ATHLONE TAILORS (PRIVATE) LIMITED
versus
CAG FOODS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 February & 27 April 2016

Civil trial

C Kuhuni, for the plaintiff
SK Chivizhe, for the defendant

TSANGA J: The plaintiff, Athlone Tailors (Private) Limited, ("Athlone") seeks cancellation of a lease agreement and an order of eviction of the defendants, CAG Foods (Private) Limited, ("CAG") from premises described as 106 Coventry Road, Workington. This is for non-payment of rentals from the period May 2014 to December 2014 in the sum of US $40 000.00. Athlone further seeks payment of $ 5 500.00 for each month of continued occupation from 1st January 2015 until the date CAG vacates the premises. In addition, it seeks operating costs of $7 140 as well any further operating costs incurred by CAG from 1st January 2015 to the date of ejectment. Interest at the rate of 5% is also claimed. Costs of suit are sought on a higher scale.

The facts and evidential background

The factual context in which CAG resists the eviction as emerged in the trial is as follows. In June 2013, it took over the leased premises as a going concern from a company named Pluplon (Private) Limited, (Pluplon) which had been running a milling business thereat. CAG had written a letter on the May 2013 to Athlone about the proposed takeover over the leased premises. In that letter, it had specified that it had acquired milling equipment from Pluplon (Pvt) Ltd and that it was its intention to continue using Athlone's premises for milling purposes. It also indicated that it had been advised by Pluplon that the current rental was US$5 500 and that it would like to continue paying this amount. It also highlighted that it would pay a deposit of one's month rental. It further made a special request regarding the notice period in that as the premises had been modified specifically for the operating

equipment in it, the notice period should be six months to provide time to remove it and reassemble elsewhere.

In the context of that letter, discussions had taken place with Athlone thereafter, leading to a letter by Athlone dated 1 June 2013, which essentially set out the terms of take over. As the letter written by Athlone is at the centre of dispute regarding the parties' arrangement it is worth capturing in full in terms of its content. The letter reads:

> "As per our discussion confirming tenancy the following will apply as of 1st June 2013.
>
> - Rentals to be paid in advance or 1st of each month.
> - Insurance of the fire for building is for our account(sic)
> - All other aspects of insurance that is contents breakages etc. to be for yourselves to insure
> - All terms and conditions apply under the standard lease of agreement
> - The maintenance of the property must be adhered to all the time.
> - Rent upward review will on the 1st of January 2014.
> - Electricity bill must be under your name and account.
> - Rates, sewage, water will be apportioned between the tenants.
> - Deposit is not refundable.
>
> We hope we have a long lasting relationship.
>
> E & OE"

The letter was signed by Mr M Jivan. On the part of the CAG it was signed for by Mr Anthony Gura its Chair.

It was therefore not in dispute that CAG took over and was paying rentals of $5500.00 which were paid in full up to April 2014. There was part payment for May 2013. There after CAG stopped paying rentals. What has spurred this trial are CAG's reasons for so doing and for instituting a counter claim against Athlone.

In December 2013, the milling licence which CAG had been using, which they had taken over from Pluplon and were effectively operating under, expired. The City of Harare did not renew the licence but instead indicated a host of issues that needed attention on the premises in a letter dated 22 January 2014. The letter which the city council wrote as a result of its inspection, pointed out the following shortcomings in the premises:

1) Lighting and ventilation to be provided in the premises in accordance with the provisions of model building by-laws.
2) The floors of every room in which food is to be handled to be constructed of cement concrete or other impervious material, brought to a smooth finish.
3) The walls of every room in which food is to be handled, to be constructed of brick concrete or other approved material and the internal surface of every such wall to be finished to the satisfaction of the Director of Health Services.
4) All junctions between walls and floors in rooms to be handled to be properly covered.

5) Every room in which food is to be handled to be provided with a ceiling or other approved means of preventing entry into the room of dust from above.

6) Approved sanitary accommodation to be provided for the exclusive use of persons employed on the premises, such accommodation to form an integral part of the building which accommodates the business and to be entered from within the building.

7) Approved facilities to be provided for the storage of employees clothing.

8) A sufficient yard paved throughout to be available for the use on the premises and direct access to be provided from the premises to such yard.

9) A platform constructed to concrete or other impervious material for the placing of refuse bins to be provided in an approved position in the yard, such platform to be roofed , graded and drained to a gully connected to the drainage system and provided with a pipe d wear supply.

10) At least one double bowl sink with draining boards in moulded stainless steel ad with piped supply of hot and cold water connected thereto to be provided within the premises for washing all equipment and utensils.

11) Sufficient and approved mechanism to be installed to prevent dust emanating from preparation of food from settling within the premises.

CAG say the issues raised were central to granting it an operating licence for milling purposes.[1] It considered the major ones as being the construction of separate toilets for the workers and an approved storage for employees' clothing. CAG took the view that these were structural requirements which were expenses for the lessor to incur. Athlone's standpoint was that what it had leased in the initial instance to Pluplon was a core structure and that it was Pluplon which had installed the milling equipment - which business CAG had taken over as its own specific request. As far as Athlone was concerned, it was under no obligation to alter its premises and incur expenses on account of the business being conducted by the lessee. As a result of not being able to operate, CAG counterclaimed a sum of $1,123 200.00 on the basis of loss of business to the tune of $5 6160.00 a month. CAG's reasons for resisting eviction were also that the letters that had been exchanged between the two parties did not constitute a valid lease agreement and as such they could not be bound by those letters as constituting a lease agreement.

At the trial, Mr M Jivan the Director of Athlone, gave evidence on the plaintiff's behalf. His evidence essentially stated the circumstances under which Athlone had come to lease out the property. He highlighted that the letter written by CAG on 24 May and the response in writing by Athlone on 1 June 2013, encapsulated the agreement between them. According to him the lease was therefore not an oral lease. He was also emphatic that the

[1] The premises were said to be in violation of the following by –laws: Harare (Licensed Premises) by laws 1976: Harare (Food Hygiene) By-Laws 1975.

letter written by the City of Harare to CAG had never been availed to him and that he was seeing it for the first time in court. He was also of the view that the building had no defects as it does have a toilet and that if more toilets are needed for CAG's line of business, then it was up them to install them. He said that even assuming that CAG believed that Athlone should pay, then it was still their responsibility to avail the plans and costs of the proposed changes, which they had not done. He also emphasised that when Pluplon initially occupied the premises, there was no milling business, his point being that it was not as if he had let out a milling business in the initial instance. He said what he had let out to Pluplon were premises.

The court was availed with copies of text message between the directors to the two companies as part of plaintiff's evidence. The text messages also show numerous attempts by Athlone's directors to follow up arrear rentals. They also show attempts to meet with CAG directors. One message in particular dated 11 November 2014, from Mr Gura on behalf of CAG, indicated that he wished to discuss the issue of the city council's refusal to grant an operating licence because of the issue of toilets and water. The meeting was cancelled by Mr Gura.

Mr Ronald Chiwundura who gave evidence on behalf of the defendant, confirmed that the premises had been taken over with effect from 1 June 2013. His version was that when the licence under which they were operating expired, CAG had informed Athlone of the city council's requirements since they could not alter the lessor's building. He said that Athlone had indicated that it was CAG's responsibility to effect the changes including drilling a borehole for water.[2] He said they had to stop operations because of these short-comings. Since they had taken over an operational business, he said that they had assumed that the premises were suited for their purpose. His evidence was also that the equipment fitted for milling is extremely heavy and would cause damage to both the equipment and to the building were it to be removed.

In the context of the facts as whole, it was argued by Mr *Kuhuni* on behalf of Athlone that all elements of a lease were satisfied namely; to let the use of ascertained property at a fixed rent. He highlighted that CAG's own letter was specific in terms of the property it sought to rent and the amount it wished to pay. He asserted that CAG had no legal basis for its failure to pay rent and could not use Athlone's failure to effect improvements as a basis for not doing so.

[2] At the time they was also no water as City council had closed water due to unpaid bills.

Mr *Kuhuni* further argued that legally CAG could not have been a statutory tenant since in terms of SI 676 of 1983, the expectation is that such a tenant continues to pay rent and perform all conditions of the lease. This was said not to be the case in CAG's instance as they had not paid rent for over eighteen months. He further argued that no evidence had been led to support the counter claim for lost profits when, from case law, such evidence is necessary.[3]

Mr *Chivhizhe* who represented CAG argued that the letter did not constitute a lease as it referred to "our discussion" as opposed to the letter sent by CAG on 24 May 2013. His position was that it was the discussions rather than the letter which formed the basis of the lease. He also asserted that the letter of 1st June was defective as a lease because it did not describe the property, nor state the rent payable. Referring to a standard lease agreement was said to have created the impression that a lease was to follow later since the lease with Pluplon had terminated. The gist of his argument was therefore that there was an oral agreement. He also contended that what was leased to CAG were milling premises and that there was an obligation to place the leased premises in a condition fit for the purpose they were to be used. [4] The case of *Harlin Properties (Pty) Ltd & Anor* v *Los Angeles Hotel (Pty) Ltd*[5] *Phillipson* v *Bahadur*[6]*; Mudukuti* v *FCM Motors (Pvt) Ltd*[7] *and Chinyerere* v *Fraser NO* were cited in support of the contention that there was an implied term in the agreement to lease the premises in a satisfactory condition.[8] He therefore claimed that the parties would not have entered into an agreement in the full knowledge that CAG would not be allowed to carry out its milling business. He also argued that Athlone had not disclosed the defects mentioned in the City of Harare letter dated 22 January 2014 which he said it should have known as it had already housed a previous tenant. CAG's position was therefore that Athlone should not be allowed to claim arrear rentals in respect of the period for which it was impossible for it to operate owing to plaintiff's breach in failing to put the property in a condition reasonably satisfactory for CAG to legally operate a milling plant. He also argued that the denial of the licence was a supervening impossibility that terminated the lease agreement. As such he argued that Athlone should not claim rentals from 22 January 2014 as the lease had

[3] The case of *Mining Industry Pension Fund* v *DAB Marketing (Pvt) ltd SC 25-12* was cited in support of this contention.
[4] Counsel relied on AJ Kerr., the law of lease (2nd edition) (Butterworths 1976 at p51 for this argument.
[5] 1962 (3) SA 143 (AD)
[6] *1956 (1) SA 83 (SR) at p 91-92*
[7] *2007 (1) ZLR 183 (H)*
[8] *1994 (2) ZLR 234 (H) at p 247 C-E*

terminated by virtue of a supervening impossibility. He further argued that the immovable property had become attached to the property. In terms of the counterclaim the key argument was that the loss had been sustained because of the failure by CAG to put the premises in usable condition for the purposes for which they were let.

Athlone's counter argument in response was that CAG bought milling equipment worth over $800 000.00 and that as diligent business people, it was their duty to conduct their own due diligence test to establish that all conditions and laws necessary for them to run their business were in place. It was denied that there had been a supervening impossibility or that the property could not be removed from the premises.

The issues referred to trial in the joint PTC minute were as captured as follows:

1. Whether or not the plaintiff misrepresented to the defendant that the property had adequate facilities suitable for the granting of an operating licence and a factory licence.
2. Whether or not the defendant is indebted to the plaintiff in the sum of US$40 000.00 as arrear rentals for the period May 2014 to December 2014 and operating costs in the sum of $7140.00.
3. Is defendant liable for holding over damages in the sum of $5 500.00 per month and all operating costs of the premises from the 1st of January 2015 until defendant vacates the premises?
4. Whether defendant is liable to pay interest at the rate of 5% per annum on the sums claimed from the 9th of December 2014 to date of payment in full.
5. Whether or not plaintiff is liable to defendant in damages as claimed in the claim in reconvention?
6. What was the nature of the lease agreement?
7. Is plaintiff entitled to an order for eviction?

LEGAL ANALYSIS

What was the nature of the lease agreement?

The first issue for decision is whether there was an oral or a written lease agreement. In my view the wording of the letter written on 1st of June makes it clear that it was confirming a tenancy and that it goes on to set out the conditions of that tenancy. Furthermore, it is signed by representatives of both parties namely Athlone as the lessor and CAG as the lessee. The fact that it alludes to discussions and not to the letter of the 24th of May is neither here nor there. It is self-evident from the parties own evidence that the discussions could only have been about the letter of the 24th May and the offers made therein. To argue that the failure to mention the letter is an indicator that the letter of 1st of June was totally unconnected makes little sense and is simply indicative of clutching at straws.

Whether plaintiff misrepresented to the defendant?

CAG as lessee relied on the case of *Philipson* v *Bahadur*[9] for its standpoint that the common law obligation which rests on a landlord to deliver premises in a condition fit for the purposes for which they are let, extends to fulfilling statutory requirements. In that case premises had been let for purposes of running a butchery at a time when certain by laws had been promulgated a few months prior to the lease. The by-laws clearly set out specific requirements, which were imperative, for running a butchery. Even though the lessor had not been aware of the changes at the time of making the lease, because he had specifically let out the premises as a butchery, it was held that it was indeed his obligation to effect mandated changes if the butchers shop was to be run legally and if he wished to keep the contract alive and to recover rent. It was specifically stated in *Phillipson* case that it would be unusual for a tenant to take on the burden of so doing without some agreement as to how he should be compensated for the outlay.[10] The lessor had tried to argue that as the lessor had renewed the lease with full knowledge of the municipal requirements, the obligation was now upon him to effect the necessary repairs. It is this argument of placing the burden on the lessee that the court rejected. The lessor had also tried to hold the lessee liable for rental for the duration of the lease. It is again this argument which the court rejected including on appeal.[11] The case must therefore be understood in this context.

The factual situation in the case before me is also significantly different in that CAG took over the lease of a milling company that was operating on the very same premises under a valid licence. Nothing was placed before this court to suggest that the premises had hitherto been deemed unsuitable or that they had failed to meet the legal requirements. It is therefore not as if the Athlone failed to give CAG premises that were fit for the purposes for which they were let. It is certainly not an unreasonable expectation on the part of a lessee to expect that the property should be fit for the purpose for which it has been leased. To the extent the lessor was informed in the letter of 24 May the purposes for which the premises were required and to the extent the lessee replied confirming the tenancy on 1 June 2013, it is reasonable to conclude that the lessor warranted that they were fit for the purpose and were of suitable quality for the purposes intended. Materially, at the time that the lease agreement was entered into the lessee was able to use the premises for milling purposes until the licence it

[9] 1956 (1) SA 83 SR
[10] Supra at p 91
[11] See Bahadur v Phillipson 1956 (4) SA 638 (F C)

was using expired. The circumstances under which Pluplon had managed to get a licence for a milling business in the same premises that were later found to be unsatisfactory for the purpose, was not explained. Significantly also, CAG purchased a milling plant from Pluplon not from the Athlone. In other words, it was not Athlone that sold it a milling plant but Pluplon. What Athlone had initially leased to Pluplon were the premises upon which the lessee at the time was effectively conducting a milling business under licence.

What is significantly in favour of the plaintiff in finding that there was no misrepresentation is that there was indeed an ongoing milling business being legitimately conducted in the same premises at the time. Furthermore, there was no evidence placed before this court that the lessee had ever complained prior to the Municipality's letter of any shortcomings in the premise at the time that it took occupation. This is clearly not a case where the lessor put out that the premise were suitable when they were not.

In *Bayley* v *Harwood*[12] where the lessee had cancelled their lease when the lessor refused to carry out alterations and additions which were required by a licensing authority to the leased premises before the licences could be renewed, it was held that there was no **duty** upon the lessor at common law to make structural alterations. In other words, under circumstances where the lessor has refused to effect structural improvements, the lessee is not entitled to an action for breach of contract. The point here is that if the lessor wishes to hold the lessee to the lease then it is the lessor who should effect the structural changes that would enable the lessee to remain on the premises. Whilst recognising the landlord's duty to maintain the premises for purposes which they were let, the duty was not regarded in the Bayley case as extending to the making of structural alterations or improvements required by a licensing authority for the grant or renewal of a licence.[13]

I am unable to find that the lessor in any way misrepresented to the defendant the suitability of the premises for the purposes for which they were let.

Whether or not the defendant is liable for the sums owing?

The issue here is whether the lessee has a right to withhold rent and all sums owing on account of what it perceives as the landlord's failure to effect the structural changes. The lessee's remedy, once the landlord made it clear that it was not prepared to effect the alterations, was for it to cancel the lease and quit the premises so as not to incur any further

[12] 1953 (3) SA 239 (T). See also Bayley v Harwood 1954 (3) SA 498 (A)
[13] Supra at p 242H -243A where the case of Poynton v Cran 1910 AD 205 at p221 was cited as authority in this regard.

rent obligations. If a lessee chooses to remain in occupation as a result of the lessor's failure to address structural defects that would enable them to obtain a licence, the lessee is liable for rent. Liability for rent terminates on actually quitting the premises including removal of its property.[14]

I therefore find that the lessee is indebted to the lessee for arrear rentals for the period May 2014 to December 2014. Furthermore, the lessee is also liable for holding over damages and all operating costs of the premises from 1 January 2015 until vacation of the premises. Interest at the rate of 5% per annum on the sums claimed from 9 December 2014 to date of payment in full is equally justified.

Whether plaintiff is liable to defendant in damages as claimed the claim in reconvention?

Having found that there was no misrepresentation and that the lessor was not in breach of any lease condition by failing to effect the structural improvements, there can be no basis for finding the lessor liable at all for the damages in reconvention. I am in full agreement with the lessor that it was the duty of the lessee in purchasing the plant to ensure that every detail was in order and to have a full understanding of what would be required to run such a business by the relevant business authorities.

Whether the plaintiff is entitled to an order for eviction?

The plaintiff is entitled to an order for eviction on the basis of breaching the lease agreement by its failure to pay rent. Furthermore, as the evidence presented also showed that the equipment can be dismantled, the lessee should leave the premises. The lessee of its own accord asked for six months when it entered into the lease agreement precisely to allow it sufficient time to remove its equipment should it need to. It makes no sense having been the author of this clause to turn around and argue that the machinery is now part of the structure and that removing it would destroy the building. CAG has had more than sufficient time to remove its machinery from the premises as it has known that Athlone was not prepared to effect the improvements in question. Costs have been sought on a higher scale. I do think that to a large extent CAG's conduct has been unreasonable and reprehensible by not moving out of the premises well knowing that the lessor's standpoint that he would not effect the improvements under the circumstances. Bringing a dispassionate mind to bear on the dispute

[14] See *Bourbon –Leftley v Turner 1953 (2) SA 104 (C)*

would have revealed that in the absence of the landlord's cooperation in incurring added expenses, vacating the premises was the only solution to cutting its losses.

Accordingly judgment is ordered for the plaintiff as follows:

1. Payment of the sum of arrear rentals for the period May 2014 to December 2014 in the sum of $40 000.00.
2. Payment of a sum of $5 500.00 for each month of continued occupation from the 1st of January 2015 until the date defendant vacates the property.
3. Payment of $ 7140.00 being operating costs and any further operating costs incurred due to defendant from the 1st of January 2015 to the date of ejectment.
4. Interest on the above sums at 5% per annum from the 9th of December 2014 to date of full payment.
5. Cancellation of the lease agreement between plaintiff and defendant.
6. Ejectment of defendant and all those claiming rights through it from plaintiff's premises.
7. Costs of suit on a higher scale.

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