NEGOWAC SERVICES (PRIVATE) LIMITED
versus
3D HOLDINGS (PRIVATE) LIMITED
and
GIFTCARE ELECTRICAL (PVT) LTD t/a
REG ELECTRICAL WHOLESALERS

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 13 October & 25 November 2009

T. Nleya, for plaintiff
B. Mugomeza, for defendant

MTSHIYA J: On 29 June 2009 the parties filed a consent paper agreeing to the consolidation of the following two cases.

1. Case No. HC 2021/09 Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd
2. Case No. HC 2022/09 Negowac Services (Pvt Ltd v Giftcare Electrical (Pvt) Ltd t/a Reg Electrical Wholesalers.

The reason behind the consolidation was to serve time and costs since the two cases dealt with similar maters and both parties were represented by the same legal practitioners.

Indeed, as confirmed here below through the issues referred to trial in each case, the matters for determination were similar.

(a) Issues for determination in HC 2021/09 were listed as follows:-

"1.1. Is there a rent dispute between the parties.

1.2. Whether or not the defendant breached the terms and conditions of the lease agreement in failing to pay its rent for the months of January, February, March, April and May 2009.

1.3. If the answer for 1.2. is in the affirmative, whether or not plaintiff was entitled thereafter to cancel the lease agreement and demand vacant possession of the premises and payment of outstanding rentals"; and

(b) Issues for determination in HC 2022/09 were listed as follows:-

"1.1. Is there a rent dispute between the parties?

1.2. Whether or not the defendant breached the terms and conditions of the lease agreement in failing to pay its March and April 2009 rentals.

1.3. If the answer for 1.2. is in the affirmative, whether or not plaintiff was entitled thereafter to cancel the lease agreement and demand vacant possession of the premises and payment of outstanding rentals".

Following the consolidation the defendants in cases HC 2021/09 and HC 2022/09 shall be referred to as first and second defendants respectively.

The record shows that with effect from 1 February 2004 the plaintiff and first defendant entered into a lease agreement whereby the plaintiff leased to the first defendant offices 5, 7, 8, 9 and A1 Strathaven Shopping Centre, 17 Browning Drive Strathaven, Harare (the premises). The lease was, subject to agreed terms, renewable and indeed the lease agreement remained in force until 8 April 2009 when the plaintiff, through its legal practitioners wrote to the first defendant in the following terms:-

"We act for Negowac Services (Pvt) Ltd.

Our instructions are that you lease from our client, offices 5, 6, 7, 8 and 9 at the aforementioned premises.

We are also instructed that, in breach of the agreement of lease with our client, you have failed to pay rent and operating costs from January 2009 to date.

Further, we are instructed that you have breached the agreement of lease by assigning your rights and obligations to a third party without the prior written consent of the landlord.

As a consequence of your breach of the agreement of lease with our client, we have been instructed to cancel the said agreement and recover the leased premises. In the circumstances, take notice that lease agreement is hereby cancelled. Further, we demand that you vacate the premises and handover the keys at our offices, no later than end of business on Tuesday 14 April 2009.

In the event that you do not vacate he premises as stated above, we shall issue court process to recover the premises without further notice. The resultant legal costs will be for your account.

Yours faithfully

GILL, GODLONTON & GERRANS
Cc. Client-Attention Mr Sibenke"

As can be deduced from the above letter the reason for terminating the lease agreement was failure to pay rent from January 2009 to April 2009 and cancellation was effective from 14 April 2009.

On 14 April 2009 the first defendant, through its legal practitioners, responded to the plaintiff's letter of 8 April 2009 in the following terms:

> "We refer to the above matter in which we have been instructed by 3D Holdings to respond to your letter dated the 8th April 2009.
>
> Our client instructs that it has not failed to pay rent as alleged by your client. The real issue and dispute between the parties is the amount of rent payable. Our client proposed payment of rent in the sum of one United States of America dollar (USD1) per square which was not accepted by your client. The rent payable was not agreed between the parties.
>
> On the issue of assigning rights and obligations without the consent of the landlord, it should be noted that the tenant, 3D Holdings did not change. It is the management of the tenant which changed, and therefore there is no assignment of any rights. It is also surprising that the issue is being raised now, when the change of management took place in 2007 and rent was being paid to CB Richard Ellis by the new management.
>
> In the circumstances, we are of the view that there is no basis at all for the cancellation of the lease agreement.
>
> Yours faithfully
>
> Mutezo & Company"

As can be seen from the second paragraph of the above letter the first defendant raised the issue of a dispute of the rental payable.

The first defendant's letter prompted the following response from the plaintiff's legal practitioners.

> "We refer to your letter dated 14 April 2009
>
> It is an express term of the agreement of lease that your client was obliged to pay rent monthly and in advance. Failure by the parties to agree on an amount with regards to rent, did not absolve your client from either paying the last agreed rent or reasonable rent since January 2009. Your client's failure in this regard, is a clear breach of the aforementioned term of the agreement of lease.
>
> In the circumstances, please note that the lease agreement remains cancelled on the basis stated above. We therefore demand that your client relinquish vacant possession of the premises forthwith and hands over the keys at our offices no later than end of business on Wednesday 23 April 2009.
>
> Yours faithfully
>
> GILL, GODLONTON & GERRANS"

On 8 May 2009 when the first defendant had refused to vacate the premises, the plaintiff issued summons by this court praying for the following relief:-

"(a) Confirmation of cancellation of the lease agreement entered into between the parties for Offices 5, 7, 8, 9 and A1, 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strathaven, Harare.

(b) An order for the ejectment forthwith of the defendant, together with its Subtenants, assignees, invitees and all other persons claiming through it from Office 5, 7, 8, 9, 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strathaven, Harare.

(c) Costs of suit at Attorney and client scale".

It is also common cause that with effect from 1 February 2004 the plaintiff and the second defendant entered into a lease agreement with plaintiff leasing to second defendant Office 21 at 3D Centre Strathaven Shopping Centre 17 Browning Drive Strathaven, Harare (the premises). The lease agreement remained in force until 9 April 2009 when the plaintiff's legal practitioners sent the following letter to the second defendant

"We act for Negowac Services (Pvt) Ltd.

Our instructions are that you lease from our client the premises described above. We are also instructed that in breach of the terms and conditions of the agreement of lease with our client, you have failed to pay rent and operating costs for March and April 2009 accumulating arrears thereby in the sum of US$510.

As a consequence of your breach of the agreement of lease with our client, we have been instructed to cancel the said agreement and recover the leased premises together with the outstanding amount. In the circumstances, take notice that the lease agreement is hereby cancelled. Further, we demand that you vacate the leased premises and handover the keys at our offices, and settle the outstanding amount, no later than end of business on Tuesday 14 April 2009.

In the event that you do not vacate the premises and make payment as stated above, we shall issue court process to recover the premises without further notice. The resultant legal costs will be for your account.

Yours faithfully

GILL, GODLONTON & GERRANS"

The issue, as can be seen from the above letter, was non-payment of rental for the months of March and April 2009 (i.e. indicated as a total sum of US$510).

On 14 April 2009 the second respondent's legal practitioners responded to the plaintiff's letter in the following terms:-

"We refer to the above matter and to your letter dated the 9th April 2009.

Our client instructs that it has not failed to pay rent. Our client advises that the real dispute is about the amount of rent to be paid per square metre. Your client wanted five United States of America dollars (USD5) per square metre which our client rejected as unreasonably high. It counter-offered rent payable as one United States of America dollar (USD1) per square. No agreement was reached on the rent payable. Our client was surprised to see your letter when the rent payable was not agreed on.

In the circumstances, we feel that there is no basis to cancel the agreement of lease. It is the issue of rent payable which should be resolved. Our client has instructed us to tender rent calculated on the basis of one United States of America dollar (USD1) per square which is twenty seven United States of America dollars (UDS27) per month.

Yours faithfully

Mutezo & Company"

Again, as was the case in the other lease agreement with the first defendant, the second defendant, in similar fashion, also raised the issue of there being a dispute over the rental payable.

On 20 April 2009 the plaintiff's legal practitioners responded to the second defendant's letter in the following terms:

"We refer to your letter dated 14 April 2009.

It is an express term of the agreement of lease that your client was obliged to pay rent monthly and in advance. Failure by the parties to agree on an amount with regards to rent, did not absolve your client from its obligations in terms of the agreement of lease. Your client ought to have paid either the last agreed rent or a reasonable amount towards rent. The failure by your client to pay rent for March and April 2009, is a clear breach of the aforementioned term of the agreement of lease.

In the circumstances, please note that the lease agreement remains cancelled on the basis stated above. We therefore demand that your client relinquish vacant possession of the premises forthwith and hands over the keys at our offices no later than end of business on Wednesday 23rd April 2009.

Yours faithfully

GILL. GODLONTON & GERRANS"

With the second defendant having refused to vacate the premises by 23 April 2009, on 6 May 2009 the plaintiff issued summons through this court praying for:

"(a) Confirmation of cancellation of the agreement of lease entered into between the parties for Office 21 at 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strahaven, Harare

(b) An order for the ejectment forthwith of the defendant, together with its Subtenants, assignees, invitees and all other persons claiming through it from Office 21 at 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strathaven, Harare.

(c) Costs of suit at Attorney and client scale".

The foregoing sets out the background to the two cases that were consolidated and as can be seen the issues for determination listed on pages 1 & 2 herein are indeed similar, if not the same. The only slight difference is that default in rental payments covers different periods in each case. (i.e. January – March in respect of HC 2021/09 and March - April in respect of HC 2022/09).

For its case the plaintiff called one witness, a Mr Darlington Tapiwa Mandaza (Mandaza) of CB Richard Ellis (Pvt) Ltd who are the plaintiff's agents managing the premises. Mandaza said he is the Property Portfolio Manager at CB Richard Ellis (Pvt) Ltd. He said he had dealt with both defendants in this matter since January 2009. He said there was indeed a dispute over the amount of rent payable but insisted that the defendants, instead of not paying any rent at all, should have continued paying what they were offering, namely US$2 per square metre. The dispute had arisen when they proposed a new rental of US$5 per square metre in line with market trends. He was, however, convinced that the defendants did not want to pay any rent at all and hence the reason for not even approaching the Commercial Rent Board or an Arbitrator. The witness said he was fully aware that the correct thing to do was to approach the Commercial Rent Board or go to arbitration for the fixing of a fair rent.

Under cross-examination Mandaza maintained that they (CB Richards Ellis (Pvt) Ltd were convinced that there was no commitment on the part of the defendants to pay any rent at all. He said, although not produced in court, statements had been sent to the defendants in March 2009. He did not indicate though what rentals were reflected on those statements. He also said apart from their proposal of 3 February 2009, which suggested US$5 per square metre, another proposal had been sent to the defendants on 1 January 2009 proposing that rentals be paid in the form of fuel coupons. It was his evidence that by end of February 2009, it was clear that there would be no agreement on the issue of rent and hence the decision to institute legal proceedings.

The plaintiff closed its case after Mandaza's evidence.

The defendants led evidence from Regis Jamba, (Jamba) the Managing Director of both defendants. He said he has been the Managing Director of both companies since 1997. In the main Jamba's evidence was a confirmation of what the plaintiff's witness told the court.

Jamba said after their offer of US$2 per square metre which was made on 17 February 2009, he had remained in constant communication with Messrs CB Richards Ellis (Pvt) Ltd. He had consistently been phoning Mandaza and at one time he spoke to a Mr Matondo who had expressed surprise as to why the rent issue had remained unresolved. The said Matondo had promised action but had never gone back to them (defendants) with a solution.

Jamba said on 8 April 2009 defendants had requested for rental statements which the plaintiff was no longer sending to them. He maintained that the real issue separating the parties was the rent dispute. He, however, said the issue had, been resolved by the owner of the premises, namely Minister Goche. He said Minister Goche had indicated that he was not interested in the legal proceedings. This was, however, quickly dismissed by the plaintiff's legal practitioner who said his instructions were to proceed with the action.

Jamba went on to say that in March 2009 the defendants' accounts were suspended. The defendants had, however, made the following payments in October 2009.

"(a) First defendant : US$2560-00

(b) Second defendant : US$ 350-00

The payments, he said, were based on US$3 per square metre and were accepted by the plaintiff.

Under cross-examination, Jamba agreed that the payments were accepted under a receipt with the endorsement "without prejudice". He also confirmed that since January 2009 the plaintiff had never interfered with the defendants' occupancy of the premises. He said at a meeting held on 8 October 2009 the defendants' new proposal of US$3 per square metre had been accepted and the defendants were now waiting for details regarding the outstanding amounts.

The defendants closed their case after Jamba's testimony.

I must point out at this stage that apart from confirming the rentals dispute, Mr Jamba's evidence also touched on evidence that did not form part of the pleadings. Such evidence, for the purposes of this judgment, will remain ignored.

At the close of the defendant's case I postponed the proceedings and asked for written submissions from the legal practitioners, which I received as arranged. I am

grateful to the two legal practitioners for both their oral and written submissions which I found useful.

Facts that are common cause *in casu* are well captured and summarised by Mr *Nleya*, counsel for the plaintiff, in his written submissions. I cannot do better than reproduce them hereunder in full:

> "1. The defendants currently occupy the plaintiff's premises situated at Strathaven Shopping Centre, Strathaven Harare.
>
> 2. First defendant has been in occupation of plaintiff's premises from March 2004 to date.
>
> 3. Second defendant has been in occupation of plaintiff's premises from April 2004 to date.
>
> 4. The relationship between the plaintiff and both defendants is governed by separate written lease agreements, which were for an initial period of one (1) year, but were automatically renewed in terms of the provisions of clause 2 therein.
>
> 5. In February 2009, the parties commenced negotiations for payment of rentals in United States Dollars, following the adoption of the Multi-currency system.
>
> 6. These negotiations were not concluded.
>
> 7. Plaintiff proposed rent at US5 per sq/m and the defendants made a counter proposal of US$2 per sq/m.
>
> 8. Whilst these negotiations were still pending, the first defendant did not pay rent, at all, from January 2009 up to May 2009.
>
> 9. Likewise, second defendant failed to pay rent, at all, for March and April 2009.
>
> 10. Following defendants' failure to pay rent, plaintiff cancelled the lease agreements and caused Summons to be issued against both defendants on 8th May 2009".

In his submissions Mr *Nleya* correctly submitted that the obligation, on the part of a tenant, to pay rent is the core of the nature of a lease agreement and indeed failure to do so entitles the landlord to cancel the agreement. He then proceeded to submit that the fact that negotiations for new rentals were in process did not absolve the defendants from paying the last agreed rentals or the amount proposed as a fair rent during the negotiations. He also said at the every least the defendants should have continued paying the amount they were

proposing. This submission, as the facts show, is indeed a confirmation of the fact that there was indeed a rent dispute.

Mr *Nleya*, however, did not agree that the rent dispute necessarily required the intervention of the Commercial Rent Board in terms of the Commercial Premises Rent Regulations (S.I. 626 of 1983). He reasoned that the fact that the defendants continued in occupation of plaintiff's premises without taking the initiative to refer the dispute to the Commercial Rent Board, enjoined the defendants to pay some rent. They could therefore not use the rent dispute as an excuse for not paying any rent at all.

In his written submissions, Mr *Mugomeza* for the defendants, pointed out that the admission by the plaintiff to the fact that there was indeed a rent dispute meant that the matter ought to have been referred either to an Arbitrator or the Commercial Rent Board as admitted by Mandaza who testified on behalf of the plaintiff.

It was Mr *Mugomeza's* submission that since the parties agreed that there was a rent dispute which remained unresolved in terms of the law, then the matter should be dismissed on that basis. He said it was not the court's duty to fix rent for the parties. This was the duty of the Commercial Rent Board as provided for in s 7 of the Commercial Premises (Rent) Regulations (S.I. 626 of 1983).

An analysis of the facts in this case leads me to the conclusion that from January 2009 the rent payable by the defendants became a totally unknown entity. It was mentioned that on 1 January 2009 a proposal of rental in fuel coupons was made. There were, however, no details of that proposal and no information as to how the defendants responded to the proposal. It is clear, however, that as from February 2009 the plaintiff was no longer accepting payment of rentals in Zimbabwe dollars. In March 2009, having failed to get the defendants' acceptance of the proposed rental of US$5 per square metre, the plaintiff suspended the defendants' accounts. The defendants' had counter offered US$2 per square metre. The pleadings refer to US$1 per square metre but evidence in court confirmed the offer of US$2 per square metre. That offer was rejected as being too low and from that time up to the issuance of summons, there was no agreement on the rent payable. The rentals fixed in Zimbabwe dollars ceased to be payable from 31 December 2008. There was therefore no question of the defendants continuing to pay the rentals previously agreed. That point finds confirmation in the suggestion that the defendants could have at least continued to pay the rental they proposed. That rental, though, could not, in the absence of an agreement, constitute a fair rental. Clearly therefore, it was incumbent upon

both parties to approach the Commercial Rent Board or an Arbitrator for the fixation of rent from January/February 2009.

Section 7 of the regulations referred to by Mr *Muzomeza* provides as follows:-

"1. A lessor may apply to the appropriate board for:-

(a) the determination of a fair rent: or

(b) the variation of such a determination; in respect of commercial premises let by him.

2. A lessee may apply to the appropriate board for:-

(a) the determination of a fair rent; or

(b) the variation of such a determination; in respect of commercial premises hired by him.

3. ……."

I agree with Mr *Mugomeza* that apart from ensuring a fair Commercial rent, the regulations are aimed at also preventing "unscrupulous landlords from taking advantage of the shortage of Commercial premises by increasing their rent unjustifiably". See *Moffat Outfitters (Private) Limited v Yunus Hoosein and Others* 1986(2) ZLR 148 (SC).

It is, however, true that on the basis of authorities cited by Mr *Nleya*, the defendants had a duty to continue paying the last agreed rentals (See *Parkside Holdings (Private) Limited v Londoner Sports Bar* HH 66-2005). However, this was not possible *in casu* because, as per evidence payment of rental in Zimbabwe dollars ceased on 31 December 2008 and from March 2009 the defendants' accounts were suspended. Accordingly, it could be argued, that even if defendants thought US$2 was reasonable, they could still claim that they were prevented from effecting payment. That fact, however was disputed. It was submitted that statements were sent for February and March on the basis of the US$2 proposed by the defendants. The statements were, however, not produced in evidence. The defendants only requested for statements in April 2009.

It is clear to me that up to the date of the hearing of this matter there was no agreed position on rent. The dispute over rent still persists. Instead of approaching the Commercial Rent Board, the plaintiff has chosen to issue summonses seeking confirmation of the cancellation of the lease agreements and ejectment of defendants from its premises. Apart from stating that the defendants are in breach of not paying rent, the plaintiffs' summonses do not disclose what rent was payable. This is so because there was indeed never any agreement on the reviewed rentals.

I must point out that the plaintiff's agents totally mishandled this matter. They knew what the law says in the event of a rental dispute. Mandaza confirmed this. They sat back and did nothing.

I am unable to find any law which allows a landlord faced with a rental dispute to avoid the regulations and impose any rent on a sitting tenant. I am also equally unable to find a law which says when there is a rent dispute a sitting tenant's obligation to pay rent ceases and the tenant should continue in occupation indefinitely without paying any rent at all.

Whilst I agree that there was indeed a rent dispute, I am, however, not persuaded to agree that the plaintiff's action should be dismissed on that ground.

My view is that as long as the defendants wanted the tenancy to continue, they had an obligation to continue paying rent. They should have continued to pay what they believed was a reasonable rent. I do not believe that the plaintiff would have refused to accept receipt of rent paid in American dollars. I believe that statements were indeed sent to the defendants and notwithstanding the dispute, the defendants ought to have paid what they believed to be reasonable. The defendants agree that they only asked for statements in April 2009.

Due to the fact that as from 31 December 200i8 the plaintiff was no longer accepting payments in Zimbabwe dollars, the defendants should have continued paying their suggested US$2 per month rather than enjoy a benefit from the plaintiff for nothing. Added to the need to pay rent, the regulations allow the defendants to independently approach the Commercial Rent Board for a fair rent. The need to approach the Commercial Rent Board applied to both parties. Instead of using the law to protect their tenancy, the defendants chose to believe that they would remain in the premises without paying anything for as long as the rent dispute persisted. That cannot be. The obligation to pay rent remained present and failure to do so in the manner I have indicated above means that the defendants were in breach of the lease agreement for non-payment of rent.

The regulations, apart from offering the tenant protection from unfair and prohibitive rentals, do not in any way give a tenant the licence to exploit the landlord by enjoying occupation of the landlord's premises without paying rent for it. That is why it is incumbent upon a sitting tenant to either pay the last agreed rent or to approach the Commercial Rent Board for a fair rent. This, the defendants failed to do. They did not pay any rent for the periods indicated on the summonses. That fact they do not dispute. The defendants were therefore in clear breach of the lease agreement for non-payment of rent.

Subsequent payments allegedly made in October 2009 did not in any way save the breaches. The plaintiff remains entitled to its arrear payments and therefore acceptance of those payments without revoking cancellation of the agreement(s) cannot be held against the plaintiff.

As to the issue of costs, I find that failure to approach the Commercial Rent Board or an arbitrator is an omission attributable to both parties. That failure is what led to this action. I therefore deem it fair for each party to bear its own costs.

In the premises, my finding is that the plaintiff is entitled to the relief it seeks.

I therefore order as follows:-

1. That the cancellation of the lease agreement entered into between the parties for Offices 5,7,8,9 and A1, 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strathaven Harare be and is hereby confirmed.
2. That the plaintiff be and is hereby authorised to evict forthwith the first defendant, together with its Subtenants, assignees, invitees and all other persons claiming occupation through it from Office 5,7,8,9, 3D Centre, Strathaven Shopping Centre, 17 Browning Drive, Strathaven, Harare.
3. That the cancellation of the lease agreement entered into between the parties for Office 21 at 3D Centre Strathaven Shopping Centre 17 Browning Drive, Strathaven, Harare be and is hereby confirmed.
4. That the plaintiff be and is hereby authorised to evict forthwith the second defendant together with its subtenants assignees, invitees and all other persons claiming occupation through it from Office 21 at 3D Centre. Strathaven, Harare.
5. That each party shall bear its own costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Mutezo & Company, defendants' legal practitioners