Road Msasa, Harare" (the premises)". The premises belonged to Crestlane, who for sometime, had, without success, instituted court proceedings to evict the plaintiff.

However, on 16 July 2010 the plaintiff was evicted from the premises. The plaintiff claims the eviction was perpetrated by the two defendants and not Crestlane (its landlord) who claimed the premises had been abandoned. This suit, as already said, is, however, against the two defendants and not Crestlane.

The Joint Pre-Trial Conference minute, dated 12 November 2012, lists the issues for determination as:-

"1.1. When, by whom and in what circumstanced was the plaintiff's property removed from the premises the subject hereof?
1.2. Was such removed unlawful/wrongful?
1.3. Did the plaintiff suffer any loss as a result of such removal?
1.4. Is such loss recoverable and from who?
1.5. If such loss is recoverable, in what amount?
1.6. Whether the second defendant has been properly joined to these proceedings?
1.7. Whether Crestlane Investments (Private) Limited should have been joined to this proceedings (*sic*) and is so what is the effect of such non-joinder?"

At the commencement of the trial, the plaintiff's bundle of documents and the defendant's discovered documents were, by consent, admitted as exhibits 1 and 2 respectively.

The plaintiff led evidence from five witnesses, namely; Munyuki Robert Armitage Chikwavira (Chikwavira); Byron William Antony Willey (Willey); J.W. Jani (Jani); Brett Krambergar, and Benjamin Kandondo. The plaintiff closed its case after calling the said five witnesses.

Upon the plaintiff closing its case, the defendants indicated their wish to apply for absolution from the instance. I requested for heads of argument to be filed before the application for absolution was argued. The matter was then argued on 1 October, 2015.

The plaintiff's first witness was Chikwaira, a Chartered Accountant. The witness testified that he was the Chairman and Managing Director of the plaintiff. He confirmed that as at 16 July 2010, the plaintiff leased the premises (i.e. at 65 Mutare Msasa Harare) from Crestlane who owned the said premises. He said at the time of eviction on 16 July 2010 the lease had expired and the plaintiff was then occupying the premises as a statutory tenant. He said it was, his evidence that Crestlane was, under extant Court orders, not in a position to evict the plaintiff. It was, instead, the two defendants who evicted the plaintiff. He said he had witnessed part of the eviction and had identified the first defendant's workers by their uniform/work suits. He went further to state that the second defendant was the Managing Director of the first defendant.

The witness admitted being shown correspondence between the plaintiff's legal practitioners and those of Crestlane-particularly the letter from Crestlane dated 15 July 2015, (which letter we shall return to later in this judgement). The letter, in brief, intimated that, because the premises had been abandoned, Crestlane were repossessing same for their own use.

The witness testified that the plaintiff had earlier on attempted to proceed against its landlord, Crestlane. However, due to the fact that it knew the delict had been committed by

the first and second defendants, it abandoned that route and proceeded against the defendants herein. The witness also said in addition to correspondence, the plaintiff was aware of the statement of Mr Mutsonziwa who represented Crestlane. He, however, asked the court to ignore same because, due to existing court orders, Crestlane was incapacitated from evicting the plaintiff from the premises. To that end, as far as he was concerned, there was no need to join Crestlane in the proceedings.

The witness also gave detailed evidence on the value of the plaintiff's property. However, given the fact that the application for absolution from the instance is mainly based on the fatality of the non-joinder of Crestlane and the misjoinder of the second defendant, I do believe that in the event of that argument succeeding, there would be no need to reproduce the detailed evidence on the value of the plaintiff's property. The same attitude obtains regarding the evidence of the four other witnesses, who, to a large extent, confirmed the eviction of the plaintiff and the handling of its property after the eviction.

In responding to the application for absolution from the instance the plaintiff has summarised the issues for determination (i.e. under the application) for absolution from the instance as:-

"2.1 Whether or not Plaintiff abandoned the leased premises?

2.2 Whether the eviction was carried out by the Defendants or Crestlane Investments?

2.3 Whether or not the eviction was lawful?

2.4 What property was removed during the Plaintiff's eviction?

2.5 The question of valuation of the Plaintiff's property.

2.6 Whether or not Plaintiff's conduct pursuant to the eviction was reasonable?

2.7 Whether or not 2nd Defendant has been properly cited?

2.8 Whether or not Plaintiff has established a *prima facie* case?"

The above issues are in line with the issues recorded in the joint pre-trial conference minute already listed herein at p 2.

Clearly once it is admitted, as it is indeed admitted, that Crestlane was the landlord, there is no way the above issues can be determined without its (Crestlane) involvement. It therefore becomes necessary to commence by dealing with issues 1.6. and 1.7 as listed in the joint pre-trial conference minute, which issues are repeated in the plaintiff's submissions in para(s) 2.2 and 2.7 above.

In their application for absolution from the instance, the defendants submit:

"4.1 The second defendant has been improperly joined to this lis.

4.2 The first defendant is a sister company of Crestlane. Its employees received directions from Crestlane to undertake the repossession. He who does something by the hand of another does it himself. Consequently, the action complained of was done by Crestlane.

4.3 Brightland accepts this aspect in pleadings in other cases.

4.4 The removal was justified in the circumstances and all reasonable steps where taken to safeguard the property.

4.5 The plaintiff has not established its alleged loses.

5. The defendants pray for absolution from the instance at the close of the plaintiff case.

6. At the close of the plaintiff case it is respectfully contended that the defendant is entitled to an order of absolution from the instance because there is no 'evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for (the plaintiff)"

In addition to the above the defendants (applicants herein) state:

"2.3 Some time at the beginning of February 201 the plaintiff ceased to trade at the leased premises. There is a dispute as to whether this amounted to abandonment of the premises, Crestlane's affidavit in HC 4292/13, compare paragraph 7 of the declaration.

2.4 Crestlane's lawyers wrote to the plaintiff lawyers advising of the "abandonment" and asserting a right to reposes consequent upon such abandonment.

2.5 It is not seriously in doubt that all correspondence and instructions came from Atherstone and Cook acting for Crestlane, see in particular Mutsonziwa's statement to the police, and the plaintiff's declaration and replication in HC 5630/13.

2.6 On 16th July 201 the plaintiff was ejected from the leased premises. Its legal practitioners were advised that the plaintiff's property would be taken into storage and that Crestlane would bear no responsibility if the plaintiff did not make arrangement to secure the same.

2.7 The plaintiff did not secure the property, which was eventually moved to ABC Auctions and some of it eventually sold to best advantage. The plaintiff knew of the intended action, but claims that its legal practitioners did not pass the information to it. It waited until after all set deadlines had long passed to issue process. Chikwavira admitted that he was aware of the need to mitigate the plaintiff's loses but took no steps in that regard.

2.8 The first defendant's employees carried out the repossession of the premises. Redan contends that was at the instance of Crestlane.

2.9 Brightland initially issued out summons against Crestlane and its directors. The Claim was dismissed for want of prosecution. It then issued the present summons. It

issued yet other summons against Redan and Crestlane in HC 5630/13 A clear indication that it is on a fishing expedition.

3. The issues for trial are boil down to the question of who is responsible for the removal, who is liable for the alleged damages and whether the damages have been proved".

The evidence so far placed before the court points to the fact that it was indeed Crestlane who evicted the plaintiff using the first defendant. Crestlane admits that the official player in first defendant was the second defendant, who, no doubt, operated in her official capacity as the Managing Director of the first defendant. It is in that official capacity that she carried out, through the first defendant, Crestlane's instructions to evict the plaintiff. The fact that it is Crestlane who evicted the plaintiff is confirmed by its legal practitioner's letter of 15 July, 2010, addressed to the plaintiff's legal practitioners, which letter reads as follows:

"Messrs Gill, Godlonton & Gerrans,
Legal Practitioners,
HARARE

Dear Sirs,

RE CASE NO HC 3872/2008

CRESTLANE INVESTMENTS (PRIVATE) LIMITED v BRIGHTLAND FARMING (PRIVATE) LIMITED

With reference to the above matter, we advise that your client has abandoned our client's premises. We understand that the premises have been abandoned since the end of January last.

In the circumstances, our client has decided to retake possession of the premises for its own use.

In so far as your client's movable property on the premises is concerned, our client intends to put it in storage and your client may collect it form storage by arrangement with our client. This offer is made without prejudice and subject to any rights that our client might have in respect of your client's movable property

Please be guided accordingly.

Yours faithfully,

ATHERSTONE & COOK"

The contents of the above letter are further confirmed in Mutsonziwa's statement, whose admission as exh number 2 I accepted, as I believe the plaintiff had deliberately excluded it from its papers. The statement reads as follows:-:

> "I, the undersigned ARTHUR MORRIS TENDAYI MUTSONZIWA, do hereby state as follows:
>
> 1. I am a duly registered legal practitioner of the High Court of Zimbabwe and a partner of the firm of Atherstone & Cook, legal practitioners, of 7th Floor, Mercury House,24 George Silundika Avenue, Harare.
>
> 2. I act for Crestlane Investments (Private) Limited ("Crestlane"), an associate Company of Redan Petroleum (Private) Limited, and I have been acting for that Company in relation to its claim for eviction against Brightland Farming (Private) Limited ("Brightland"), from its premises at Stand 65, Mutare Road, Msasa, Harare ("the premises).
>
> 3. In or about July 2010, I gave certain advice to Crestlane concerning its right to take possession of the premises. I gave this advice in my capacity as the legal practitioner of record for Crestlane and I gave such advice to Crestlane after due consideration of all the legal issues pertaining to the manner, in the context of the law applicable thereto.
>
> 4. Crestlane acted on such advice, took possession of the premises, after I gave due notice to Brightland's legal practitioners, Messrs Gills, Godlonton & Gerrans, of 8th Floor, Beverley Court, 100 Nelson Mandela Avenue, Harare, of Crestlane's intention to do so, and placed Brightland's movable property in storage.
>
> 5. On Crestlane's instructions, I advised Brightlane's legal practitioners of the whereabouts of Brightland's movable property, that is Lacho Freight, 65 Mutare Road, Msasa, Harare, and invited Brightland to arrange for its collection.
>
> 6. Crestlane subsequently decided to move Brightland's movable property from the above location to ZBC Auctions, Seke Road, Harare and, again, on Crestlane's instructions, I advised Brightland's legal practitioners of this and invited their client to arrange to collect the property from that address. As before, there was no response or reaction from either Brightland or its legal practitioners.
>
> 7. At no time did Crestland or I instruct ABC Auctions, or anyone else for that matter, to sell Brightland's property".

Added to the above documents is a contract dated 16 July, 2010, between Crestlane and Lacho Freight (Pvt) Ltd (Lacho) for the storage or warehousing of the plaintiff's property that was removed from the premises in line with the contents of the letter of 15 July 2010 from Crestlane's legal practitioners.

If one accepts that the above documents speak for themselves, as I do, then there is no doubt that, as per the letter of 15 July 2010, Crestlane indeed proceeded to "retake possession of the premises for its own use". I do not think it matters how it carried out the repossession.

However, what is clear is that it used the first defendant for the purpose. The first defendant was open about that fact and even despatched instructions to ABC on its own letter heads to implement the contents of para 2 and 3 of Crestlane's letter of 15 July 2010, –which, for purposes of emphasis, read:-

> "In the circumstances, our client has decided to retake possession of the premises for its own use.
>
> In so far as your client's movable property on the premises is concerned, our client intends to put it in storage and your client may collect it form storage by arrangement with our client. This offer is made without prejudice and subject to any rights that our client might have in respect of your client's movable property"

Clearly Crestlane accepted responsibility for what took place at the premises on 16 July 2010. It even went further to confirm that position, when, on 20 July 2010, it wrote to the plaintiff's legal practitioners (Messrs Gill, Godlonton & Gerrans) in the following terms:

> "Re: CASE NO HC 3872/2008
> CRESTLANE INVESTMENTS (PRIVATE) LIMITED v BRIGHTLAND FARMING (PRIVATE) LIMITED
>
> We refer to our letter dated 15 July 2010 and advise that our client has retaken possession of the premises in question in this matter for its own use.
>
> In so far your client's movable property is concerned, our client has put it in storage at Locho Freight, 62 Mutare Road, Msasa, Harare Our client has placed client's movable property in storage as a *negotiorum gestor* and it reserves to itself the right to claim any necessary expenses incurred by it in this regard.
>
> However, our client is not prepared to keep the property in storage indefinitely and it has, therefore, instructed us to advise you, for onward transmission to your client, that your client must make arrangements to collect the property from storage by no later than the close of business on Friday, 23 July 201. If your client fails to collect the property from storage by the close of business on the 23 July 2010, our client will accept no responsibility whatsoever for any loss, damage or expenses incurred as a result of the property remaining in storage after the date.
>
> Please be guided accordingly.
>
> Yours faithfully
>
> ATHERSTONE & COOK"

The above position is once again reconfirmed in Crestlane's letters of 13 August, 2010 and 20 September 2010, addressed to the plaintiff's legal practitioners and ABC Auctions respectively.

On 20 September 2010, Crestlane's legal practitioners wrote to the plaintiff's legal practitioners in the following terms:

> "RE: CASE NO HC 3872/2008
> CRESTLANE INVESTMENTS (PRIVATE) LIMITED v BRIGHTLAND FARMING (PRIVATE) LIMITED
>
> We refer to previous correspondence in the above matter, resting with our letter of the 13 August 2010, to which we have received no response.
>
> We advise that our client has removed your client's property from Lacho Freight, 65 Mutare Road, Msasa, Harare, to ABC Auctions, Seke Road, Harare.
>
> Our client has requested ABC Auctions to contact you, to ascertain from you what they should do with your client's property. Our client wants nothing more to do with your client's property, as it has spent more in storage charges than the value of your client's property.
>
> If your client does nothing about reclaiming its property, that will be at its own peril and our client does not and will not accept any responsibility for the property.
>
> Yours faithfully
>
> ATHERSTONE & COOK"

In the above correspondence Crestlane clearly states that it is the one that "removed the property from Lacho Freight to ABC Auctions."

In view of the foregoing, I find it extremely difficult to refuse to accept that it is Crestlane who evicted the plaintiff from the premises using the first defendant. It therefore follows that it is Crestlane who can answer:-

a) Whether or not the premises had been abandoned
b) Whether or not eviction was lawful
c) What property was removed from the premises during the eviction; and
d) What value is placed on the property it removed from the premises

I have already indicated that the second defendant was acting in her capacity as the official in charge of the first respondent who was used by Crestlane to remove the plaintiff from the premises. To that end, it is not proper to cite the second defendant in her personal capacity. Corporate entities operate through natural persons such as the second defendant.

Having identified an issue of non-joinder, (i.e failure to cite Crestlane), I shall now proceed to deal with the law relating to same. Thereafter, I shall also address the law applicable to the application for absolution from the instance.

I have, in the foregoing paragraphs, stated that the non-joinder of Crestlane was fatal to the plaintiff's case. Rule 87 of the High Court Rules, 1971, provides as follows:

> "(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) Order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
>
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.
>
> (3) A court application by any person for an order under subrule (2) adding him as a defendant shall, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter".

My assessment of the facts *in casu*, as presented so far by the plaintiff, (i.e. before the presentation of the defendant's case), leaves me in no doubt that the issues in dispute cannot in anyway be determined in the absence of Crestlane. It is Crestlane who caused the plaintiff to approach the courts. It should therefore be Crestlane who can assist the court in determining the plaintiff's violated rights and interests as stated in the above rule. The plaintiff was fully aware of this and hence its earlier attempts to proceed against Crestlane or to join Crestlane. If indeed at the end of the trial the finding could be that liability lies squarely on Crestlane who perpetrated the removal of the plaintiff from the premises, it would be improper to grant an order against Crestlane when it was never cited.

In *Tetrad Holdings Limited & 10 Others* v *National Social Security Authority & 2 Ors* HH 938/15 where the issue of mis-joinder arose, Makoni J, had this to say:

> "A joinder of parties takes place where two or more parties join together to bring an action or application or two or more defendants or respondents are joined in the same matter. Parties are joined either as a matter of convenience or as a matter of necessity. Joinder for convenience is to avoid *inter alia* a multiplicity of actions.

On joinder of necessity the authors Herbstein and Van Winsen: The *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed p 215 had this to say:

> "A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or is such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined. Such a person is entitled to demand joinder as a party as of right and cannot be required to establish in addition that joinder is equitable for convenience. In fact, when such person is a necessary party in this sense the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises."

In terms of our rules non-joinder is provided for in terms of r 87 (1) which provides as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they effect the rights and interest of the person who are the parties to the cause or matter."

In interpreting r 87 (1) Patel J (as he then was) had this to say in *John Simon Rodger & Ors* v *Frik Muller & Ors* HH 2/20 on p 4 of the cyclostyled judgment:

> "While I accept that non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that r 87 (1) do not absolve a litigant of the obligation to cite all relevant parties. The discretion of this court in this regard must be exercised so as to ensure that all persons who might be affected by the determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made."

I have deliberately quoted at length from Makoni J's judgement in order to bring out the guiding principles relating to non-joinder. *In casu*, my view is that, given the position of Crestlane and its role in this matter, its joinder was a matter of necessity.

The words of Patel J, as he then was, in the last quotation above, is in my view, applicable to this case. The plaintiff was or should have been fully aware that for the issues in this matter to be properly ventilated upon, it was necessary to cite Crestlane. Failure to do so was fatal to its case.

(See also *Indium Investments (Private) Limited* v *Kingshaven (Private) Limited* (2) *Daniel Shumba* (3) *Linda Shumba* SC 40/2015).

Turning to the applicable law in application for absolution from the instance, I am indebted to the plaintiffs own submissions on the same. I believe the plaintiff has properly enunciated the law. In paragraphs 1.3 and 1.4 of its submissions, the plaintiff states:

> "1.3 In Supreme Service Station (1969) (Pvt) Ltd v Fox And Goodridge (Pvt) Ltd 1971 (1) RLR 1 Beadle CJ (as he then was) held that the onus placed upon a defendant who applies for absolution from the instance before closing his case is greater than that

placed on him when he makes such an application after closing his case, and that the test to be applied when the application is made before the Defendant closes his case is 'what might a reasonable court do?' i.e. 'is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?'. If such application is made after the defendant has closed its case, the test to be applied is 'what ought a reasonable court to do?'

1.4 At p. 4 the learned judge espoused: 'The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court 'might' do, allowance must be made for its making a reasonable mistake and giving an incorrect judgment (my emphasis). In speculating, therefore, the judicial officer must take into account the possibility of the reasonable man giving a judgment which is wrong, but not so wrong as to be unreasonably wrong."

(See also: *Lawrence* v *Ragar Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S).)

I also agree with the defendants when, relying on similar principles spelt out in *Maisiri & Anor* v *Maisva & Anor* HH 35/2007, they submit:

"8. The simple question that the court must answer at this stage is whether the plaintiff has put up a case justifying a response from the defendant? The court's task is a very simple one: if the defendant was to open and close its case without leading any evidence, and there was no further evidence on record, would the court give judgment in favour of the plaintiff on the evidence before it? The answer is no. There is no evidence on record to support such a factual finding.

9. In that case the defendant must not be put to the expense of seeking to contradict what has not been established".

I hold the strong view that given, Crestlane's acceptance of its responsibility for the predicament of the plaintiff through documentary evidence, whatever the plaintiff says about the alleged role of the defendants, cannot help it without Crestlane being joined to the case. It would obviously be unjust to transfer responsibility to the defendants when there is a party who says "I did it". To that end, the application for absolution from the instance ought to succeed. Furthermore, given the fact that the non-joinder is fatal to the plaintiff's case, no point will be served by considering any of the other issues raised by the plaintiff in support of the relief it seeks.

It is ordered that:

The application by the defendants for absolution from the instance be and is hereby upheld with costs.

Jakachira & Company, plaintiff's legal practitioners
Dube, Manikai & Hwacha, defendant's legal practitioners