PARKSIDE HOLDINGS (PRIVATE) LIMITED
versus
ROLEN TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 07 May 2013 and 24 July 2013

Civil Trial

H. Mutasa, for Plaintiff
N. Bvekwa, for Defendant

CHIGUMBA J: The plaintiff issued summons against the defendant on 12 October 2011, claiming:

(a) An order for the eviction of defendant together with its sub-tenants, assignees, invitees and all other persons claiming occupation through it from the plaintiff's premises known as shops 1 and 2 Benhay Art House, located at 120 Chinhoyi Street, Harare.
(b) Payment of US$22, 730,99 in respect of rent arrears.
(c) Payment of holding over damages at a monthly rate of US$5000, 00 together with operating costs from 1 November 2011 to date of the defendant's eviction.
(d) Payment of interest on the sums of money claimed at a rate which is 5% above the commercial banks minimum lending rate per month or part thereof calculated from due date to date of payment in full.
(e) Payment of costs of suit at the scale of legal Practitioner and client.

The facts giving rise to the cause of action in this matter are that, on or about 30 March 2010, the plaintiff and the defendant entered into a lease agreement in terms of which the plaintiff leased to the defendant the premises known as Shops 1 and 2 Benhay Art House, 120 Chinhoyi Street, Harare. The terms and conditions of the lease agreement were that the

defendant would pay rental monthly in advance within the first seven days of the month, it would be liable for interest calculated at a rate which is 5% above the commercial bank's premium lending rate per annum, and it would pay operating costs at agreed rates.

The plaintiff averred, in its declaration, that the defendant breached the lease agreement by failing to pay rent as agreed, and incurred arrears in the sum of US$22,730. The plaintiff had cancelled the lease agreement and demanded vacant possession of the leased premises together with payment of arrear rentals. Despite demand, the defendant has continued to occupy the leased premises, resulting in the plaintiff incurring holding over damages at a monthly rate of US5000, 00 a month.

The defendant filed its plea on the 23 January 2012, and denied that the plaintiff had cancelled the lease agreement. The defendant admitted that it was in rent arrears, and stated that the parties had agreed that the outstanding rent be paid by way of installments, an agreement that the defendant was complying with in full. On 14 February 2012, the defendant filed a Notice of amendment of plea in which it inserted a sentence in paragraph 2 of its original plea, to the effect that if indeed there was a cancellation of the lease agreement, there had been no notice given to it, of such cancellation.

At the pre-trial conference, the matter was referred to trial on the following issues:

1.1 Whether or not the plaintiff properly cancelled the lease agreement in respect of Shops number 1 and 2, Benhay Art House, 120 Chinhoyi Street, Harare.

1.2 Whether or not any agreement for the out of court settlement of this matter was concluded between the parties.

1.3 If so, what are the terms of the agreement?

1.4 Whether or not the plaintiff is entitled to an eviction order.

At the hearing of the matter, the plaintiff led evidence from McDonald Chinyoka, who produced a bundle of documents which included a copy of the lease agreement, as well as copies of the transaction tables which showed how rent and operating costs were paid and utilized. Mr Chinyoka produced a letter, dated 26 September 2011, written by the plaintiff's Legal practitioners, to the defendant. The letter placed the defendant in *mora,* cancelled the lease

agreement, and demanded payment of arrear rentals in the sum of US$16 980, 00 within three days of its date, failing which eviction proceedings would be commenced.

The parties entered into without prejudice negotiations, and the plaintiff prepared a deed of settlement, in terms of which the defendant was to acknowledge its indebtedness to the plaintiff in the sum of US$16 980,00, and to discharge the indebtedness at the rate of US$2 500,00 a month with effect from 1 November 2011. The defendant was to continue to pay monthly rentals of US$5 000, 00 in terms of the lease agreement. The draft deed of settlement that was tendered into evidence was signed by the plaintiff's Legal Practitioners on 3 November 2011. The defendant's Legal Practitioners did not sign.

Mr Chinyoka produced a letter dated 14 December 2011, addressed to the defendant's Legal Practitioners, in which the defendant was given up to 16 December 2011 to sign the draft deed of settlement or failing which an application for summary judgment would be filed without further notice. Finally, the witness told the court that adequate notice in terms of the lease agreement had been given to the defendant. He referred to clause 12 of the lease agreement, which he said indicated that no notice was required to be given.

During cross examination, Mr Chinyoka told the court that the rent was due on the first day of each month. He conceded that in terms of clause 3.2 of the lease agreement, the defendant was given up to the seventh day to pay the rent. The plaintiff closed its case and the defendant made an application for absolution from the instance, which was vigorously opposed.

The court identified the issue for consideration as being whether the evidence adduced by the plaintiff in support of its claim was sufficient to establish facts on which a reasonable court could accept its claim. The question that must be answered is always one of the sufficiency of the evidence. The court stated that it is not necessary that there be proof on a balance of probabilities at this stage, the question boils down to whether the plaintiff has established a *prima facie* case. The standard of evidence required on the face of it is lower that proof on a balance of probabilities. The court relied on *Standard Chartered Finance Zimbabwe v Gerogias 1988 (2) ZLR 547* where it was stated that, in considering an application for absolution from the instance a court should always lean in favor of the case continuing if there is reasonable evidence that it might find for the plaintiff.

The court found that the plaintiff had established, *prima facie*, that:

1. The defendant breached the lease agreement between the parties.
2. There was a purported cancellation of the lease agreement.
3. There was a deed of settlement duly signed by the plaintiff and not by the defendant.

This evidence, on the face of it, entitled the plaintiff to the relief that it was seeking. The onus shifted to the defendant to prove that the parties had entered into a valid compromise, as averred in its plea. The application for absolution from the instance was dismissed and the defendant was put to its defense.

The defendant led evidence from Alex Muzvare, a director of the defendant, who confirmed that the defendant was in arrear rentals in September 2011, and that a proposal to discharge the arrears at the rate of US$2 500, 00 had been put to the plaintiff. He told the court that the defendant paid US$2 500, 00 to the plaintiff in December 2011, and thereafter for six months until the arrear rentals were discharged in full. Mr. Muzvare referred to a letter dated 3 November 2011, in which he stated that the plaintiff accepted its payment proposal. He stated that the defendant did not sign the draft deed of settlement because it believed that the matter had been settled as indicated in the letter of 3 November 2011. Mr Muzvare told the court that he did not expect the plaintiff to issue summons against the defendant because the matter had been settled.

His interpretation of clause 12 of the lease agreement was that the defendant was entitled to seven days notice within which to remedy any breach of the lease agreement, and that failure to give such notice, rendered any cancellation of the lease agreement invalid. Mr Muzuva told the court that the defendant was currently not in rent arrears. During cross examination, he told the court that until summons was issued on 12 October 2011, he was not aware that the plaintiff was contemplating litigation against the defendant. He denied any knowledge that a copy of the summons was served on his Legal Practitioners of record. He admitted that the defendant failed to sign the draft deed of settlement, but maintained that this was because the defendant believed that the matter had been settled. The defendant then closed its case.

The issues that fall for determination by this court are:

1. Whether the plaintiff gave adequate notice of intention to cancel the lease agreement before the agreement was cancelled.
2. Whether there was a valid cancellation of the lease agreement between the parties.
3. Whether the parties entered into a separate agreement relating to the outstanding rent.

The law that governs a lessee's obligation to pay rent is trite. It has been stated that:

"…the lessee is obliged to pay rent agreed upon less any amount remitted by law". *A.J. Kerr- The law of sale and lease 2nd ed at page 319, see Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd & Anor 2009 (2) ZLR 46(H)*

It has also been held, that:

> "The failure to pay rent on time is critical not only in the case of statutory tenancy but also in the case of a contractual lease where the lease agreement contains a forfeiture clause or cancellation clause. In both cases, the lessee's failure to pay rent timeously amounts to a major breach of the lease justifying its cancellation and the ejectment of the Lessee". See *Parkside Holdings (Pvt) Ltd v Londoner Sports Bar HH-16-05 at p9.*

The defendant admitted to being in three months rent arrears as at September 2011, which is a clear breach of the lease agreement. The question that is exercising the court's mind is whether the lease agreement was then adequately cancelled and if so, what the date of cancellation was.

Clause 3.2 of the lease agreement stipulates that rent shall be paid monthly in advance, within the first seven days of the month.

Clause 12 stipulates that:

> "If:
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> 12.1. any rent is not paid on due date; or
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> 12.2. the tenant commits any breach or fails to observe or perform any
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> of the terms and conditions of this agreement and remains in default for a period of fifteen (15) days after the giving of notice in writing by the landlord drawing attention to the breach or omission and requiring it to be remedied; then the landlord may forthwith

cancel this lease, and re-enter upon and take possession of the premises without prejudice to any claim for damages…"

"At common law, it is clear that the service of summons claiming the ejectment of a lessee is considered to be notification of cancellation of the lease agreement".

See *Parkside Holdings (Pvt) Ltd v Londoner Sports Bar supra.* Summons in this matter was filed on 12 October 2011, and served on the defendant on 6 December 2011.

My reading of clause 3.2, as read with clause 12.2 of the lease agreement, is that if the tenant is in breach of the lease agreement, for non-payment of rent, then on the 8th day of the month, the landlord is entitled to write to the tenant, and give the tenant fifteen days from the date of that letter, within which to remedy the breach, failing which, on the fifteenth day after the delivery of the letter to the tenant, the Landlord may forthwith cancel the lease and re-enter and take possession of its premises.

The evidence of the defendant's director was not accepted by the court. He was evasive and dishonest about the dates on which letters were sent or received by the defendant to and from the plaintiff. He professed ignorance of vital facts, such as when summons was issued and served. He denied facts which seem obvious, such as whether or not the parties entered into a deed of settlement, and of the effect of failure to enter into a deed of settlement. The defendant was fully legally represented, yet its representative Mr Muzvare claimed to have operated under a layman's ignorance of the law, a fact which is clearly untenable. The evidence which was accepted by the court, is to the effect that, the defendant was in arrear rent, in the sum of UD$16 980, 99. The plaintiff wrote a letter to the defendant on 26 September 2011 in which it purported to cancel the lease agreement.

In my view, the letter of 23 September 2011, did not effectively or adequately cancel the lease agreement. It gave the defendant 3 days within which to rectify its breach. Clause 3.2 as read with clause 12.2 of the lease agreement clearly stipulates that fifteen days be given to the defendant, within which to rectify the breach. That letter was delivered to the defendant, on 27 September 2011. That is when the fifteen day period began to run. The defendant had up to 12 October 2011 to remedy the breach. Letters were exchanged between the parties, on a without prejudice basis in settlement negotiations.

On 3 November 2011, well after 12 October 2011 when the defendant was legally obliged to remedy its breach, the plaintiff indicated that the defendant should sign the draft deed of settlement. The defendant did not do so, by its own admission. It is my view that by 12 October 2011, when the plaintiff issued summons for eviction and for recovery of arrear rentals, it did so in compliance with the provisions of the lease agreement. The stipulated period within which the defendant ought to have remedied its breach had lapsed. After 12 October 2011, the plaintiff became entitled to cancel the lease agreement, and to re-enter its premises. By coincidence, summons for eviction was issued on 12 October 2011, which I accept constituted notification of intention to cancel the lease agreement, at common law.

The court needs to consider whether the parties entered into a compromise agreement, in terms of which the plaintiff agreed not to assert its right in terms of the lease agreement. The plaintiff wrote a letter to the defendant, paragraph 2 of which reads as follows:

> "Unless we receive a signed copy of the Deed of settlement by no later than close of business on 16 December 2011, our instructions are to file an application for summary judgment against your client without giving you further notice."

It is my view that the plaintiff failed to give adequate notice of cancellation of the lease agreement on 26 September 2011. That letter, which purported to cancel the lease agreement, did, place the defendant in *mora.* The defendant then had fifteen days from the date of being placed in mora to remedy the breach. The defendant did not remedy the breach. The fifteen day period expired on 12 October 2012. That is the date of cancellation of the lease agreement. The plaintiff became entitled, as at that date, to cancel the lease and forthwith re-enter the premises and take possession. I find that the plaintiff issued summons within such period that the requisite notice to remedy the breach had expired. The parties all understood that the plaintiff's intention was to cancel the lease and when summons was issued in October 2011, that intention became express not implied. The defendant by its own admission failed to sign the deed of settlement. I find that there was no compromise agreement entered into by the parties and that the plaintiff is accordingly entitled to the relief that it seeks.

It is hereby ordered that:

(a) The defendant, together with its sub-tenants, assignees, invitees and all other persons claiming occupation through it, be and are hereby evicted from the plaintiff's premises known as shops 1 and 2 Benhay Art House, located at 120 Chinhoyi Street, Harare.

(b) The defendant shall pay to the plaintiff the sum of US$22, 730, and 99 in respect of rent arrears.

(c) The defendant shall pay to the plaintiff holding over damages at a monthly rate of US$5000, 00 together with operating costs from 1 November 2011 to date of the defendant's eviction.

(d) The defendant shall pay to the plaintiff interest on the sums of money claimed at a rate which is 5% above the commercial banks minimum lending rate per month or part thereof calculated from due date to date of payment in full.

(e) The defendant shall pay the costs of suit.

Gill Godlonton & Gerrans, Plaintiff's legal Practititoners

Bvekwa Legal practice, Defendant's Legal practitioners