

**JOYLEN INVESTMENTS (PVT) L TD**

**VERSUS**

**SNAPPY SPORTS BAR**

**AND**

**INNOCENT WINSTON BABBAGE**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 24 JUNE 2011 AND 15 SEPTEMBER 2011

*Mr. J. T Tsvangirai* for plaintiff  
*Mr N. Mazibuko* for respondents

Special plea and exception

**CHEDA J:** This is an application for a special plea and exception by the defendant.

Plaintiff is the landlord and owns shops 3, 5 and 6 Norvaal House, at corner Fife Street and 6<sup>th</sup> Avenue. First defendant is a business concern which leased the above property from plaintiff while second defendant bound himself as surety and co-principal debtor in the lease agreement entered into by the parties on the 11 May 2005. Despite the day of signing, the lease was to run from 01 March 2005 to 28 February 2006.

One of the terms of the agreement was that the rentals were to be \$5400 per month, with an understanding that they would be increased from time to time by agreement.

It is plaintiff's assertion that first defendant has failed to honour the rental payments and as of the date the summons were issued, was in arrears in the sum of \$7938.76 and holding over charges in the sum of \$600-00 per month and \$22.56 of the total expenses per month from 23 September 2010 to date of full payment. Plaintiff also sought eviction of first defendant. Defendant entered an appearance to defend, asked for further particulars and they were duly furnished by plaintiff.

Defendants have filed a special plea and notice of exception. The ground for its exception is that plaintiff has instituted proceedings before a wrong forum because, clause 35:1 of the lease agreement precludes them from doing so. Clause 35:1 of the said lease agreement reads:-

“Where a dispute arises between the parties hereto in regard to the interpretation or application of this Agreement or any matter relating to or arising from this Agreement, the Landlord shall be entitled (if the dispute has not been resolved within seven days of it having arisen) to refer the dispute for arbitration by a single independent arbitrator (hereinafter referred to as “the Arbitrator”) appointed by The Commercial Arbitration Centre in Harare (hereinafter referred to as “the appointing authority”) and/or to institute legal proceedings against the Tenant for such relief as the Court might grant, including interim relief pending the decision of the Arbitrator.” (my emphasis)

It is their further argument that proceedings against them in the courts must only relate to interim relief pending a decision of the Arbitrator. They argued that this was not the position here, and that plaintiff never cancelled the lease agreement.

Plaintiff’s contention on the other hand is that the clause referred to *supra* refers to a dispute which involves legal issues and not a failure to pay rentals which is a clear breach, therefore, factual. With regards to the cancellation it is its argument that its claim is for the cancellation of the lease agreement based on the non-payment of rentals. Such non-payment is, to it, a breach which entitles it to cancel that lease agreement.

The question that falls determination in my view, is the interpretation of clause 35:1. It is defendants’ argument that the correct interpretation of the said clause is that any dispute arising out of this agreement should be referred for arbitration. However, on the other hand plaintiff is of the view that such referral should be of a dispute relating to the quantum of rentals and not the failure to pay rent.

Firstly, it is not in dispute that defendants are in rent arrears. It stands to reason, therefore, that, plaintiff is entitled to seek relief in order to enforce its right. The question then is, should they approach the courts or an Arbitrator? To me the use of the words “---and/or to institute legal proceedings against Tenant for such relief as the court might grant, including

*interim relief pending decision of the Arbitrator*", gives plaintiff an option to either refer the matter for arbitration or institute legal proceedings or both.

In light of this, plaintiff is at liberty to resort to whatever legal route it deems fit in order to obtain expedient relief.

Defendants have also argued that plaintiff has used the wrong procedure by seeking an order for eviction before the agreement is cancelled. They further argued that plaintiff should sue for damages and arrear rentals only.

Defendants, not in so many words 'admit that they are in rent arrears', which in itself is a breach of the agreement.

Defendants' failure to pay rent, in those circumstances entitle plaintiff to cancel the agreement. This is one of the relief it is seeking. Failure to pay rent entitles the landlord to cancel the agreement, see *Venter v Venter* 1949 (1) SA768 (A-D).

In my view, there is no legal basis for challenging the procedure adopted by plaintiff.

Accordingly first and second defendants' special plea and exception be and are hereby dismissed with costs.

*Danziger and partners'* plaintiff's legal practitioners

*Calderwood, Bryce Hendrie and partners, defendants's* legal practitioners