

VALIS BAKERY (PRIVATE) LIMITED
versus
KENSINGTON CENTRE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MHURI & MUCHAWA JJ
HARARE, 6 July & 24 October 2023

Civil Appeal

Mr *T Mpfu*, for the appellant
Mr *CC Mumba*, for the respondent

MUCHAWA J: Before us is an appeal and cross appeal. The brief background facts which are common cause are that the appellant has been leasing the respondent's premises, namely shops 10 and 11 Kensington Centre in Harare (the premises), for the past twenty-five plus years. Throughout this relationship, the parties would conclude periodic leases and the last such agreement was executed on 12 September 2019. It would run from 1 September 2019 to 31 December 2020. In terms of clause 3, the rentals were payable in Zimbabwean dollars at the Stanbic Bank midrate for the day, charged per month. For the period 1 September 2019 to 31 December 2020 the rentals were payable at the rate of USD 6.50 per square metre for a total of 392 square metres as per clause 3 (a).

Clause 3 (d) of the lease agreement provides as follows:

“The lessor reserves the right to review rentals every three months, the first such review being on 1st January, 1st April, 1st July, 1st October each successive year that the lease is renewed. Notice of such increase shall be given to the lessee one calendar month prior to such increase.”

The rentals rates per square metre, rose from USD 6.50, to USD 9.00 with effect from 1 January 2021, then USD 13.20 from 1 June 2021.

The appellant was further obliged to pay levies/operating costs. The respondent issued out summons before the court *a quo*, claiming the following:

- a. “Cancellation of the verbal lease agreement for breach of same and contravention of the Commercial Premises (Rent) Regulations, 1982; arising from late payment of levies/operating costs and/or late and non-payment of rentals; and

- b. Ejectment of defendant and all those claiming occupation through it, from certain commercial premises being shop 10 and 11, Kensington Centre, Kensington, Harare; and
- c. Payment of ZWL 677 531.61 (six hundred and seventy-seven thousand five hundred and thirty-one Zimbabwean dollars and sixty-one cents): being rental arrears and outstanding levies/operating costs for the period 1st June 2021 to 30 September 2021; and
- d. Payment of holding over damages in the sum of USD 5 205.76 (five thousand two hundred and five United States of America Dollars and seventy-six cents) plus value added tax thereon; payable in Zimbabwe Dollars at the prevailing Stanbic Bank mid-rate; as at the date of payment; and the sum of ZWL 58 604.00 (fifty eight thousand six hundred and four Zimbabwe Dollars) for operating costs; per month reckoned from 1 October 2021 to date of vacation/ejectment; and
- e. Interest on all sums due at the prescribed rate from the 8th of November 2020 being the date of default to date of full and final payment; and
- f. Costs of suit on an attorney and client scale."

The court *a quo* made the following order after the trial:

"IT IS ORDERED THAT:

- 1) The lease agreement between the parties be and is hereby cancelled.
- 2) The defendant and all those claiming occupation through it be and are hereby evicted from Shop 100 and 11, Kensington Centre, Harare.
- 3) Defendant to pay ZWL 677 531.00 being arrear rentals.
- 4) Defendant to pay holding over damages in the sum of USD 5 205. Or its equivalent.
- 5) Interest on the above sums (3) and (4) at the prescribed rate from the 8th of November 2020 being date of default to date of full and final payment.
- 6) Costs of suit on an ordinary scale."

Disgruntled, the appellant filed this appeal on the following grounds:

1. "The court *a quo* erred in law when it determined that the appellant had breached the lease agreement existing between it and the respondent, despite the undisputed fact that the appellant had paid what it deemed to be a fair rent during the period in respect of which the parties had an unresolved rent dispute.
2. The court *a quo* erred when it determined that the appellant had incurred rent arrears when in fact the perceived rent arrears were being computed on the basis of an unagreed increase of rentals by the respondent.
3. The court *a quo* erred in law when it failed to determine that the respondent did not have the right to unilaterally vary the terms of the lease agreement existing between it and the appellant.
4. The court *a quo* erred in law when it failed to determine that the purported variation of the lease agreement by increasing rentals was of no force and effect for want of being reduced to writing and signing by the parties."

It is prayed that the appeal be allowed with costs and the judgment of the court *a quo* be set aside and substituted with the following: -

"1. The plaintiff's claim be and is hereby dismissed with costs."

The respondent filed a cross appeal on the following ground:

1. "The court *a quo* misdirected itself on the facts and erred at law in ordering that the appellant ought to pay holding over damages in the sum of USD 5 205.00 or its equivalent (sic) only without prescribing the applicable months or other period thereof; when the court *a quo* had agreed with the formula provided by the respondent for computing the holding over damages due from the appellant."

The draft order prayed for is as follows:

1. "The cross appeal be and is hereby allowed.
2. Paragraph 4 of the order in the judgment of the court *a quo* be and is hereby set aside and substituted with the following:
 - 2.1 Defendant to pay holding over damages in the sum of USD 5 205.76 (five thousand two hundred and five United States Dollars and seventy-six cents) or its Zimbabwe dollar equivalent; per month reckoned from 1st October to date of vacation or eviction."

We heard the parties on both the appeal and cross appeal and reserved our judgment. This is the judgment, starting with the cross appeal. For purposes of this judgment, I refer to the parties as appellant and respondent as they appear in the main appeal.

The cross appeal

Mr *Mpofu* submitted that the cross appeal is improperly before the court and ought to be struck off the roll on the basis that it was noted out of the times prescribed in the Rules of the Court. He further submitted that the cross appeal is incurably defective because it does not challenge any findings of the court *a quo*.

In expanding on these points, reference was first made to Order 31 (1) (3) of the Magistrates Court Rules, 2019 which provides as follows:

"A cross appeal shall be noted by the delivery of notice within seven days after the delivery of the notice of appeal."

The meaning of the word "deliver" was derived from Order 1 Rule 5 which states that deliver means to file of record with the clerk of court and to serve a copy on the other side.

In applying this to the matter at hand, Mr *Mpofu* averred that the notice of appeal was issued out on 1 December 2022 and served on the other side on 2 December 2022. The cross appeal was issued out on 14 December but apparently only served on the other side on 4 January 2023 by which time it was eleven days out of the prescribed time.

Whilst conceding that the appeal was delivered out of time, Mr *Mumba* argued that the delay is not a disrespect to the processes, and it is not inordinate. He accepted that they received the appellant's heads of argument on 6 April 2023 in which this point was raised. He could not explain why no application for condonation had been made and said that he believed that he could make an oral application as there is no prejudice as the parties are before the court. He had assumed that his colleague would not pursue this issue further.

In terms of computing the time of delay, Mr *Mumba* said that they had delivered the notice of cross appeal just a few hours later as it was delivered on 14 December 2022 at 12.00 hours. Indeed, the record shows that the notice of cross appeal was delivered on 14 December 2022. There is nothing on record, which was pointed to, to show that delivery happened some eleven days later.

It does not really matter whether the delay was a day, eleven days, or a few hours. The point is that the cross appeal was delivered out of the prescribed time. Fortunately for us, this issue has already been settled by our courts as to the fate of such a process. In *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) it was held that where an application for review is not brought within the time specified in the Rules, an application for condonation must be sought. It was further held that it was erroneous for the judge *a quo* to condone what was, on the face of it, a grave noncompliance with R 259 which requires an application for review to be instituted within eight weeks of termination of proceedings in which the irregularity or illegality complained of is alleged to have occurred. The making of an application is necessary to trigger the discretion to extend the time. Where proceedings are not instituted within the period specified and an application for condonation is not made, the matter is improperly before the court.

In *casu*, the respondent knew that the cross appeal had been delivered outside the prescribed time. The appellant's heads of argument raised this same issue on 6 April 2023. No application for condonation was filed nor did the respondent have the courtesy to advise the appellant in writing about the plans to make an oral application. Mr *Mumba*'s half-hearted attempt at making an oral application fell far short of the requirements of such an application. He simply explained the extent of the delay but did not relate to the explanation for the delay for both the initial delay of a day and then the delay from 6 April 2023 to the date of hearing on 6 July 2023. The broad factors the court would have regard to in determining whether to condone the noting of an appeal late are the extent of the delay, the reasonableness of the explanation proffered for the delay and the prospects of success on appeal. See *Jensen v Acavalos* 1993 (1) ZLR 216 (SC).

In *Rinos Terera v Lock & 3 Ors* SC 93/21, it was held as follows:

“It was incumbent upon the applicant to explain the delay in noting the appeal and in filing this application for condonation.”

The respondent had to explain both the initial delay and the inaction from 6 April to 6 July 2023. This was not done. It is clear therefore that there was nothing the court could do to save the cross appeal as there was no application for condonation before it nor was the oral one sufficient. The cross appeal is improperly before us and there is no need to consider the other point raised by the appellant.

The point *in limine* is thus upheld and the cross appeal is struck off the roll with costs as costs follow the cause.

The appeal

The appellant impugns the following findings of the court *a quo*:

- i. "The law is clear on this aspect. While the tenant disputes the amount (sic) of rentals, that challenge does not absolve the tenant. In fact, the defendant was obligated to pay the amount to avoid being ejected. Case law is clear that even if rentals are not fair, the tenant ought to pay the disputed amount and later claim the difference once its contention as to what constitutes fair rentals are validated."
- ii. "From the evidence on record, it is clear that the defendant resisted the plaintiff's unilateral actions of rental increase and decided to pay what it considered to be fair rent for the premises."
- iii. "Since the defendant was not paying the required rent but rather what was deemed fair, rental arrears obviously accumulated."

The first issue argued on is whether the appellant was obliged to pay the disputed rent. Mr *Mpofu* argued that the court *a quo* misread the law regarding what a lessee is obliged to pay as rental when a dispute arises as to what is payable as rental. Contrary to the findings of the court *a quo* he provided case law authority to the effect that a tenant must pay what it considers fair and reasonable pending a determination of the rent issue. He averred that when a tenant pays this amount, they cannot be held to be in breach and if the lessor is unhappy with the amount paid, it is for them to get a binding determination on rent review by either the Rent Board or an arbitrator. This was on the strength of the case Of *Supline Investments (Pvt) Ltd v Forestry Commission* 2007 (2) ZLR 280 (H) at page 281 where it was held as follows:

"A tenant has an undisputed obligation to pay rental for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rental is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentious as to what constitutes fair rentals are validated."

The court *a quo*'s conclusion is vehemently argued to be at cross intent with what the above case says as it gives the tenant two options. At the very least, the tenant can pay what is considered fair rental and this is enough to avoid ejectment until validation of the rental amount. Alternatively, the tenant can, elect to pay the disputed amount and be credited in the future once validation occurs and the amount paid is above what is fair.

According to Mr *Mpofu*, payment of rentals is a *sine qua non* of a lease agreement and where rent disputes arise, the law does not force the hand of either party as rent review is effected retrospectively. In *casu*, the appellant is alleged to have continued to pay the rentals he had been paying and it was contended that he could not be held to have been in breach thereof. It was further argued that once it was found that the appellant was paying what it considered a fair rental, it could not be said that it was in breach. It was said that the respondent had the option to approach the Rent Board to resolve the rent dispute and as it did not, it could not proceed to act on an alleged breach of the contract. In this respect, the judgment is said to fly in the face of known precedents.

The appellant's case is that the respondent had no right to unilaterally increase rent in a lease agreement without the parties agreeing to the increase. There is a clear departure between the parties on how the rental review clause is to be interpreted. The appellant believes that the clause gives the respondent the right to the process of rental review but does not bestow the right to unilaterally increase rentals. It is argued that the process of reviewing rentals is bilateral and where there is no agreement, then the respondent should get a binding order.

Before the court *a quo*, the respondent's witness was asked to interpret clause 23 of the September 2019 lease agreement which provides that "no alteration or variation of this lease shall be of any force and effect unless reduced to writing and signed by both parties". She accepted that an increase in the rentals in terms of clause 3 (a) of the lease agreement constituted an alteration of the lease agreement. She accepted too that such alteration needed to be reduced to writing and be signed by both parties to be effective. When it was put to her that the respondent was therefore seeking cancellation of an agreement based on an unagreed rental increase, she answered in the affirmative.

Further, Mr *Mpofu* argued that in the summons, the respondent had pleaded a verbal lease but even if regard is had to the written lease agreement, it has a non-variation clause therefore respondent could not vary rentals quantum without an addendum being placed before the court. It was averred that any of the parties could have approached the Rent Board but in

this case, it was the respondent who wanted to act on the review, so it was its duty to approach the Rent Board instead of pleading breach of contract and seeking the appellant's ejection.

Mr *Mumba*, on the contrary argued that the question of fair rent does not arise at all as the cases in which the question of a fair rental was decided was in extreme cases and where there was no formula for calculating the rental as in *casu*. It was contended that relying on a fair rental generally goes against the tenet of sanctity of contract. Clause 3 (d) was pointed to as obliging the appellant to pay rentals or any increase thereof as it provides that the lessor reserves the right to review rentals every three months and notice of such increase shall be given to the lessee one month before such increase. Reliance is placed on the case of *Printing Registering Co v Sampson* (1875) 19 Eq 462 at 465 which held that public policy requires that where persons of full age and competent understanding have freely and voluntarily entered into a contract, it shall be held sacred and be enforced by courts of justice. The courts are not to lightly interfere with this freedom of contract.

In *casu*, it was argued that the parties had included a clause on rental review which gave the respondent the right to review rent with the only qualification being the need to give one month's notice to the appellant. The court was urged to respect the lease agreement of the parties by enforcing the agreed position particularly as the agreement has a built-in rental review formula in clause 3(d). It was therefore averred that the respondent was entitled to unilaterally increase rentals due.

It is alleged that the appellant fell into arrears in the payment of rentals as reviewed through the formula and was therefore in breach of the lease agreement as a tenant has no right to continue in occupation of a property except by meeting its obligation to pay rent. Where there is no agreement on the amount of rental payable, Mr *Mumba* argued that the lessee is liable to pay the lessor a reasonable amount for the use and occupation of the property and that the rental value in the open market is the criterion for the assessment of the amount. Because the respondent was party to the lease agreement and failed to pay in terms of the agreed formula or what all the other 22 tenants were paying at the premises, it was contended that there was no objective basis for refusal to pay the reviewed rental amount.

Furthermore, it was submitted that if the appellant was unhappy with the rental review amount, it had the onus to approach the Rent Board. It was pointed out too that the appellant had continued in occupation of the premises for 7 months after the order of the court *a quo* and had only paid ZWL 30 000 000 a day before the appeal hearing and that this goes to show that the

appellant was coming off as a difficult tenant who chooses how much and when to pay the rentals.

It appears to me that the starting point in this matter is to have a look at the lease agreement, particularly clause 3(d). This is what it provides:

“The lessor reserves the right to review rentals every three months, the first such review being on 1st January, 1st April, 1st July and 1st October each successive year that the lease is renewed. Notice of such increase shall be given to the lessee one calendar month prior to such increase.”

What we have in clause 3 (d) is a rent review clause. A rent review clause is a term in a commercial property lease that allows the landlord to adjust the rent periodically. The clause specifies the review dates, method of calculation and notice period for the increase.

In the case of *British Gas Corporation v Universities Superannuation Scheme Limited* [1986] 1 WLR 398 @ 401 or [1986] 1 ALL ER 978, the general purpose of a rent review clause was set out as follows:

“There is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of the property during a long term.”

In the matter before me, the rent review clause specifies the review dates and the notice period for the increase. What it does not include is the method of calculation or formula for the reviewing of the rent.

Clause 3 (a) says:

“The rental for the leased premises, shall be payable in ZIMBABWE DOLLARS LOCAL at the Stanbic Bank mid-rate of the day, charged per month from the 1st September 2019 until the 31st December 2020 for 392 square metres at \$ 6.50 per square metre.”

This clause sets out the rental at \$6.50 per square metre and how the Zimbabwe dollar equivalent for this will be ascertained, it is by reference to the Stanbic Bank mid-rate of the day, charged per month. There is no formula in clause 3 (d) which explains how the rentals moved from \$ 6.50 to \$ 9.00 then \$13.20. There must be certainty in the clause about how the rent will escalate given that rent is a material term of the lease, and the intention of the parties must be clear.

Where parties agree to be bound by a rent review clause such as the one in *casu*, can the appellant argue successfully that the exercise of the right to review the rent was unilateral

and therefore, unenforceable on the strength of a separate clause providing for non-variation of the lease?

Clause 23 of the lease is titled, "Variation of Lease" and it provides as follows:

"It is recorded that this agreement is the whole agreement between the Lessor and Lessee and that there have been no warranties, guarantees, representation or conditions precedent save as are specifically recorded herein. No alterations or variations of this lease shall be of any force and effect unless reduced to writing and signed by both parties."

W. E Cooper in *Landlord And Tenant, Second Edition, Juta & Co Ltd, 1994* at page 59 states the following:

"During the currency of a lease, the parties may agree to change the amount of rent.....To be binding on him the lessee must either expressly or impliedly agree to any increase in rent proposed by the lessor. By itself, a mere statement by the lessor that rent will be increased from a certain date or occurrence will not render the lessee liable to pay the higher rent¹ because the lessor cannot unilaterally change the terms of the lease. In the absence of express agreement, the lessee will be bound to pay the higher rent only if by his conduct he gives an unequivocal indication to the lessor of his agreement to do so."

In this case by the admission of the respondent's witness, the rent was increased through a statement to the appellant of the new increased rental. She agreed too, that the rental was increased unilaterally. The respondent did not have a right to do so having regard to Cooper's sentiments above but also clause 23 of the lease agreement which provides that no alterations or variations of this lease shall be of any force and effect unless reduced to writing and signed by both parties. It is my finding therefore that the purported variation of the lease agreement by increasing rentals was of no force and effect for want of being reduced to writing and signing by the parties. This means therefore that grounds 3 and 4 of appeal succeed. Having made these findings it follows that it was an error for the court *a quo* to find in favour of the respondent on rental arrears as these were computed based on an unagreed and unlawful increase of rentals by the respondent.

The only remaining issue to be decided is whether the court *a quo* erred in law when it determined that the appellant had breached the lease agreement existing between it and the respondent despite the undisputed fact that the appellant had paid what it deemed to be a fair rent during the period in which the parties had an unresolved rent dispute. The *Supline Investments (Pvt) Ltd v Forestry Commission* supra case adequately deals with this. It says:

¹ Union Government v Foxon 1925 NPD 47

“A tenant has an undisputed obligation to pay rental for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord’s property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to what constitutes fair rental is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentious as to what constitutes fair rentals are validated.”

Even the court *a quo* relied on this case but seems to have given it the interpretation that the appellant was obliged to pay the disputed amount and claim or be credited with the difference upon validation of what a fair rental is. This is however not what the case says is all that is open to the lessor. Another option is for the lessor to at least pay the amount it contends is a fair rental for the premises. This is done to avoid ejection from the premises for total non-payment of rent. Once validation of what is a fair rental is done, then the lessor can be asked to make up the difference, if any. In the circumstances, given the finding that the appellant was paying what it considered a fair rental, it could not have been found to be in breach and should not have been evicted. Ground of appeal 1 also succeeds.

Accordingly, the appeal succeeds in its entirety.

Consequently, **IT IS ORDERED THAT:**

The Appeal

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be set aside and is substituted as follows:
 - a. “The plaintiff’s claim be and is hereby dismissed with costs.”

The Cross Appeal

1. The cross appeal be and is hereby struck off the roll with costs on an ordinary scale.

MUCHAWA J:.....

MHURI J: Agrees.....

Gill, Godlonton & Gerrans, appellant’s legal practitioners
Corious & Co Attorneys, respondent’s legal practitioners