YUZASS INVESTMENTS (PRIVATE) LIMITED
versus
BAREP AUTOMOTIVE INNOVATIONS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 26 May 2022 and 28 July 2022

Opposed Matter

Advocate Uriri, for the applicant
E R Samukange, for the respondent

MANYANGADZE J: This is an application for summary judgment, in which the applicant seeks the following relief, as per its summons and declaration:

> "a. An order confirming the termination of the lease agreement between the plaintiff and the defendant.
>
> b. Eviction of the defendant and all those claiming occupation through it from Stand 1435 A Salisbury Township, Harare, owned by the plaintiff as successor in title to the Kay Trust, commonly known as 12 Park Street, Harare.
>
> c. Holding over damages at the rate of the equivalent of USD 133.33 (One Hundred and Thirty – three United States Dollars and Thirty – Three cents only) per day at the rate at which CBZ BANK LIMITED shall be purchasing United States Dollars on the day of payment reckoned from 1 November 2021 to the date of the defendant's eviction."

A reading of the plaintiff's declaration and applicant's founding affidavit gives the following pertinent facts as constituting the background to this application.

On 1 September 2019, the respondent entered into a lease agreement with the Kay Trust, being the applicant's predecessor in title, in respect of premises located at Stand No. 1435 A Salisbury Township, Harare, commonly known as 12 Park Street, Harare ("the property"). The property comprises a fuel service station and ancillary workshop and offices. The Kay Trust obtained the title for the property from the late Katherine Venturas under Deed of Transfer No. 1410/2019, dated 12 March 2019.

Prior to this development, the respondent had entered into a lease agreement with the Executor of the late Katherine Venturas, one Phryne Persephone Bousanis. This lease

agreement is referred to in the pleadings as the "Bousanis Lease". The lease was for 5 years, running from 1 June 2018 to 31 May 2023.

In terms of clause 3 of the Bousanis lease, the respondent was required to pay monthly rental in cash in the sum of USD 10 000,00.

When the Kay Trust assumed title, a new lease agreement was executed. This superseded the Bousanis lease agreement. This lease introduced a new clause, clause 17.2. It was envisaged that the purchaser of the property might require possession of the property for its own use. Clause 17.2 was intended to cater for such an eventuality, as it allowed termination of the lease on 3 months' notice. The lease was duly executed on 26 September 2019.

In terms of the new lease ("the Kay Trust lease"), rent was revised to the Zimbabwean dollar equivalent of USD 4000,00. Thus, the respondent began paying this rent, instead of the USD 10 000,00 cash that was payable under the previous lease.

The Kay Trust lease was also for a period of 5 years, running from 1 September 2019 to 31 August 2024.

The Managing Director of the respondent, one Stout Mbano, entered into a Lease Surety Agreement, executed on 5 September 2019, in respect of the Kay Trust lease.

As already indicated, the Kay Trust lease contained clause 17.2, which provides for termination of the lease by either party on 3 months' notice. The clause reads as follows;

> "The parties agree that should either party require to give notice relating to termination of the lease agreement under the Commercial Premises Rent Regulations or any other law in Zimbabwe, 3 months' notice shall constitute reasonable and sufficient notice for the party receiving such notice to seek alternative premises."

Exercising its rights under clause 17.2, the applicant gave notice to the respondent, for the latter to vacate the property. Relevant paragraphs of the notice, written by the applicant's legal practitioners to the respondent's legal practitioners and dated 29 July 2021, read as follows:

> "4. My client is and has always been in the fuel industry and intends to utilise the premises for its own use.
> 5. I am instructed to give, as I hereby do, your client three (3) months' notice to vacate the referenced premises in terms of Section 22 (2) (b) of the Commercial Premises (Rent) Regulations, 1983, Statutory Instrument 676 of 1983 as read together with clause 17.2 of the aforesaid lease agreement on the basis that, as stated in paragraph 4 above, my client requires the premises for its own use."

When the respondent/defendant refused, failed, or neglected to vacate the premises, the applicant/plaintiff issued summons.

The respondent entered appearance to defend to on 2 November 2021. It subsequently filed its plea, on 23 November 2023.

Basically, the respondent is clinging to the Bousanis lease, and is alleging that the Kay Trust lease is a fraudulent document. This lease is unknown to the respondent, as the one it signed, that is, the Bousanis lease, does not have clause 17.2.

The applicant, on the other hand, avers that the respondent has no *bona fide* defence to its claim. It has entered appearance to defend and filed its plea merely to delay its vacation of the applicant's property. In view of this, the applicant proceeded to file the application for summary judgment.

The law on the remedy of summary judgment is well established in the case authorities. The parties have made reference to some of these authorities.

First and foremost, it is significant to note that this truncated procedure denies the defendant the benefits of the fundamental principle of *audi alteram partem*, in that judgment is entered for the plaintiff without proceeding to the defendant's case. It is a drastic and extraordinary remedy. Its rationale is to grant relief to a plaintiff who has an unanswerable claim. It denies a hearing to a defendant who has no plausible and *bona fide* defence, and has entered appearance or plea merely to delay the inevitable. He or she is doing nothing more than postpone a known fate. In most such cases, the resistance to the claim is intended to gain some temporary and unfair advantage over the plaintiff, such as a prolonged stay on premises whose continued occupation the defendant is clearly no longer entitled to.

The position of the law was crisply put across in the case of *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) RLR 277, where it was stated, at page, 279 C-D:

> "The procedure of Summary Judgment was conceived so that a *mala fide* defendant might be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem.* So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law that this drastic relief will be afforded to a plaintiff."

MAKARAU JP (as she then was) clarified the law in the following terms in the case of *Stationary Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor* HH 64/10, at page 3 of the cyclostyled judgment:

> "The test to be applied in summary judgment applications is clear and settled on the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial, would

> entitle him to succeed in his defence. Obviously implied in this test but oft overlooked by legal practitioners is that the defendant must raise a defence. His, facts, must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

However, the light onus resting on the defendant does not mean that he/she gets away with bald and unsubstantiated assertions or flimsy explanations. He must allege the material facts upon which the defence is based, with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit discloses a bona fide defence. See *Mbayiwa* v *Eastern Highlands Motel* SC 139/86:

In casu, the pertinent question is whether the facts establish the existence of a lease agreement between the respondent and the Kay Trust, which lease contains clause 17.2.

It is my considered view that this lease agreement is well established on the pleadings. The facts looked at clearly show how and why clause 17.2 of the Kay Trust lease came into being. The lease agreement is backed by a surety agreement executed by none other than the respondent's managing director.

Added to this, there is the supporting affidavit of Mr Machingura, a legal practitioner and officer of this court. He was involved in the execution of all the agreements, from the Bousanis to the Kay Trust leases.

The respondent avers that the legal practitioner was made to depose to an affidavit he did not author. Put differently, the lawyer was so unscrupulous as to sign a doctored affidavit which was prepared by someone else. I find this averment astounding, if not downright scandalous.

It seems to me the respondent has nothing meaningful to say in rebuttal of the applicant's cogent averments. These averments are well substantiated by clear documentary evidence. Against this are respondent's bold and bald assertions.

In the circumstances, I find the applicant/ plaintiff's claim unanswerable. The prayer for summary judgment is sustained by the facts established. There was no reasonable, or any basis at all, for resisting the claim. Thus, the prayer for costs on the higher scale is also justified.

It is accordingly ordered that:

1. **The application for summary judgment be and is hereby granted.**
2. **Summary judgment in case number HC 6038/21 is entered for the applicant ("the plaintiff").**
3. **The termination of the lease agreement between the applicant and respondent for stand 1435A Salisbury Township Harare commonly known as 12 Park Street Harare be and is hereby confirmed.**
4. **An order evicting the respondent and all those claiming occupation through him from Stand 1435A Salisbury Township Harare, owned by the applicant as successor in title to the Kay Trust, commonly known as 12 Park Street Harare be and is hereby granted.**
5. **The respondent be and is hereby ordered to pay Holding Over Damages at the rate of the equivalent of USD$133.33 (One Hundred and Thirty-Three United States Dollars and Thirty-Three cents only) per day at the rate at which CBZ Bank Limited shall be purchasing United States Dollars on the day of payment reckoned from 1 November 2021 to the date of the respondent's vacation or eviction as the case may be.**
6. **The respondent shall pay the costs of this application as well as the wasted costs in case number HC 6038/21 at the legal practitioner and client scale.**

Kossam Ncube & Partners, applicant's legal practitioners
Sanukange Hungwe Attorneys, respondent's legal practitioners