CNV ELECTRICAL (PRIVATE) LIMITED
versus
BREWTECH ENGINEERING (PRIVATE) LIMITED
and
C BABBAGE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 February 2016 & 2 March 2016

Civil Trial

T Tandi, for the plaintiff
S Zvavanoda, for the defendants

TSANGA J: The plaintiff issued summons seeking confirmation of cancellation of a lease agreement with the first defendant as a result of breach arising from non-payment of rentals. Also sought was an order ejecting the first defendant from the premises known as Factory No. 1, Stand No. 16977, corner Shepperton Road and Diamond Way, Graniteside, Harare. Arrear rentals were equally claimed as were holding over damages from 1 February 2013 to the date of first defendant's vacation of the premises. Also claimed were interest charges as well as cost of suit on higher scale.

At the hearing, the defendants' counsel indicated that they were admitting to the issue of arrear rentals and holding over damages made up of **US$26 191.29** as arrear rentals and **US$19 704.22** as holding over damages, culminating in a total of **US$45 695.61** The issue that remained for trial pertained to the defendants' counter claim whereby the defendants seek off on the basis of improvements effected to the property and allege unjust enrichment.

The facts

The first defendant was in the business of manufacturing components for the food and beverage industry. The parties having had some initial dealings dating back to 2007-2008, according to the agreed facts, they entered into a written lease agreement on 13 January 2010 when the first defendant was still trading as *Dematech Zimbabwe (Pvt) Ltd* before changing

to Brewtech Engineering. Upon expiration of the lease agreement, the parties entered into a second lease agreement for the period 1 February to 31 January 2011. The parties then entered into another lease agreement signed on the 20th day of January 2012 which was to run for a one year period. At all times the written lease agreement imposed restrictions on the latitude of the tenant to effect improvements to the property. According to Mr Charles Andrew Babbage, first defendant's director and the second defendant in this matter, he effected a range of improvements on the property during the tenancy between 2010-2012. These included installing an electricity supply feed into the warehouse as the premises only had a single phase power supply and a light bulb in the warehouse. He emphasised that this was a necessary improvement since without power he could not operate any machinery. Work done with regard to this particular improvement included connecting the main feed cable into the factory and installing an MCB board as well as a power point for the machinery.

In addition, he had also installed and fitted a kitchen as this was an industry requirement to feed his workforce. For that reason, he also deemed this as a necessary improvement claimable from the lessor. The kitchen had been fitted by a professional company called ***Tusilago***. It had also been tiled for hygiene purposes. He had also tiled the down stairs offices and had the reception area made up since the premises did not have a reception.

Further improvements included building a stair case and a mezzanine floor constituting of an upstairs office for the company's store-man. This was also where the finished goods and spares were kept. Again, he classified these improvements as necessary on the basis that the entire building only had one office which he occupied.

Also, among the improvements was the building of a warehouse in one corner of the factory. A new gate into the premises had also been fitted and new interlocking brick had been laid to avoid water clogging the drive way during the rainy season. He regarded the gate as a necessity in the sense that what was fitted was a more secure gate where one could no longer see into the premises. Security screens had also been fitted throughout the whole building. Maxi door screens were also fitted to the reception area. The cost of all the improvements amounted to **US$50 364.59**. Invoices and receipts were provided regarding these various improvements.

It was Mr Babbage's evidence that he had sought verbal permission from the plaintiff before effecting each of the improvements as outlined above and that authority had been

given. Observably, he made no attempt in his oral evidence to give the fuller details of any terms upon which the permission had been given. Mainly, he argued that there should be set off of the debt owing for rentals based on the value of these improvements otherwise the plaintiff would be unjustly enriched if first defendant was not compensated.

Mr *Laxman Ranchhod* gave evidence on behalf of the plaintiff. He denied owing the defendant anything. He argued that the improvements made were unauthorised and unnecessary. He emphasised that the improvements were meant for the defendant's business and were cosmetic in nature. He maintained that the premises were suitable for use as they were and that there was absolutely no need to effect any improvements. He also emphasised the fact that the defendants never raised the issue of set off when a letter of demand regarding the rentals was sent to them. Instead they had admitted liability for the rentals owing.

The Provisions of the lease agreement

Of key significance is that the issue of improvements, and how they were to be handled, was provided for in the contract of lease. Clause 9 was to the following effect:

> (a) "The LESSEE shall not make any structural or other alterations or additions to the leased premises without prior written consent of the lessor.
> Should the LESSOR grant such consent, then, such alterations and additions shall be effected by the LESSEE at the lessee's own cost and expense and be carried out subject to any terms and conditions that the LESSOR may consider reasonable and to his satisfaction.
>
> (b) With the approval of the LESSOR, the LESSEE shall at his own cost and expense, be entitled to install fixtures and fittings additional to those affixed by the LESSOR, or to alter the position of existing fixtures and fittings. At the termination of this lease by passage of time, or otherwise, the LESSOR may require the LESSEE to remove such additional fixtures and fittings and to restore the leased premises to the state and position they were at the commencement of the lease. Alternatively, the LESSOR may require the LESSEE to leave such additional or repositioned fixtures and fittings as and where they stand, which fixtures and fittings shall become the property of the LESSOR and the LESSEE shall not be entitled to claim payment or any compensation or other consideration whatsoever therefore.
>
> In addition, the lease contained clause 14 on termination which read:
>
> The LESSEE shall at the termination of this lease, re-deliver the leased premises to the LESSOR in the same good condition as existed at the commencement thereof and shall, in particular, remove and dismantle any fixtures, fittings, advertising signs or signboards erected or brought into the leased premises. Any damage caused to the leased premises as a result of the lessee's failure to maintain the leased premises in such good order and condition, shall be made good by the LESSEE at the LESSEE'S own cost and expense".

It was in light of the above provisions which clearly forbade alterations without written permission, and that additionally, forbade any claim for compensation if fixtures were

not removed, that the plaintiff relied on the principle of sanctity of contract. The plaintiff drew on the cases of *Omarshah* v *Karasa*[1] and *Bangure* v *Gweru City Council*[2] to emphasise the necessity of the owner's consent as a prerequisite for claiming compensation for effecting improvements. He emphasised that *in casu* the landlord's consent was not sought as specifically provided for in the agreement and therefore that the matter should end there.

The law

A core legal argument presented on behalf of the defendants was that of unjust enrichment whose core tenets are that the other party must have been enriched; the party claiming unjust enrichment must have been impoverished; the enrichment must be unjustified; and the enrichment must come within the classical enrichment actions. There must also be no positive law which refused an action of the impoverished person. The case of *Komissaris* v *Van Binnelandse Inkomste en 'n Ander* v *Willers en Andere*)[3] was cited by the defendant's counsel in support of these principles. Plaintiff's primary defence to the unjust enrichment argument was that the improvements must have been made with the consent of the owner.

In his book *Business law in Zimbabwe* R H Christie[4] highlights that improvements fall into three classes namely, necessary, useful, and luxurious. He defines 'necessary improvements' as those necessary for the protection of the land. Being unable to remove necessary improvements, he further points out that a tenant would want compensation for them. A tenant is entitled to compensation in full for necessary improvements.

Useful improvements on the other hand are defined as those which enhance the value of the property. The right to compensation is not full compensation as the tenant is entitled to nothing if he made the improvements without the consent of the owner. He has a choice of removing the improvements before the termination of the lease. If he made the improvements with the consent of the owner then he is entitled to compensation on the scale of the cost of the materials "without sand, lime or cost of labour.[5]"

Improvements deemed luxurious which do not enhance the value of the property are said not to entitle the tenant to any compensation whatsoever so it is immaterial whether or not consent was obtained. Again, they may be removed at the expiration of the lease.

---

[1] *1996 (1) ZLR 584 (H) at 588A-589F;*
[2] *1998 (2) ZLR 396 (H) at 399 A*
[3] 1994 (3) SA 283 (A)
[4] RH Christie Business law in Zimbabwe (Claremont: (Juta & Co. 1998) at p 294
[5] Supra at p 295.

G. Bradfield and K Lehman in their book *Principles of the law of Sale and Lease* [6]similarly explain the above entitlements thus:

> "A lessee who has made useful or luxurious improvements to the property is entitled to remove them before the lease expires, provided they can be removed without damage to the property. Necessary improvements can of course not be removed, for necessary improvements are those needed for the protection or preservation of property, and so are of a type that in the nature of things can ordinarily not be removed without damage to the property. The distinction between useful and luxurious improvements depends on prevailing economic and social views of the community; luxurious improvements are often described as those made on the 'whim' of the lessee, which may increase the market value of the property but do not add to its usefulness, while useful improvements are those which add to the utility of the property and increase its value."

It is my considered opinion that the above being that as it may, it is not necessary to unpack the improvements using the above principles because the intent of the parties as regards fixtures and improvements emerges from their contract of lease. It is therefore to the principles regarding written contracts that parties have consensually entered into that I turn to in finding resolution to this matter.

At the heart of the argument on sanctity of contracts is that the contract would have been entered into freely and voluntarily. As such it becomes sacrosanct and the courts can freely enforce it. The plaintiff's counsel referred the court to the following cases regarding the principle of sanctity of contracts: *Old Mutual Shared Services (Pvt) Ltd* v *Brighton Shadaya*[7]*, First Mutual Investment (Private) Limited* v *Jonsput trading (Private) Limited & Ors*[8]*, Burger* v *Central African Railways*[9] and *Wells* v *South African Alumenite Company.*[10]

An instance where a court can intervene is where there is restraint of trade because that is deemed to be against public policy. Another is where the court applies the doctrine of severability or the 'blue pencil' test to some aspects of the contract. The doctrine allows the court to sever unreasonable parts of the contract and enforce only the reasonable parts. The severability doctrine limits the sanctity of the contract to the extent of the severability of those clauses deemed unreasonable.[11] None of these principles are of any application here. There was nothing unreasonable in the contractual provisions regarding improvement. It is in fact standard practice in lease agreements to include specific clauses that regulate the issue of

---

[6] G. Bradfield and K Lehman *Principles of the law of Sale and Lease* (Cape Town: Juta 3rd ed 2013) at p193
[7] HH -15 -2013
[8] HH 1-16
[9] 1903 TS 571 at 576;
[10] *1927 AD 69.*
[11] See Maja I *The law of contract in Zimbabwe*, (Harare: The Maja Foundation; 2015) at p 27

improvements. (See *Business Aviation Corporation (Pty) Ltd & Anor* v *Rand Airport (Pty) Ltd.* [12]

However, the spectre of constitutionalism has not left this field of classical contract law untouched in the sense of surfacing the argument that freedom of contract should be limited where it diminishes the constitutional value of human dignity. Hawthorne and Pretorious[13] explain the evolution thus:

> "Today public policy is infused with the values of the constitution and represents the legal convictions of the community, the values embraced by society. This imports fairness, justice and reasonableness into the law of contract to counter balance the principles of freedom of contract and sanctity of contract so dear to classical contract law.
>
> Consequently, the modern law is evolving to the point where a party could prove that enforcement of a term would be unfair and unreasonable in the circumstances because the party had been in an unequal bargaining position, and therefore that enforcement of the unfair term or contract would be contrary to public policy. In such circumstances reasonableness and fairness combined within public policy would trump both freedom and sanctity of contract."

In reality, courts remain reluctant to undermine the doctrine of *pacta sunt servanda.* In *Brisley* v *Drotsky*[14] the court was cautious and reluctant to embrace the concept of the community's mores into contract because it would lead to unacceptable chaos and uncertainty. It therefore did not exercise its discretion to throw away contractual terms that were said to be unfair and unreasonable.

In casu, there was nothing in the evidence provided by Mr Babbage that suggests that the parties bargained from an unequal position. In fact, given that the lease was renewed yearly, he would have been aware at the start of each new lease period just what it was that needed improvement and to engage the lessor meaningfully on whatever needed to be negotiated and to frame their agreement accordingly.

The difficulty that I had with the defendants' evidence as I have already pointed out was that even though he purported to state that the parties had agreed orally to the improvements his evidence was virtually non-existent as regards the terms of the oral agreement that in essence showed that the parties had departed from the written agreement. He had the onus of proving how and when in the face of what the contract stipulated, the parties had reached a contrary agreement. Mr Babbage's argument regarding set off is also problematic. Set off occurs when the parties are obligated to one another, both debts being liquidated and due. The debts must also be of the same kind. Furthermore, the debts must be

---

[12] 2006 (6) SA 605 (SCA) at p620 E
[13] L Hawthorne and C-J Pretorius *Contract Law Casebook (Juta:2010 3rd edition at p205*
[14] 2002(4) SA 1 (SCA)

owed between the same parties in the same capacities.[15] Based on the common law regarding a lessee's entitlement to improvements, plaintiff's counsel argued that the debt in this case was not liquidated and not all expenses are refundable. Significantly, there was nothing to confirm that the lessor had ever agreed to embrace any of the expenses that were incurred by the lessee. This is indeed clearly not a case where the defendants can definitively say "the plaintiff owes me a debt". It is more a case where the defendants are saying "I have a claim against him".[16] Any claim cannot hold in light of the clear provisions of the lease agreement.

Costs were sought by the plaintiff on a higher scale for both the main claim and the claim in reconvention. I believe these are justified as the plaintiff has been put to unnecessary expense to obtain his rentals. I agree that the counter claim was not justified as there was a shocking lack of supporting evidence regarding any agreement to depart from clear contractual terms. I further agree that the closing submissions by defendants' counsel equally lacked depth supportive of the counterclaim. In the result, I find in favour of the plaintiff.

The plaintiff's prayer is granted as follows:

1. The first and second defendants, jointly and severally, one paying the other to be absolved, to pay the sum of US$26 191.29 plus interest at the prescribed rate reckoned from January 2013 to date of payment in full.

2. The first and second defendants, jointly and severally, one paying the other to be absolved, to pay the sum of US$19 704.22 plus interest at the prescribed rate reckoned from January 2013 to date of payment in full.

3. The first and second defendants, jointly and severally, one paying the other to be absolved, to pay costs in respect of the main claim and the claim in reconvention on a scale of attorney and client.

Kantor and Immerman, plaintiff's legal practitioners
Chiturumani Law Chambers, defendant's legal practitioners

[15] See I Maja Note 11 above at p 145. See also *Schierhout v Union Government* 1926 AD 286 at 289
[16] *Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 355C.