

ANDREW MURWISI
versus
HARVEST GLOBAL (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 25 June & 3 July 2019

Civil Trial

M Mavhiringidze, for the plaintiff
P Kawonde, for the defendant

MATHONSI J: The plaintiff seeks from the defendant payment of the sum of US\$32 000 together with interest and costs of suit which he says represents arrear rentals due by the defendant in respect of a lease agreement signed by the parties on 18 January 2017. In terms of that lease agreement, the plaintiff leased to the defendant business premises known as No. 20 Nyanga Road, Rusape for use as a betting shop and offices. The lease was for a fixed period of about one year from 18 January 2017 to 28 February 2018.

In his declaration the plaintiff made the averments that indeed the lease was to terminate on 28 February 2018 and that the rent was \$4 000 per month but did not plead that in fact the rent for the entire duration of the lease period in the sum of \$48 000 had been paid upon signing the agreement. Instead the plaintiff pleaded that the defendant took occupation of the premises and is still in such occupation but has failed to pay the agreed rent for the period from March to November 2018 giving rise to rent arrears of \$32 000.

The defendant entered appearance to defend and proceeded to file a plea and counter-claim. It averred that although the parties entered into the lease agreement as alleged, it never took physical occupation of the premises because doing so was predicated upon obtaining an operating licence, the authorized use in terms of the lease agreement having been a betting shop and offices. The defendant further averred that advance rent for the duration period of 12 months had to be paid in order to allow for the time to apply for and obtain the shop licence. After failing to secure the shop licence, the plaintiff was informed that the lease would not be renewed at its expiration.

The lease agreement having expired and not having been renewed, no rent is due to the plaintiff and as such the claim should be dismissed.

The defendant filed a counter claim for payment of the sum of US\$8 451 paid to the plaintiff as a refundable good tenancy deposit equivalent to two months rent which money was to be expended on rectifying any damage, effecting repairs, renovations and restoring the premises to their original condition. As the defendant never really took occupation it is entitled to the refund of the deposit. To the counterclaim the plaintiff retorted that it was a term of the agreement that he would be allowed to set off the good tenancy deposit against any outstanding rentals. Given that the defendant is in rent arrears, the deposit has been used to set off part of the arrears and the defendant is not entitled to anything.

The plaintiff further pleaded that the defendant did not surrender the keys to the premises and for that reason it is regarded as still being in occupation of the premises. Rent continues to accrue as a result. At the pre-trial conference held by the parties before a judge the defendant admitted that it did not give any written notice in terms of the lease agreement and the parties agreed to refer the following issues to trial.

1. Whether the defendant owes the plaintiff the sum of \$32 000 in arrear rent.
2. Whether the defendant is entitled to a refund of the deposit of \$8 451.

It was the plaintiff's evidence that after the parties signed the lease agreement produced in court, he immediately demanded rent in advance for the duration of the period of lease. He stated that the parties specifically agreed that the defendant would make annual rent payments. He was however paid the first payment in kind, that is in the form of a motor vehicle. In that regard he produced a copy of an agreement dated 30 January 2017 for the sale of a Toyota Land cruiser motor vehicle sold to him at a price of \$87 000. He also produced a schedule of payment for that date showing that of the purchase price of \$87 000, \$48 000 was appropriated as rent for the premises in terms of the lease agreement.

That would mean that the rent was indeed \$4 000 per month. The schedule in question which was signed by himself and Bruce Taruvunga representing the defendant shows that the plaintiff was required to pay to the defendant a sum of \$27 000 in cash and a further \$12 000 by electronic transfer bringing the total to \$87 000. The witness stated that the lease agreement did not terminate by effluxion of time even though it was for a fixed term. According to him, in terms

of clause 2.2 of the lease agreement, the defendant was required, at least 3 calendar months before the last day of the lease period, to advise him in writing of his intention not to renew the lease. If the defendant did not do so, then the lease would continue to subsist in terms of clause 2.3. A converse application of procedure, as it were.

According to the plaintiff, the defendant did not give written notice of termination of the lease and as such clause 2.3 kicked in meaning that the lease continued and the defendant is liable to pay rent for the period from March to November 2018 when he issued summons. The rent for that period of 9 months is \$36 000. He applied the good tenancy deposit of \$4000 (not \$8 451 as claimed by the defendant) to the arrear rent leaving the balance of \$32 000 being claimed. The plaintiff made an admission that he received a sum of \$4 000 from the defendant as good tenancy deposit and disputed that what was paid was \$8 451 as claimed by the defendant.

He went on to say that when he issued summons against the defendant on 29 November 2018 he did not seek an eviction order or the return of the keys even though the defendant still had the keys and was in occupation because all he wanted were rent arrears. The lease continued thereafter until 25 January 2019 when his legal practitioners wrote a letter to the defendant which was delivered at the address of its legal practitioners, cancelling the lease agreement and demanding the return of the keys.

When later asked to explain why he did not demand the return of the keys and eviction in the summons, the plaintiff said he is in fact claiming the return of the keys but did not explain why eviction was not sought against a defaulting tenant. His evidence is to the effect that the defendant is no longer in occupation of the premises and all he wants now is the return of the keys. He does not know when the defendant vacated but knows that he has vacated but kept the keys. He did not explain why holding over damages were not sought against the defendant if it only vacated after the termination letter of 25 January 2019. The entire evidence of the plaintiff does not make sense and appears couched in a way to take advantage of the provisions of clause 2.2 and 2.3 of the expired lease agreement while ignoring the situation on the ground which situation chimes neatly with the defendant's version.

According to Bruce Nhamo Taruvenga, a director of the defendant company the underlying intention of the parties was that the premises in question would be customized and utilized solely as a betting shop. That is consistent with clause 1.4 of the agreement which reads:

“1.4 the ‘authorised use’ of the premises is for Betting Shop and Offices.”

It was therefore understood and appreciated by the parties that the defendant would have to apply for a licence to operate a betting shop. It is for that reason that rent was paid in advance for a full year to allow for the licence to be obtained. As a result, the defendant never took occupation as it awaited the grant of a licence. Of course after signing the lease the defendant’s representatives were referred to the plaintiff’s nephew by the name of Binali who is the plaintiff’s point man at the premises. This is so because Binali operated an ecocash tuck shop at the premises.

It is Binali who gave the defendant the keys to the premises (not the plaintiff as he claimed) and it is Binali who showed them around. Even before the expiry of the lease, the plaintiff was made aware of the defendant’s inability to obtain the licence and that the lease would not be renewed for that reason. As the defendant had obtained the keys from the point man, Binali, it surrendered them to him even though the written lease would have required that the defendant deals directly with the plaintiff.

Tarvinga testified that at the commencement of the lease period the defendant had paid \$8451 to the plaintiff as two months good tenancy deposit. This was done in terms of clause 5.1 of the lease agreement. The witness was asked as to why such an odd amount was paid given that the monthly rental was \$4 000-00, 2 months rent \$8 000-00 and clause 1.6 defined the good tenancy deposit as:

“1.6. the deposit is US\$4 000-00 equivalent to one month’s rent.”

His explanation was that the money was paid in kind in the form of a motor vehicle resulting in the defendant making an over payment of \$451-00. That part of Tarvinga’s evidence is unreliable and does not make sense either especially as he admitted signing both the agreement for the sale of the motor vehicle and the schedule of payment produced by the plaintiff. The schedule does not show any over payment of \$451-00.

I shall now proceed to relate to the provisions of the lease agreement which ground the respective claims of the parties. Clause 2 reads:

“2. LEASE

2.1 The Lessor lets to the Lessee who hires the premises for the lease period.

2.2. At least three months prior to the last day of the lease period the Lessee shall advise the Lessor in writing whether-

2.2.1 The Lessee intends to vacate on the termination date in which event a written agreement of renewal shall be entered into by the Lessor and Lessee on such terms as may be agreed.

2.3. If the Lessee fails to give notice as provided in clause 2.2. hereof the Lease will continue from the termination date of the lease or option period on the same terms and conditions other than the rent payable but subject to two months' written notice of termination on either side being given."

Those are the provisions relied upon by the plaintiff in marking an audacious claim for 9 months rentals after the expiry date. For its part, the defendant relies on Clause 5:1 in making the counter-claim. It provides;

"5. DEPOSIT

5.1. The Lessee undertakes to deposit two months' rent with the lessor which deposit may be used at the termination of the Lease or at anytime at their discretion to rectify, repair, renovate and restore the condition of the leased premises or any of its fixtures, fittings, locks, keys and fastenings which may be found to be deficient or missing due to the negligence of the Lessee, the balance or the whole amount of which may be set off against any rental that may be due and owing by the Lessee. The Lessee shall, at all times, maintain a deposit amounting to two months' rent and any additional charges as determined by this lease and any extension thereof. In the event of all or part of the deposit being expended as aforementioned during the currency of this lease or any extension thereof, the Lessee hereby undertakes to remit to the Lessor to make up the deposit to the full amount as herein provided."

Mr *Mavhiringidze* for that plaintiff submitted that the written lease agreement regulates the conduct of the parties and as such their relationship, rights and obligations must be restricted to the four corners of the written agreement. He relied on the parol evidence rule to make the point that no extrinsic evidence may be brought into the picture outside the written agreement. Mr *Kawonde* for the defendant submitted that the plaintiff's approach is a forensic, if not impirical one, which ignores completely not only the reality on the ground but also the conduct of the parties which are consistent with the termination of the agreement by effluxion of time even though no written notice was given in terms of clause 2.2 of the written agreement.

Mr *Mavhiringidze*'s simplistic approach to what is in essence a very complex issue is of course informed by the principle that when a contract has been reduced to writing, the writing becomes the exclusive memorial of the transaction and as such the parties are precluded from resorting to extrinsic evidence to contradict its contents; See *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47 (quoted with approval in *Nhunda v Chiota & Anor* S-28-07; *Johnston v Leal* 1980 (3) SA 927 (A) at 943.

In my view that would be exclusively applied in cases where the matter turns solely on the interpretation of the provisions of the contract where one party insists that a provision in the contract should be applied while the other attempts to introduce another agreement not integrated in the complete written memorial of the parties' written agreement. The situation is slightly different in the present matter in that the defendant does not seek to import extrinsic evidence *per se*. All that the defendant is saying is that the lease agreement terminated because it was never consummated as a result of a supervening impossibility, the failure to obtain an operating licence, and yet the purpose for which the premises were leased was to operate a betting shop.

The plaintiff's case hinges on fictional occupation in the form of keys to the premises which he says were never surrendered to him. The matter then turns on the issue of the keys, which has to be decided on the credibility of witnesses as well as consideration of the parties' conduct, it being critical to have regard to the conduct of the parties where there is an ambiguity, in interpreting their rights. In making that point in *National Railways of Zimbabwe Contributory Pension Fund v National Railways of Zimbabwe* 1984 (1) ZLR 322 (H) at 327 A-B KORSAN J (as he then was) quoted with approval the remarks of FAGAN CJ in *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa & Anor* 1958 (4) SA 571 AD at 632 that:

“The subsequent conduct of the parties to an agreement may afford evidence of a common interpretation of an ambiguous document by both parties to it...and the court would, on satisfactory evidence of such common interpretation by the parties concerned, hold them to it.”

See also *Cone Textiles v TTL Development Corporation* 1979 RLR 114 at 120.

In my view the application of the foregoing legal principles goes a long way in showing how the parties related to clauses 2.2 and 2.3 as well as clause 5.1 of the agreement. According to the plaintiff the lease continued because the defendant did not submit a written notice of its non-renewal 3 months before its expiration and did not surrender the keys thereby giving the defendant fictional occupation until he formally terminated the lease by letter written on 25 January 2019 delivered at Kawonde & Partners in Harare. Delivery of that letter in Harare disregarded clause 13 of the agreement which required all notices to be served on the Lessee at the leased premises. Clearly the parties were in the habit of ignoring the provisions of the agreement because the

defendant also says that he surrendered the keys to Binali at the end of the lease without giving written notice. According to him the parties communicated verbally.

I have said the issue of the surrender of keys is paramount in determining where the truth lies. This is because if indeed the defendant surrendered the keys to Binali in February 2018, there would be no entitlement to rent because fictional occupation falls away. The versions of the parties are mutually destructive and as such the matter turns on the credibility of witnesses. In *Nicoz Diamond Insurance Ltd v Clovgate Elevator Company (Pvt) Ltd* HH 76-18, HUNGWE J dealt with the assessment of the credibility of witness. The following passage is apposite:

“In assessing the credibility of witnesses the court generally is guided by several factors. A range of factors must be taken into account in assessing a witness’s credibility. In *Hees v Nel* 1994 PHF 11 MAHOMED J, had this to say on the subject of assessment of credibility:

‘Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candor, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings.’”

Considering all the factors set out in the above passage, the plaintiff does not fare well at all. I shall demonstrate. Although he claimed that he is the one who handed over the keys to the defendant’s representative and dealt directly with him even when he was claiming arrear rent, he was ambivalent as to what was happening at the premises. He appeared cagey about admitting that the premises were never occupied even though he insisted that he passed through the premises regularly. One would expect that as a person who passed through there regularly not only would he inspect the premises to assess its condition and how it was being used, but he would be forthright as to whether the place was occupied or not.

As a person who was such a stickler to the terms of the agreement one would expect him to inspect the premises and enforce the provisions of clause 5.1 of the agreement if there was any damage arising out of use of the premises. He could not claim that the defendant physically occupied the premises without inspecting the premises for a person who was determined to forfeit the good tenancy deposit. By the same token, the plaintiff would have been expected to enforce

clause 11 of the agreement relating to breach by non-payment of rent “or any portion” of it on due date. It allowed him “forthwith to cancel the lease and re-enter” the premises.

We know that for almost a year after the lease expired, the plaintiff did not cancel the lease agreement, neither did he seek to re-enter the premises. In fact even when he issued summons in November 2018, cancellation of the lease and eviction were not claimed. He only sought payment of what he regarded as arrear rent. A person who presented himself as a strict adherent of the terms of the lease he did not deliver his letter of cancellation in terms of the agreement at the leased premises but somewhere in Harare. Of course he could not do so because he knew the defendant was not in occupation all the time.

It is for that reason that even when he demanded the return of the keys as a window dresser, he never pursued that demand and never incorporated their return to him as part of his claim. In fact when asked if the defendant was still in occupation, the plaintiff stated the defendant was not. As to how this was so, he could only say because he wrote a letter of cancellation while at the same time claiming the defendant still has the keys. This does not make sense because if the defendant still has the keys and the plaintiff has been denied access to the premises, the fictional occupation he relied on to claim arrear rent of 9 months would still apply to this day. Yet there is no claim for holdover damages.

I have no hesitation in rejecting the plaintiff’s version as it is clearly inconsistent, contradictory and contrived. There is no doubt that this lease was never consummated and as such the matter is *sui generis*. When it expired the parties agreed it would not be renewed because the underlying reason for its existence had failed to eventuate. The provisions of clause 2.3 for the extension of its tenure did not kick in because there was nothing to extend. The defendant was not in occupation and the plaintiff contrived the issue of keys in order to find something to stand on. As a result he was an unreliable witness whose credibility flew away when one had regard to his incredible version.

It occurs to me that the plaintiff came up with a fabricated claim, which is inconsistent with the conduct of the parties, for the sole reason to justify retention of the deposit paid. Speaking of the deposit, the defendant also failed to prove an entitlement to \$8 451-00 as refund and appears to have tried to take advantage of the wording of clause 5:1 providing for a 2 months’ rent deposit to claim an amount not due. I tend to agree with Mr *Mavhiringidze* that clause 1.6 providing for a

deposit of \$4 000-00 overrides clause 5.1 because it is in the definition section of the agreement. Even if it was not, the defendant would still not be entitled to the amount claimed because it did not prove that \$8 451-00 was paid.

The defendant's saving grace is the admission made by the plaintiff that he received \$4000-00 as deposit. In terms of s 36 of the Civil Evidence Act [*Chapter 8:01*]:

- “(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.
- (2)
- (3) It shall not be necessary for any party to civil proceedings to disprove any fact admitted on the record of proceedings.”

The plaintiff is liable to refund the \$4000-00 admitted as having been paid as deposit because he failed to lay any legal foundation for its forfeiture.

In the result, it is ordered that:

- (1) The plaintiff's claim is hereby dismissed.
- (2) The defendant's counter-claim is hereby granted in the sum of US\$4000-00 together with interest at the prescribed rate of 5% per annum from 18 December 2018 to date of payment in full.
- (3) The plaintiff shall bear the costs of suit.

Mavhiringidze and Mashanyare, plaintiff's legal practitioners
Kawonde Legal Services, defendant's legal practitioners