

FORT ENTERPRISES (PVT) LTD

Versus

NOMALANGA SIBANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 1 NOVEMBER 2011 & 7 FEBRUARY 2013

N. Mlala for the plaintiff
Miss N. Ncube and J. Tshuma for the defendant

Civil Trial

NDOU J: The plaintiff seeks the termination of a lease agreement between the parties and eviction of the defendant from the premises subject matter of the proceedings. The plaintiff further claims holdover damages and costs of suit on a higher scale. The salient facts of the matter are the following. The plaintiff has leased the property commonly referred to as number 4 Derby House (“the premises”) since 1976 to the defendant. The defendant is operating a hair salon known as Modern Hair Salon. On 20 May 2009, the plaintiff gave the defendant a notice to terminate the lease (“the notice”) formulated as follows:

“Re: Notification to terminate lease

We hereby give three (3) months notice to terminate lease as from the 1st June 2009 to 30 August 2009 when you will hand over the shop keys to Fort Group head office. The reason for termination of the lease is that the owner now intends to use the shop himself. [sic]

Yours faithfully

[Signed]
FORT ENTERPRISES (PVT) LTD”

(Emphasis added)

It is beyond dispute that the original lease between the parties expired in 2003 and was not renewed. The defendant was therefore a statutory tenant in terms of the Commercial Premises Rent Regulations, Statutory Instrument 676 of 1983 (“the Regulations”). Before considering the evidence adduced by the parties I propose to deal with the preliminary legal point raised in the defendant’s heads of argument. The defendant seeks to rely on the provisions of clause 4 (b) of the original lease. She cannot do so as a statutory tenant. As alluded to above, the original lease expired in 2003 and was not renewed. The defendant averred in paragraph 2 of the heads of argument that she is a statutory tenant. In the circumstances, the notice should be in terms of section 22(2) of the Regulations. Section 22(2) provides.

“No order for the recovery of possession of commercial premises or for the ejection of

a lessee therefrom which is based on 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 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 than that:
 - (i) The lessee has declined to agree to an increase in rent; or
 - (ii) The lessor wished to lease the premises to another person.”

In casu, the lessor says that it intends to use the premises to operate a butchery. The plaintiff called one witness, one Simbarashe Nhopi in support of its case. He is its Administration Manager. He testified that the plaintiff used to run a butchery from a leased property along Fort Street and 13th Avenue. The said premises have been recovered by the land lord thus necessitating the plaintiff to seek alternative premises to operate its butchery business. The plaintiff decided to recover its premises from the defendant hence the notice. The decision was informed by the fact that the premises were ideally located near Unit Village Flea Marketing and further near a busy public transport drop off/pick up point. The butchery would therefore be exposed to many people. Further, the premises had an extra room which would be ideal for fitting a cold room. He conceded that there were attempts to raise rentals during the period 2003 to 2010 and also that at some stage the plaintiff instituted proceedings to evict the defendant for rent arrears. He, however, distanced those issues from the current matter. He said the current matter is premised on business considerations. He said that in 2010 the parties reached an agreement on increased rentals which the defendant failed to honour. I am satisfied that Mr Nhopi gave a credible explanation why the plaintiff seeks to recover the premises. His testimony has adequately proved that the plaintiff has good and sufficient reasons to recover its premises. In *Kingstons (Pvt) Ltd v LD Ineson (Pvt) Ltd* SC-9-08 at page 6 of the cyclostyled judgment ZIYAMBI JA stated:

“Our courts have held that the landlord need do no more than assert his reasons in good faith and then to bring some small measure of evidence to demonstrate the genuineness of his assertion and it rests upon the lessee who resists ejection to bring forward circumstances casting doubt on the genuineness of the lessor’s claim. See *Film & Video Trust v Mahova Enterprises* 1993 (2) ZLR 191; see also *Newman v Biggs* 1945 EDL 51 and 54 and 55 ... It was correctly submitted on behalf of the appellant, that the Regulations were enacted for the protection of tenants. See *Moffat Outfitters, supra* at 154C – D [*Pvt Ltd v Hoosein & Ors* 1986 (2) ZLR 148 SC]. However, the protection afforded is meant to be from unscrupulous landlords – not those who are genuine in their desire to reclaim their property for their own use.”

Mr Nhopi’s testimony shows that the plaintiff genuinely reclaimed the premises for its own use. The defendant dwelt a lot on the history of the relationship of the parties between 2003 and 2010. In this long period of around seven years one would expect rent increases especially bearing in mind that the substantial part of that period was during the hyper inflation era. The plaintiff’s conduct has to be viewed in that context. The same goes to the previous

legal proceedings instituted by the plaintiff against the defendant. These actions do not impeach the genuineness of the plaintiff's desire to reclaim the premises for its own use. In her own evidence the defendant states that withheld part of the agreed rental to induce the plaintiff to effect repairs on the premises. The legal proceedings to recover perceived rent arrears have to be viewed in that context and have nothing to do with the current proceedings. In the circumstances, the plaintiff made out a case for the relief sought. I, however, hold that the plaintiff did not justify costs on higher scale and holdover damages.

Accordingly, it is hereby ordered that:

- (1) The termination of the lease agreement between the parties is confirmed.
- (2) An order is granted for the eviction of the defendant and all those claiming through her from number 4 Derby House, Bulawayo within fourteen days of service of this order.
- (3) In the event that the defendant fails to comply with the order in paragraph 2, above, the Deputy Sheriff, Bulawayo be and is hereby ordered and directed to evict the defendant and all those claiming through her from the above-mentioned premises.
- (4) The defendant pays the plaintiff costs of suit on the ordinary scale.

Cheda & Partners, plaintiff's legal practitioners

Webb, Low & Barry, defendant's legal practitioners