

TIMOTHY NHAMO NYAMWEDA
versus
INNOCENT BENZA
and
PATIENCE BENZA
and
HERENTALS GROUP OF SCHOOLS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 22 March & 9 May 2018

Opposed Application

P Manhibi, for applicant
TG Makanza, for respondents

TAGU J: The applicant issued summons on the 30th of October 2017 against the respondents claiming orders confirming the cancellation of the lease agreement entered between the parties, ejectment of respondents and all those claiming occupation through them from the premises at No. 174 Munondo Street, Ruwa Industrial Park, Harare, payment of the arrear electricity bill calculated from the 1st of May 2016 to date of ejectment, payment of the arrear water and rates levies calculated from the 1st of May 2016 to date of ejectment, payment of arrear rentals amounting to US\$5 600.00, payment of holding over damages of US\$40.00 a day calculated from the 1st of November 2017 to the day of ejectment and costs of suit at the legal practitioner and client scale.

The respondents entered an appearance to defend the claims on the 13th of November 2017. This prompted the applicant to file this application for summary judgment on the basis that the respondents do not have a *bona fide* defence to the claims but only entered an appearance to defend for the purposes of postponing the inevitable while they continued to occupy the applicant's premises without paying rentals or bills and rates in that from December 2016 to 31st August 2017 they accrued rental shortfalls of US\$4 000.00, September and October 2017 they accrued arrear rentals of US\$2 400.00, Water and Rates Bill stood at US\$5 756.74, Electricity Bill stood at US\$2

365.35 making a total of US\$14 522.09 as well as holding over damages at the rate of US\$40.00 a day from the 1st of November 2017.

In their opposing affidavits the respondents admitted that indeed the first and second respondents entered into a lease agreement with the applicant. They however, questioned why the third respondent was made a party to these proceedings. As regards the claims the respondents denied that they had been paying US\$800.00 per month instead of the agreed US\$1 200.00 per month hence breaching the agreement. They averred that the parties reached a temporary novation of the verbal agreement in terms of which respondents would pay US\$2 400.00 cash as rent covering three months in advance. In turn the applicant undertook to discount US\$1 200.00 from the three months that would have been paid in advance as a token of his appreciation for the cash payments instead of bank transfers. However, due to cash shortages they engaged the applicant so that the applicant provides them with the bank account but the applicant refused to give them the bank account hence the cause of action was self-created.

The applicant disputed the issue of novation and insisted that the respondents owed him rentals as stated above.

The issues to be decided are whether or not the third respondent was properly cited, whether or not the respondents are in arrears as stated by the applicant, whether or not there was any novation and whether or not the applicant met the requirements for a summary judgment to be granted.

As regards the first issue the undisputed facts are that the first respondent is the Managing Director of Herentals Group of Colleges cited as the third respondent. It is not in dispute that Herentals Group of Schools operate from rented premises at No. 174 Munondo Street, Ruwa Industrial Park, Harare. These are the premises in question. In my view the third respondent was properly cited.

As regards the second issued from the respondents' opposing affidavit they conceded that in terms of the lease agreement they were to pay the rentals as stated in the lease agreement which they had been paying in cash until they faced cash shortages. They then did not pay due to the fact that the applicant did not supply them with bank details into which they were to transfer the money. Clause 6a stipulates how the rentals were to be paid. It reads as follows-

“All rentals shall be delivered by the lessee to the Lessor in advance and on the 7th day of each month in respect of which they fall due. In the event that the seventh day of such

month is a Saturday, Sunday or a Holiday, the Rent shall be delivered on the preceeding working -day. **In addition, the Rent shall be delivered by the Lessee at such place in Harare as the Lessors may from time to time direct in writing.**” (My emphasis)

The reading of this clause clearly suggests that the Rent was supposed to be delivered in cash by the Lessee at such place in Harare as the Lessors may from time to time direct in writing. In my view if the lessors did not direct or refused to direct that the Rent be transferred into a bank account that was not provided for in the lease agreement. Therefor it can safely be said that the respondents were and are still in arrears.

On the issue of novation the applicant denied that. I have not been convinced that there was any novation because there was no old agreement to fall back to. The parties were bound by their initial agreement.

THE LAW

An application for Summary judgment is made in terms of Order 10 r 64 (1) of the High Court Rules 1971 which states that-

“Where the defendant has entered appearance to a summons, the plaintiff may at any time before the Pre-Trial Conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.”

The requirements for lack of a bona fide defence for a successful application for summary judgment was enunciated in the case of *Mercantile Bank Ltd v Star Pomer CC And Anor* 2003 (3) SA 309 where it was said-

“The defendant must therefore be condemned to pay plaintiff’s claim unless the defendant can show the existence of a triable issue based upon a dispute which is bona fide in nature, to have been contrived for the purpose of temporizing. The procedure casts upon the defendant the onus of disclosing a defence which is sound in law and which is based on apparently bona fide proportions of fact.”

In casu, the founding affidavit was deposed to by Timothy N. Nyamweda who is lessor of the premises in question and the plaintiff in the main matter. The affidavits clearly sets out the facts that show that the respondents breached the lease agreement by not paying rentals and utility bills. To support his assertions the electricity bill, water bill and levy statements were attached as annexures revealing the arrears from the time the respondents took occupation. The respondents could not deny that they have materially breached the lease agreement as they have not paid rentals

in full for 10 months, or paid rentals at all from September to date. The same applied to water, rates, levy and electricity bills.

As regards the holding over damages the applicant is claiming US\$40. 00 per day. In terms of clauses 3 and 6b of the lease agreement the lessee was to pay US\$1 200.00 per month payable in advance on the 7th day of each month. In my view the applicant lawfully claimed holding over damages of US\$40.00 per day. A figure of US\$40.00 is very conservative and reasonable given that a month has at least 30 days. The application for summary judgment therefore should be granted with the relief sought without the applicants incurring the expense and inconvenience of a trial. The applicant met all the requirements for an application for summary judgment.

IT IS ORDERED THAT

1. Summary judgment be and is hereby entered for the applicant for
 - a) Confirmation of the cancellation of the lease agreement between the parties;
 - b) Ejection of the respondents and all those in occupation of the premises through them known as NO. 174 Mundondo Street, Ruwa Industrial Park, Harare;
 - c) Payment of arrear rentals in the sum of US\$5 600.00,
 - d) Payment of arrear Electricity Bills calculated from the 1st of May 2016 to date of ejection.
 - e) Payment of the arrear water and rates levies calculated from the 1st of May 2016 to date of ejection;
 - f) Holding over damages in the sum of US\$40.00 per day calculated from the 1st of November 2017 to day of ejection.
 - g) Costs of suit on legal practitioner and client scale.

Mushonga Mutsvairo & Associates, applicant's legal practitioners
Messrs Nyamayaro Makanza Bakasa, defendants' legal practitioners