

PARIRENYATWA GROUP OF HOSPITALS
versus
DEFINE HORIZONS (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 26 and 27 October 2016 & 25 January 2017

Civil Trial

T Tandi, for the plaintiff
G.W Gurimo, for the defendant

FOROMA J: This is a matter in which Parirenyatwa Group of Hospitals sued Define Horizons (Private) Limited for:

- (a) an order confirming the cancellation of a lease agreement between the parties.
- (b) an order for the ejectment of the defendant and all those claiming occupation through it from Parirenyatwa Hospital Superrette.
- (c) payment of US\$1 600.00 per month reckoned from 1 March 2015 to date the defendant vacates the premise
- (d) costs of suit on an attorney and client scale if the defendant opposes this action.

Defendant defended plaintiff's claim

The plaintiff's claim arises from a cancellation of a lease agreement which the plaintiff entered into with the defendant in respect of certain commercial premises at Parirenyatwa Hospital Mazowe Street Harare known as the Superrette and Take Away. The plaintiff claims that it cancelled the said lease agreement pursuant to its exercise of its right to terminate the contract prematurely in terms of the lease agreement. The clause plaintiff relied in is number 19 which reads as follows:

“Nineteenth : the lessor reserves the right to terminate the contract pre-maturely for the purpose of carrying out his business provided six months notice to vacate the aforesaid premises is provided the lessor shall compensate on an agreed pro-rata basis for the costs of refurbishments and other developments that the lessee would have incurred.”

The plaintiff and the defendant (hereinafter referred to as “the parties”) entered into the lease agreement in August 2010 after the defendant had successfully won a tender as the highest bidder in a tender floated for identifying a suitably qualified company to operate a Superette and a fast food outlet at Parirenyatwa Hospital. It was a condition of the tender that the successful bidder would enter into a 3 year lease contract (renewable) with Parirenyatwa Hospital on terms acceptable to Parirenyatwa Hospital. A copy of the lease agreement was attached to the bundle of documents and its terms and conditions were common cause.

As Parirenyatwa Group of Hospitals is a public enterprise it is required in terms of s 34 of the Procurement Regulations to acquire supplies or services following the provisions of the Procurement Act. It is important to note that despite its failure to win the original tender Red Cross Society of Zimbabwe remained anxious to operate the Superette and Take Away. It therefore persisted with negotiations with the authorities at Parirenyatwa so that it could be granted the opportunity to run that business.

As a result of the negotiations with Parirenyatwa authorities Red Cross succeeded in persuading Parirenyatwa to grant it the lease agreement to operate the Superette and Take Away which the defendant was operating in terms of a successful tender award.

It is not clear though how the Red Cross managed to procure the lease as no tender could have been floated in respect of premises lawfully leased to the defendant. After agreeing to grant the Red Cross Society the opportunity to run the Superette and Take Away aforesaid the plaintiff suddenly faced a formidable challenge i.e. to give vacant possession of the Superette and Take Away occupied by the defendant to the Red Cross Society. Several meetings to try and persuade the defendant to voluntarily vacate the premises in question were held to no avail as the defendant understandably would not budge. The defendant’s position could well be understood as the plaintiff was seeking to pre-maturely terminate the defendant’s second lease tenure in favour of a candidate that had lost the initial tender. Determined to secure possession of the premises occupied by the defendant for the Red Cross the plaintiff wrote a letter notifying the defendant that it should vacate the Superette and Take Away as it had terminated the lease in

order to make way for the Red Cross Society which would run same on a yearly basis. The defendant would have none of this and it sued the plaintiff and Red Cross Society for an order declaring the purported cancellation of the lease unlawful and null and void. The defendant's case was conceded by both the plaintiff and The Red Cross Society of Zimbabwe but the plaintiff did not give up. It sought to cancel the lease agreement with the defendant by resorting to its right to pre-maturely terminate the lease agreement under the lease agreement as indicated herein above.

In its effort to terminate the lease agreement with the defendant this time around the plaintiff addressed a letter dated 18 August 2014 to the defendant partly reproduced below:

“Attention Mr Goto

Re: Termination of Lease

Reference is made to our lease agreement dated 3 August 2010.

We hereby advise that we intend to use the premises accordingly as contemplated by clause 19 of the lease agreement, we hereby give you six months notice to vacate the Superette and Take Away. The notice shall be effective from the 1st September 2014 terminating on 28/02/2015. Put differently you are advised to vacate the premises on or before the 1st March 2015.”

The said letter was signed by E Mundenda Director of Operations on behalf of Group Chief executive and copied to The Secretary General - Red Cross Society of Zimbabwe Mr M. Phiri among others demonstrating in no uncertain terms that the defendant was being ejected to make way for the Red Cross Society of Zimbabwe despite the earlier abortive attempt. The defendant would not have any of this either. It resisted and pointed to the plaintiff's *mala fides*. The defendant made it clear that it would not move out. This much is made clear in the defendant's plea and summary of evidence. The defendant's attitude resulted in the plaintiff suing the defendant for an order declaring the lease agreement cancelled and consequently the defendant's ejection.

At the pre-trial conference the issues were agreed to be the following:

- 1.1 whether there was a valid lease agreement between the parties
- 1.2 whether the defendant is a statutory tenant
- 1.3 whether the lease agreement entered into between the plaintiff and the defendant was terminated lawfully.

1.4 Whether the defendant and all those claiming through it should be evicted from the plaintiff's premises.

At the trial the plaintiff called one Costern Zvoushe as the only plaintiff's witness. He is the plaintiff's Chief Buyer and he testified effectively that the plaintiff had terminated its lease agreement with the defendant in terms of letter quoted above and produced as exh I. He confirmed that the lease agreement originally entered into in 2010 was renewed on essentially the same terms and conditions before its expiry. Although the parties did not sign a new agreement they agreed to be bound by the same terms and conditions of the expiring 2010 lease agreement. This much was common cause between the plaintiff and the defendant. In fact it will be noticed that issue number 1 of the P.T.C issues was never an issue as no cancellation as sought to be confirmed by the plaintiff would have been competent if no valid lease agreement existed. Of significance is the concession by Mr Zvoushe of the plaintiff that initially the plaintiff wanted to terminate the lease agreement in order to give the premises to Red Cross but they no longer wanted to do this as they were advised that it was in violation of the Procurement Regulations. Mr Zvoushe did not indicate when the plaintiff abandoned its reason for seeking to cancel the agreement and give the premises to Red Cross. It is significant to note that the attempt was only temporarily abandoned only because the defendant had sued for a declaratory order of nullity. I do not accept the testimony of Zvoushe that the plaintiff ever abandoned its intention to wrestle the premises from the defendant in order to give same to Red Cross as this is clear from its letter of 18 August 2014 aforesaid.

Mr Zvoushe further testified that the lease agreement had expired at the end of June 2015 by effluxion of time thus the defendant could not remain in occupation at the expiry of the lease agreement without a renewal of the lease agreement as that would be illegal in terms of s 26 of the Procurement Regulations. The expiry of the lease agreement thus provided an additional aground for ejecting the defendant.

The plaintiffs argument namely that the lease agreement had expired by effluxion of time is self-defeating. If the lease agreement was validly cancelled through a pre-mature termination in terms of clause 19 of the lease agreement per notice dated 18 August 2014 what was there that remained running to effluxion? The plaintiff surely cannot have his cake and eat it.

The issue remaining for determination is whether the plaintiff validly cancelled the lease agreement with the defendant.

While it is true that the plaintiff had the right to pre-maturely cancel the lease agreement the exercise of such right was conditional upon the following conditions – (1) that the plaintiff wanted to run its business on the same premises and (2) it would have had to compensate the defendant on an agreed pro-rata basis for the costs of refurbishments and other developments that the lessee would have incurred.

One of the positive attributes of the Procurement Legislation (Procurement Act and Regulations) is to ensure transparency in business transactions involving public enterprises and consequently the prevention of corruption. A proper observance of the procedures stipulated in the procurement processes as provided in the legislation results in quality control and assurance which is beneficial to the State. Quite why a party which has lost competition through the tender system should be allowed to come through the back door and be allowed to wrestle the contract from a successful bidder is not easy to understand. It defeats the very *sine qua non* of the procurement procedures as provided for by the Procurement legislation. This should not be allowed to happen. Clearly plaintiff could not hide the fact that in its attempt to pre-maturely cancel the defendant's lease it was motivated by the desire to serve not its own interests but those of the Red Cross. The provision by the plaintiff of Superette and Take Away services from the premises occupied by the defendant at Parirenyatwa Hospital was never the real reason for seeking to pre-maturely terminate the lease agreement. The plaintiff shot itself in the foot by copying its notice of termination dated 18 August 2014 to Red Cross Society of Zimbabwe. It thus could not conceal its real intentions in pre-maturely terminating the lease given that recently it had made an abortive attempt to wrestle the premises from the defendant in order to give same to Red Cross Society of Zimbabwe. This court cannot countenance this flagrant and apparent fraud being perpetrated on one party by another purporting to exercise one's rights in terms of a lease agreement. To permit this would be to sanitise and condone day light robbery.

Although the defendant conceded that the Commercial Premises (Rent) Regulations SI 676 of 1983 were not applicable *in casu* by reason of their exclusion in terms of s 2 (2) of the said regulations, it would be grossly inequitable in the circumstances to permit Red Cross with

the assistance of the plaintiff to literally snatch well deserved and lawfully earned bread from the defendant's mouth.

Expiry of the lease agreement through effluxion of time

The life of the lease agreement between the plaintiff and the defendants was due to expire on 30 June 2016. The plaintiff sought to argue that continued occupation and trade from the premises post the lease period would be illegal in terms of s 26 of the Procurement Regulations. It has to be accepted that the parties renewed the lease agreement agreeing to be bound by the terms and condition of the expiring 2010 lease for the renewal period. That means the renewal provision was carried forward into the agreement operative for the renewal period under review. The onus is therefore upon the plaintiff to flight a new tender to enable the defendant to regularise its position. The court is aware that the defendant argued that the new agreement for the new lease period (sought to be pre-maturely terminated) provided for a right of first refusal at renewal. Although the alleged agreement is said to have been signed by both parties this was disputed by the plaintiff and no such lease agreement was produced in court and defendants' witness Mr Goto indicated that only one copy of that lease existed and it was kept by the plaintiff.

The defendant did not attempt to compel the plaintiff to produce the said document in terms of Order 24 r 162 of the rules of this court pertaining to discovery. I am accordingly unable to find that such agreement was proved to exist on a balance of probabilities.

The plaintiff argued that the expiry of the lease agreement on account of effluxion of time on 30 June 2016 provided an additional ground for seeking defendant's ejectment – *Mitlda v Ndudzo* 200 (1) ZLR 710. I am not persuaded to exercise my discretion in favour of the plaintiff as sought to be argued (by ejecting defendant) on that score especially when no effort was made to move the court to grant an appropriate amendment to its claim since the expiry of the lease on 30 June 2016. More so given the plaintiff's attempt to defraud the defendant who is an entirely innocent party.

The plaintiff also cited the case of *Tipaizi v Bulawayo Municipality* 1923 AD 317 at 325 in support of the proposition that no notice is required for termination of a lease that is due to expire by effluxion of time.

It has been pointed out above that contrary to the plaintiff's view that the plaintiff has two grounds for evicting the defendant the two are mutually exclusive. The case is therefore distinguishable.

In the circumstances, the plaintiff's case must fail. It is therefore ordered that it be and is hereby dismissed with costs.

Kantor & Immerman, plaintiff's legal practitioners
Ngarava Moyo & Chikono, defendant's legal practitioners