

GULSONS (PRIVATE) LIMITED
versus
MR WAYIRE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 September 2013, 24 & 27 March 2014, & 9 March 2016

Civil Trial

P. Ranchhod, for the plaintiff
L. Mashanyare, for the defendant

ZHOU J: On 15 August 2011 the plaintiff issued a summons against the defendant claiming the following relief based on an alleged breach of a lease agreement:

- “1. An order confirming cancellation of the lease agreement between the plaintiff and defendant in respect of Shop 4 Stand 67, Cnr. Kings Avenue/Nelson Mandela, Kwekwe.
2. An order for the ejection forthwith of the Defendant, all sub-tenants, invitees and all persons claiming occupation through him from the plaintiff’s premises being Shop 4 Stand 67, Cnr. Kings Avenue/Nelson Mandela, Kwekwe.
3. Payment of arrear rentals of US\$3 000.
4. Payment of holding over damages at the rate of US\$32.00 per day from 21st July 2011 to date (of) Defendant’s ejection.
5. Costs of suit at legal practitioner and client scale.”

The plaintiff’s claim is founded upon the following facts as pleaded in its declaration. In 2006 the defendant took occupation of the plaintiff’s property known as Shop 4 Stand 67, Cnr. Kings Avenue/Nelson Mandela, Kwekwe. The occupation was pursuant to and in terms of a lease agreement which had been concluded between the parties. The defendant failed to pay rentals for the months of June and July 2011, thereby prompting the plaintiff to cancel the lease by letter dated 21 July 2011. At the time of the cancellation of the lease the monthly rent, according to the plaintiff, was US\$1 000. It is common cause that that was the amount which the defendant had paid for the month of May 2011 and the other months before that. The claim is

opposed by the defendant on the basis that it did not fail to pay the rent due but that the plaintiff failed to collect the rent from the defendant. The defendant pleaded that it was always the practice for the plaintiff to notify the date on which it intended to collect the amount for the rent. The plaintiff would then send its representative to come to the premises to collect the rent. The defendant stated that the plaintiff agreed to reduce the monthly rentals “as of 24 June 2011”, but then refused to collect the rentals from the defendant. The defendant further disputed the plaintiff’s right to cancel the agreement, and stated in its plea that it never breached the lease agreement.

Three issues were referred to trial, namely:

1. Was the lease agreement validly cancelled?
2. Did (the) plaintiff agree to a reduction of rentals and if so, to what amount?
3. Is defendant indebted to (the) plaintiff in respect of arrear rentals and damages for unlawful holding over?

The plaintiff led evidence from Kaplesh Mehta who is its director. The defendant gave evidence himself and called one other witness, Priscilla Murozvi who is his wife. The evidence of Kaplesh Mehta was that the defendant has been leasing the premises referred to above in terms of lease agreements which were renewed annually. The total amount payable by the defendant monthly was US\$1 025-00, which consisted of US\$1 000-00 in respect of rentals and a sum of US\$25-00 for rates and refuse collection. Exhibits 1 and 2 are letters from the plaintiff to the defendant stating the amounts due in respect of the months of February and March 2011, as well as the dates on which the amounts would be collected. The two documents show the total sum of US\$1 025-00 which has been referred to above. The witness stated that the last amount of US\$1 025-00 which the plaintiff received from the defendant was in April 2011. Subsequent to that a meeting was called by an organization called the Affirmative Action Group which represented the tenants, including the defendant. At that meeting demands were made for the plaintiff to reduce its monthly rentals and threats that the property would be taken away were made. The witness describes the meeting as “intimidating”. A letter dated 31 May 2011, Exh. 3, was sent to the tenants of the plaintiff by the Affirmative Action Group (hereinafter referred to as the “AAG”). The letter is signed by one Owen Matava in his capacity as Secretary-General of the AAG. The material portions of the letter read as follows:

“RE: PAYMENT OF RENTALS OF GULSONS (PRIVATE) LIMITED PROPERTIES

We refer to the above matter.

Please be advised that we are currently in discussion with your landlord as regards payment of fair, equitable and just rentals of the said properties, this follows a meeting held at Golden Mile on the 26th of May, 2011 between AAG and Gulsons Properties represented by Linah Mehta.

As we speak, your landlord promised to get back to us with a new rentals proposal by the 7th of June, 2011. This is only prudent that you hold onto your monies pending the outcome of our discussion with your landlord.

Note should be heard, to the fact that all these discussions are being held in the best interests of you. We are of the humble opinion that the rentals of \$13, 30 per sqm that you are currently paying are exorbitant and should be necessarily reduced taking into consideration the harsh economic environment we are all operating in.

Be guided accordingly.”

The letter was copied to the plaintiff in addition to the other persons and organisations named therein. The letter was sent to the plaintiff after the meeting referred to above. The witness stated that the plaintiff did not receive any rentals from the defendant after that letter was written. The plaintiff did not agree to a reduction of the rentals as stated in that letter as, according to the witness, it had already agreed to reduce the figure from the one that had been agreed upon prior to agreement being made on the US\$1 000-00 per month. He stated that the \$1 000-00 was a come down from an initial figure of \$1 200-00 which the plaintiff had originally set as the monthly rental. From June 2011 the defendant did not pay any rent. During cross-examination the witness stated that the rentals which were not paid were from the month of May 2011. He disputed the suggestion that the plaintiff had refused to collect rent, and stated that at one time he was advised to collect the money for rent from the defendant’s lawyers. He went with another director of the plaintiff and an estate agent, but the lawyers did not have the money. It was then that the plaintiff decided to pursue legal remedies, and cancelled the lease by letter dated 21 July 2011 (Exh. 4). He stated that the defendant and the other tenants who were represented by the AAG refused to pay the monthly rent of \$1 000-00 stating that it was too high. He disputed the suggestion put to him in cross-examination that the plaintiff had agreed to reduce the monthly rent by 25% to US\$750. The witness referred to correspondence exchanged between the parties and in some instances through their representatives. The defendant was still in occupation of the premises at the time of the trial.

The defendant whose full names are Namuel Wayire stated that the lease agreement concluded in February 2008 was between the plaintiff and a company known as Nampri

Enterprises (Pvt) Ltd. He stated that the plaintiff's representative Linah Mehta would collect rent from the defendant every month after notifying the defendant as to when she would come to collect the rent. The plaintiff did not collect rent from June 2011. He stated that the plaintiff agreed to reduce the monthly rental to US\$10-00 per square metre, which meant that the defendant would have to pay US\$650-00 per month. He stated that the defendant deposited its rent into the account of his legal practitioners from June 2011. The amount paid to the lawyers from June 2011 was US\$650-00 per month. The defendant stopped paying the money into the account of its legal practitioners after being advised that the plaintiff was not collecting the money. In cross-examination the witness stated that the sum of US\$6 530-00 offered in terms of exh. 8 was not in respect of the amount owed by the defendant alone but also by the other tenants.

Priscilla Murozvi, the defendant's wife, stated that she was the one who was responsible for the day to day running of the shop. She stated that Linah Mehta wanted to increase the rent payable monthly to US\$1 200-00 at a time when the tenants were finding it difficult to pay \$1 000-00. For that reason the tenants went to an arbitrator, following which the parties discussed and agreed on a monthly rent of \$10-00 per square metre. She stated that the defendant and the other tenants decided to approach the Rent Board to "buttress" the agreement with the plaintiff for a monthly rent of \$10-00 per square metre. She stated that there was no time that the defendant agreed to a 25% reduction in the monthly rentals. According to her the defendant deposited money with his legal practitioners from June 2011 to December 2011.

The question of Nampri Enterprises being the correct party to be cited is not raised in the defendant's plea. Further, in response to parag 3 of the plaintiff's declaration in which it is alleged that the defendant took occupation of the premises in 2006 and was still in occupation, the defendant admitted that fact, as its response was: "No issues arise . . ." It is not one of the issues referred to trial. The attempt to raise that issue in evidence must therefore be dismissed.

It is common cause that the defendant has not paid rent for the premises since June 2011. The rent which the defendant had paid for the months prior to June 2011 was US\$1 000, to which was added a sum of US\$25 for operating costs. The defendant's case is that the plaintiff agreed to reduce the rent from the sum of \$1 000 per month. But there is no proof of such an agreement. Further, the defendant gave conflicting positions as to the allegedly reduced monthly

rental. In cross-examination of the plaintiff's witness Mr *Mashanyare* suggested that the plaintiff had agreed to reduce the monthly rent by 25% from \$1 000-00 to \$750-00. On the other hand, the defendant and his wife stated that the agreed reduced rent was \$650-00 per month. The plea filed on behalf of the defendant does not state the amount. Even the documents authored by the AAG who were the agents of the defendant do not state that there was ever agreement to reduce the monthly rent. Instead, a letter dated 31 May 2011, exh. 3, complained that the rent which the defendant and the other tenants were paying was exorbitant, and instructed the tenants not to pay rent to the plaintiff "pending the outcome of our discussion with your landlord". That letter which was copied to the plaintiff was complied with by the defendant as no rent was paid after it was written. Thus the moment that the defendant failed to pay his rent for June 2011 he was in breach of the lease agreement. By letter dated 24 June 2011 the plaintiff reminded the defendant of its obligation to pay rent and advised that failure to pay the rent would result in the lease being cancelled. Instead of paying the rent the defendant through the AAG wrote a letter asking that the letter of 27 June 2011 be withdrawn. The plaintiff, as it was entitled to do, cancelled the lease agreement with the defendant by letter dated 21 July 2011, exh. 4.

The validity of the cancellation of the lease agreement cannot be impeached as the defendant had breached the agreement by not paying rent for the months of June and July 2011. Instead of paying the rent the defendant sought to unilaterally vary the rental. As shown above, the plaintiff never agreed to reduce the rentals to a figure below \$1 000-00 per month. The payments which the defendant was making into the account of its legal practitioners are irrelevant for two reasons. Firstly, payment into the defendant's legal practitioners' account was not in accordance with the agreement. Secondly, it is clear that the amounts which the defendant was paying to its legal practitioners did not represent the agreed monthly rent but were based on the unilateral reduction to \$650-00. In any event, the defendant's witness stated that the payments were only made up to December 2011. Yet the defendant remains in occupation of the premises to date, carrying on business.

The letters purporting to invite the plaintiff to attend to collect the money for rent from the defendant's legal practitioners were not genuine, as the plaintiff's witness stated that he attended at Kwekwe but was advised that there was no money from the defendant. On 17 October 2012, some seventeen months after the defendant had defaulted in his rental payment his

legal practitioners wrote a letter, exh. 12, to the plaintiff's legal practitioners. In that letter the legal practitioners offered to pay US\$1 400-00 which they said had been paid into their trust account by the defendant. Even based on the amount of \$650 which the defendant claimed was the reduced rental, it is clear that the amount held by the legal practitioners was only enough to pay for two months. That letter clearly contradicts the claims by the defendant and his wife that they had deposited money into the account of their legal practitioner from June to December 2011.

The non-payment of rent entitled the plaintiff to cancel the lease. See *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd & Another* 2009 (2) ZLR 446 (H) at 454 and 455 G; *Alterm Enterprises (Pvt) Ltd v John Sisk & Sons (Pvt) Ltd* 2013 (1) ZLR 126 (S) at 131 E – 132 B; *Total Zimbabwe (Pvt) Ltd v Appreciative Investments (Pvt) Ltd* 2010 (1) ZLR 598 (H); *Parkside Holdings (Pvt) Ltd v Londoner Sports bar* 2005 (2) ZLR 68 (H). The payment of an arbitrary reduced amount by the defendant to his legal practitioners did not constitute payment of rent in terms of the lease agreement. The legal practitioners were the defendant's own agents. For that reason the lease was properly cancelled by the plaintiff.

As regards the arrear rentals, the defendant claimed US\$3 000-00. The declaration states that the defendant failed to pay rent from June 2011. The evidence of Kaplesh Mehta that the rent for May 2011 was also not paid is not supported by the pleadings filed. Thus, at the time that the lease was cancelled the rentals which had not been paid were those for June and July 2011, which would amount to US\$2 000 at the monthly rental of \$1 000. That is the amount which the defendant is entitled to recover.

The amount of US\$32-00 per day in respect of holding over damages is based on the monthly rent of US\$1 000-00. In fact, if one divides the monthly rent by thirty days the amount which should be recovered is \$33-33 per day. The plaintiff has claimed an amount which is less than what it would otherwise be entitled to. This court has no reason not to grant that amount. The holding over damages will be calculated from 1 August 2011 up to the day that the defendant is ejected from the premises.

The plaintiff prayed for costs of suit on the legal practitioner and client scale in the summons. However, the declaration does not claim costs on the higher scale. The special order

of costs is also not sought in the closing submissions. In the premises, there is no reason for me to award costs on the higher scale.

In the result, IT IS ORDERED THAT:

1. The cancellation of the lease agreement between the plaintiff and defendant in respect of Shop 4, Stand 67, Cnr. Kings Avenue/Nelson Mandela Road, Kwekwe, is hereby confirmed.
2. The defendant and all persons claiming occupation through him be and are hereby ejected from Shop 4, Stand 67, Cnr. Kings Avenue/Nelson Mandela Road, Kwekwe.
3. The defendant shall pay the sum of US\$2 000-00 in respect of arrear rentals for the months of June and July 2011, together with interest thereon *a tempore morae* at the prescribed rate up to the date of payment.
4. The defendant shall pay holding over damages of \$32-00 per day from 1 August 2011 to the date of his ejectment.
5. The defendant shall pay costs of suit.

Hussein, Ranchhod & Co., plaintiff's legal practitioners

Masawi & Partners, defendant's legal practitioners