

BALVANT PATEL t/a RELIABLE HARDWARE

versus

C.A. ANGELOS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
WAMAMBO J. & ZISENGWE J
MASVINGO 24 JULY, 2020 & 16 SEPTEMBER, 2020

Civil Appeal

Mr J. Chipangura, for the appellant

Mr R. Makausi, for the respondent

ZISENGWE J: This is an appeal against the decision of the Magistrates Court sitting at Masvingo confirming the cancellation of a Lease Agreement between the parties, ejecting the appellant from the leased premises, ordering the payment of holding over damages and costs of suit.

The facts

In 2017 the parties entered into a written a Lease Agreement wherein the respondent agreed to lease out certain commercial premises to the appellant for a monthly rental of \$1 100. It was an express term of the contract that it would subsist for an initial period of one year stretching from 1 May, 2017 to 30 April, 2018.

Conditions for its possible renewal were set out in Clause 2 thereof; which will be dealt with later in this judgment. Pertinently, however, the contract provided that the landlord could terminate it upon the tenant committing any of the acts of breach as set out in Clause 16 of the

General Conditions of Lease – notably for current purposes – the tenant falling into arrears with his rentals.

It would appear that initially the lease would subsist flawlessly until early 2019 when two key developments unfolded which shook the relationship. The first was a request by the respondent for a 60% upward review of the rentals in view of the prevailing economic climate – which request was resisted by the appellant. The other was the appellant falling into arrears with his rental payments.

These events served as a prelude to the total breakdown of the contract leading to its eventual termination by the respondent.

Before so terminating the contract several written communication was exchanged between the parties over the aforementioned developments with no solution seemingly in sight. Things came to a head on 22 March 2019 when the respondent wrote to the appellant terminating the lease. In that letter the respondent cited the fact that respondent had fallen into arrears as the reason for the termination.

It accordingly demanded the appellant to immediately vacate the premises and extinguish his indebtedness in terms of the arrear rentals.

The appellant was not moved. He accused the respondent of hiding behind what it viewed as the arrear rental facade when the real reason for the termination was his refusal to accede to the 60% rental increment proposal. He therefore did not budge. He paid off the outstanding rentals and stayed put.

No doubt irked by what he perceived as appellant's intransigence, respondent issued summons against the former seeking a confirmation of the cancellation of the Lease Agreement and the ejectment of the respondent from the premises among other relief as alluded to above.

The appellant resisted the claim and the matter subsequently proceeded to trial. In that trial one witness testified for either party. For the respondent (as plaintiff) it was one Rodrick Shumbanhete, a Credit and Financial Controller for Great Zimbabwe Realtors (respondent's agents) who testified. The appellant Mr Balvant Patel testified on his own behalf as defendant.

In his evidence the witness for the plaintiff highlighted the main operative provisions of the contract of lease. In particular he stressed the clause which in his view entitled the plaintiff to

terminate the contract in the event of the lessee (the appellant) falling into arrears with his rental payments. In this regard he pointed out that as of the 28th of February, 2020 the appellant had fallen in arrears and that he failed to rectify that breach within 7 days despite being notified in writing to do so. This culminated in the cancellation of the lease on 22 March 2019. The appellant as of that date was in arrears in the sum of \$830. It was also his evidence that the appellant refused to vacate the premises despite having been served with the notice of termination of lease.

He categorially denied during cross examination that the termination was occasioned by the refusal of the appellant to accede to a rental increment. He maintained that the sole reason for invoking the termination clause was the question of arrears.

For his part the defendant, Mr Balvant Patel testified that he has been respondent's faithful tenant for over 14 years (it would appear his actual tenancy predates the written lease which constitutes the subject matter of the current dispute).

A synopsis of the salient portions of his evidence is as follows; While conceding that he had fallen into arrears with his rentals as of 28 February 2019 he argued that the respondent did not invoke the termination clause on account of the fact they had in fact agreed on a staggered payment plan. Most importantly, however, he surmises that the decision to terminate the contract was *mala fide* as it was solely occasioned by his refusal to accept a steep rental increment. He indicated in this regard that he had challenged the respondent to have the rent increment dispute referred to the Rent Board for determination.

He further testified that when summons were eventually issued on 26 April, 2019 he had since cleared his arrears. He would however concede during cross examination that given the express and unambiguous provision of Clause 16(a) (i) (the termination upon rental breach clause) no duty reposed on the respondent to grant him any indulgence to continue with contract. He would blame the hostile economic environment for his unfortunate lapse into arrears.

At the conclusion of the trial the court *a quo* in its judgment found that the fact that the appellant conceded having fallen into arrears was dispositive of the matter. This was because such failure to keep abreast with his rent payments, meant that he was in breach of a material term of the contract of lease entitling the respondent to invoke the cancellation clause.

He made short-shift of the appellants arguments that his history of timeous payment of the rent ought to count for something and pointed out that neither should the magnanimity of the respondent in condoning past similar breaches.

Aggrieved by that decision the appellant mounted this current appeal contending in the main that the court *a quo* misdirected itself in confirming the cancellation of the lease (and all the consequences flowing therefrom) given that he had become a statutory tenant, yet the provisions thereof had not be respected.

His grounds of appeal read as follows;

Grounds of appeal

The learned Magistrate erred and misdirected itself in:-

1. *Confirming cancellation of the Lease Agreement which was done in breach of the Commercial Premises Rent Regulations more particularly in that an application was supposed to have been before the court for cancellation of the lease agreement and not an action for confirmation of cancellation of a lease agreement.*
2. *Granting an order for the ejectment of the appellant herein from the commercial premises when the lease agreement was not yet properly cancelled more particularly in light of the fact that the appellant is a statutory tenant.*
3. *Ordering the appellant to pay holding over damages in the sum of One Thousand Town Hundred and Sixty-five dollars (\$1 265.00) notwithstanding the fact that the appellant herein was not in arrears at the time of the summons was issued.*
4. *Disregarding the appellant's testimony that the cancellation was necessitated by the appellant's resistance to pay a rental increment by sixty percent (60%) without approaching the Rent Board for a fair rental amount.*
5. *Not appreciating the fact that without proper cancellation of the lease agreement, the respondent herein issued the summons for ejectment of the appellant on the basis of breach of the lease prematurely before.*

These will be dealt with in logical sequence rather than seriatim. In so doing grounds 1, 2 and 5 will be tackled simultaneously as they are all related, and dovetail into one another. They all attack the propriety of the cancellation of the lease. Ground 4 will soon thereafter be addressed as

it is naturally connected to grounds 1, 2 and 5. Finally, ground 3 will be addressed as it relates to the consequences of the cancellation.

Grounds 1, 2 and 5: Cancellation of the contract in view of the Commercial Rent Regulations

Despite having referred in his grounds of appeal to the Commercial Premises (Rent) Regulations, 1983, the appellant in his heads of argument surprisingly went off on a tangent and based his entire argument on the Rent Regulations, 2007 (Statutory Instrument 32/2007). To his credit, however, counsel for the appellant conceded his error in this regard and moved the court to delete the offending part of ground 1 which reads *“More particularly in that an application was supposed to have been made before the court for cancellation of the lease agreement and not an action for confirmation of cancellation of a lease agreement.”* It was further requested of the court in this connection to disregard any reference to the Rent Regulations, 2007.

The concession was properly made in view of the following; firstly the fact that the premises in question being commercial premises do not fall under the Rent Regulations, 2007 which apply solely to residential premises. Secondly, unlike the Rent Regulations 2007, the Commercial Premises Rent Regulations do not have an equivalent provision requiring a referral to the court for the cancellation of a lease agreement for statutory tenants.

An excision of that portion of the first ground of appeal leaves the remainder thereon naked. It also deals a body blow to the contentions in grounds 2 and 5 of the grounds of appeal. Although counsel bravely tried to salvage what remained of those grounds, he could not explain how the cancellation of the lease agreement circumstances such as the present results in a breach of the Commercial Rent Regulations.

I interpose here, however, to lend my thoughts on whether the appellant can properly be referred to as a “statutory tenant” to fall under the ambit of the commercial premises (rent) Regulations. This requires a proper construction of Clause 2 of the agreement of lease which reads as follows;

“2. Commencement

- (a) Notwithstanding the date of the signing of this agreement the lease shall be for an initial period of one (1) year commencing on 1st May 2018 and ending on the 30th of April 2018.*

(b) *Provided the tenant has fully complied with all the terms and conditions of this agreement the renewal thereof shall be subject to negotiation upon the tenant notifying the landlord of its intention to renew the lease for a further period two months prior to the expiry of this lease. Failure by the tenant to give such notice shall be construed as its intention to continue to lease the property on a yearly basis terminable by either party hereto upon the one giving the other three calendar months' notice."*

To my mind, this clause means that if at the expiration of the first year of the lease agreement the tenant was desirous of renewing it for any other future period, then he was required to notify the landlord of such intention 2 months prior to the end of the life of the contract. However, in the event of no such notification being given by the tenant to the landlord, then the contract was automatically renewable on a yearly basis. Termination in those circumstances could however be effected by the giving of 3 months' notice by the party of desirous of ending the contract to the other.

Implicitly, therefore, this contract automatically renewed itself on its anniversary on the 1st of May 2018. The question of statutory tenancy therefore did not in my respectful view arise.

The circumstances under which statutory tenancy arises in respect of commercial premises are provided for in Section 22 of the Commercial Rent Regulations which provides as follows;

"22. Limitation on ejectionment

- (1) ... [Irrelevant]
- (2) *No order for the recovery of possession of commercial premises or for the ejectionment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—*
 - (a) *continues to pay the rent due, within seven days of due date; and*
 - (b) *performs the other conditions of the lease; unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that:-*
 - (i) *the lessee has declined to agree to an increase in rent; or*
 - (ii) *the lessor wishes to lease the premises to some other person."*

Statutory tenancy, therefore is a legislative intervention aimed at addressing and curing the lacuna that would otherwise obtain where the fixed period provided in lease agreement comes to an end yet the lessee remains in occupation of the property and continues to abide by the terms of the expired lease agreement.

It is aimed, *inter alia*, at stopping the landlord from resorting to self-help in ejecting the tenant ostensibly on the basis that the lease no longer exists. Its primary aim, as I see it, is to regulate and smoothen the period referred to earlier, reduce the scope of disputation, safeguard the rights and interests of both parties and provide a mechanism for the resolution of disputes attending to that period.

It does not, in my view apply to a situation (such as the present) where an agreement automatically gets a new lease of life (pun unintended) at each succeeding anniversary. This would mean therefore imply that all the arguments based on statutory tenancy fall away.

Be that as it may, even if one were to adopt a contrary view and argue that clause 2 of the lease agreement does not render the lease agreement automatically renewable as earlier indicated, this does not in the least alter the complexion of the dispute.

In either instance the appellant was required to be up to date with his rental payments. The concession by the appellant that he fell into arrears took the steam out of his entire argument. The timely payment of rent lies at the very heart of a lease agreement. It operates at the same plane as the lessor availing vacant possession of the property to the lessee. Whether one views this fundamental obligation through the lens of the lease agreement (as the respondent does) or in the context of the Commercial Premises Rent Regulations (as the applicant does) the outcome is essentially the same namely that in both instances the appellant placed himself in the unfortunate circumstance of breach entitling the lessor to termination.

In other words even if one were to adopt the position that appellant was a statutory tenant and as such fell under the protection of the Commercial Premises Rent Regulations they, (i.e. Regulations) only offer such protection so long as he “...*continue[d] to pay the rent due, within seven days of the due date*” which he obviously failed to do.

Further s 23 of the Commercial Rent Regulations spells out the rights and duties of a statutory tenant as follows;

“23. *Rights and duties of statutory tenant*

A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease ...” (emphasis added)

Ultimately, therefore, in view of these provisions of the Commercial Rent Regulations one comes full circle; the whole dispute gravitates back to the original lease. In turn, whichever way one views it, the appellant was obligated to timeously pay the rent due, either in advance (as required under clause 3(a) of the lease agreement) or within seven days of the due date (as required under s 22(2)(a) of the Commercial Rent Regulations). He failed on either account.

The belated flurry of activity by appellant ostensibly to extinguish the arrear rentals after the cancellation of the lease did not and could not disentitle the respondent to the relief it sought. It amounts to no more than shutting the stable doors after the horse had bolted.

There was a spirited attempt in this appeal by the appellant to refer to both his impeccable past record and to his recent past rental breaches to evade the consequences that eventually befell him when the respondent invoked clause 16(1)(a) to terminate the lease agreement. Neither can conceivably avail him.

His impeccable past record is of no consequence. It has no bearing to the issues at hand.

Equally untenable is suggestion that because past rental arrears did not result in respondent terminating the contract, neither should the ones that led to the cancellation. Condonation for past breaches cannot by any stretch of imagination be construed as offering appellant, *carte blanche*, a right to commit similar future breaches without consequence.

The appellant sought to rely on the ratio in *Masukusa v Tafa* 1978 RLR 167 (A) as endorsed in *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 409 (H) where the issue was whether a landlord could successfully invoke a non-waiver and non-variation clause in situations where he had previously accepted late payments of rental without reservation and had not made

his election to cancel the lease within a reasonable time and at the latest when the next payment was tendered. It was held that a landlord could not retrospectively (after accepting subsequent timeous payments) invoke his prerogative to terminate the contract supposedly on the basis of the non-waiver and non-variation clause.

What obviously distinguishes the present case from the Parkview case is that at no point throughout the proceedings *a quo* did the respondent appear to rely on past breaches. To the contrary, reliance was placed solely on the arrears as at the date of cancellation. In particular the letter dated 22 March, 2019 cancelling the contract only refers to such arrears.

Grounds 1, 2 and 5 therefore are devoid of merit and cannot avail the appellant.

Ground 4: the disputed rent increment argument

The appellant expended considerable time and effort in a bid to draw a nexus between his refusal to agree to a 60% rent hike and the subsequent termination of the contract. The court *a quo* was correct in my view, in rejecting that argument. The defendant's own admission that he was in arrears as of the date of termination coupled with the contents of the letter of termination (and other written reminders by the respondent to appellant to pay up the rent arrears) negates the notion that the motive of the cancellation was in fact his refusal to accede to the rent hike.

The argument that the real but undeclared motive behind the cancellation of the lease agreement was in fact appellant's refusal to accede to a 60% rent hike was always going to be hard to sustain given the chain of events which led to the cancellation of the lease. In particular in view of his admission of having fallen into arrears and having failed to pay the same off despite numerous reminders to do so.

Here, the appellant in the absence of direct evidence indicative of the nexus between the rental increment stand off and the termination of the lease sought to rely on circumstantial evidence. The invitation to the court being for it to draw an inference between those two events.

The court *a quo* declined the invitation to draw such an inference and in this appeal the appellant persists with the quest for such an inference to be drawn. When reduced to its lowest terms, the appellant's complaint is that the court *a quo* should have believed his version as opposed to that of the respondent.

However, it is trite that an appellant court seldom interferes with findings of credibility by a lower court. It can only do so where such findings are clearly unreasonable and not supported by the facts. See *Bakari v Total Zimbabwe (Pvt) Ltd.* SC 226/16; *Barros v Chimponda* 1999 (1) ZLR 58(S).

This is because having been steeped in the atmosphere of the trial, the trial court will have had the opportunity to observe the witnesses and assess their candour and demeanor. Thus in the absence of any irregularity either proved or apparent *ex facie* the record, the appeal court will not usually reject findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court. The function to decide the acceptance or rejection of the evidence falls primarily within the province of the trial court. I could not find any such irregularity or misdirection in the acceptance of the respondent's version that the cancellation was brought about solely by the appellant having fallen into arrears and the rejection of the appellant's version that it was occasioned by the failure to resolve the rent increment dispute.

Secondly, although it is trite that in civil proceedings (unlike in criminal ones) the inference sought to be drawn need not be only the reasonable inference as the most probable inference suffices, in the present matter the most readily apparent and acceptable inference is that the lease was terminated because the appellant fell into arrears with his rentals.

Further in this regard, I find it strange and untenable that a lessee would permit himself to lapse into arrears (in clear violation of the terms of the terms of the lease agreements) and when the lessor pulls the curtain down on the contract (which it is entitled to do) the lessee is then seen to cry foul blaming the lessor of acting in bad faith. He cannot rely on or seek refuge by referring to past transgressions which went unpunished.

Ground 3: Holding Over damages

It is clear that this ground is a consequence of the confusion created by the omission of the words "per month" after the figure of RTGs\$1 265.00 in paragraph C of the respondent's claim as stated in the summons which error was obviously replicated in the order of the court *a quo* when it granted judgment "as prayed in the summons."

The result was that the appellant confused such "holding over damages" with arrear rentals. The two are different.

Arrear rentals simply refer to those outstanding amounts for rentals that accrued during the currency of the lease but were not paid.

A claim for holding over damages on the other hand is based on a breach of the contractual obligation to give vacant possession of the property on termination as required by the relevant clause in the lease agreement or as in incidence of the commercial law. A.J. Kerr in the *Law of Sale and Lease* (3rd ed. 2004) at p 421; states that under contract, the breach is the failure to restore possession on termination and the remedy of ordinary damages for holding over (i.e. market related rental) arises by reason of the landlord being deprived of the use and enjoyment of the property because the erstwhile tenant has remained in occupation.

It may also arise *ex delicto* in the sense that the continued occupation by the former lessee (former because the lease has since lapsed) of the premises without a legal right to do so is *per se* wrongful. The damages awardable to the owner of the property being (but not necessarily limited to) loss of market related rentals which the law regards as foreseeable. See *Lillicrap, Wassernaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 347 (A) at 496 I – 597 C

The latter are evidently what respondent sought and obtained in the court *a quo*. That much is apparent from the inclusion of the words “*being damages for unlawful occupation calculated from 1 April, 2019 to date of eviction*”. The sum of RTGs\$1 265.00 is a figure for each succeeding month that the appellant remained or remains in occupation of the premises post the cancellation of the contract. The appellant confused this with arrear rentals which he claims to have since extinguished.

This ground of appeal is also therefore without merit.

In the final analysis therefore I find no merit in any of the appellant’s grounds on appeal

Costs

The respondent sought costs on a punitive scale, I however find no real justification in awarding costs on that scale. The appeal is neither frivolous nor vexatious nor does it appear calculated to harass the respondent.

Accordingly, therefore, the following order is hereby given:-

ORDER

Appeal be and is hereby dismissed with costs.

Zisengwe J.

Wamambo J. agrees