P. M. G. COCHRANE

Versus

GORDON MACKIE

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 24 FEBRUARY AND 7 DECEMBER 2011

Opposed Application

E. *Morris,* for applicant

I. E. G. *Musimbe,* for respondent

MUSAKWA J: This is application for summary judgment. Applicant issued summons against respondent in which he is claiming the following relief-

1. Cancellation of lease agreement between the parties in respect of the property known as number 37 Hillview Road, Philadelphia, Harare.

2. Ejectment of respondent from number 37 Hillview Road, Philadelphia, Harare.

3. Payment of arrear rentals accrued from February 2009 to July 2010.

4. An order for payment of holding over damages at US$750.00 per month.

5. Costs of suit.

In his founding affidavit the applicant claims that when he went to England in 2000 he left Michael John O'Leary in charge of his property. Michael John O'Leary was to either sell the

property or lease it. In 2000 Michael John O'Leary leased the property to Melcome Pharmaceuticals Limited. The lease expired at the end of January 2009.

Michael John O'Leary subsequently entered into an agreement for the lease of the property with the respondent who is a former managing director of Melcome Pharmaceuticals Limited with effect from 1st February 2009. Applicant contends he never agreed that respondent carry out alterations or additions to the property.

In 2010 the applicant learnt that the respondent had failed to pay any rentals since February 2009. He immediately instructed his legal practitioners to seek cancellation of the lease and for respondent to vacate the premises. Having received no response he instructed that legal proceedings be instituted.

Michael John O'Leary deposed to a supporting affidavit in which he confirmed entering into a lease with Melcome Pharmaceuticals Limited on behalf of the applicant. The period of lease was one year with effect from 1st September 2000. Melcome Pharmaceuticals was represented by respondent in his capacity as its managing director. The lease was renewed for several years until it lapsed on 31st January 2009.

On 1st February 2009 he negotiated a lease of the same property to the respondent for US$750, 00 per month. He made reference to a copy of the lease that is attached to the papers. The lease expired on 31st January 2010. The respondent is said not to have paid any rent despite several requests for him to do so. He also disputes that the respondent was ever authorized to effect any repairs to the premises.

On the other hand the respondent contends that the lease between the applicant and Melcome Pharmaceuticals lapsed on 31st July 2006. It was never renewed. He disputes entering into a lease of US$750, 00 per month with effect from 1st February 2009. He contends that he has been a statutory tenant since 1st August 2006.

The respondent contends that he has a bona fide defence against the claim. Since February 2009 there has been no agreement either in respect of the lease or the rentals. This is because he wanted to offset the rental against the repairs he had effected to the premises. In essence he contends that there are material disputes of facts which applicant has always been aware of.

In heads of argument filed on behalf of the applicant counsel submitted that summary judgment is being sought only in respect of the claim for eviction. It is conceded that there is a dispute regarding the claim for arrear rentals whereas the claim for holding over damages is not liquid.

The law applicable in an application for summary judgment is well settled. In this respect counsel for the respondent cited the cases of *Hughes v Lotriet* 1985 (2) ZLR 179 (HC), *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (HC), *Central African Building Society v Ephison Simbarashe Ndahwi* HH-18-2010 and *Scropton Trading (Pvt) Ltd. v Khumalo* 1998 (2) ZLR 313 (S).

In the case of *Hales v Doverick Investments (Pvt) Ltd* (supra) it was held by MALABA J (as he then was) at 238-239:

"The onus is on the defendant to satisfy the court by its affidavit that it has a good prima facie defence to plaintiff's action.

The test that is to be applied to the defendant's affidavit is clear on the authorities. In Rex v Rhodian Investments Trust (Pvt) Ltd 1957 R&N 723; 1957 (4) SA 631 (SR) the phrase ``good prima facie defence to the action" in r 66(1)(b) of the Rules of Court 1971, was interpreted by MURRAY CJ at p 633G to mean:

``.... that the defendant must allege facts which if he can succeed in establishing them at the trial, would entitle him to succeed in his defence at the trial."

In Jena v Nechipote 1986 (1) ZLR 29 (S) GUBBAY JA (as he then was) said at p 30D-E:

``All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that `there is a mere possibility of success'; `he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted."

The defendant's affidavit should not only disclose the nature of the defence relied upon to resist plaintiff's claim for ejectment, but must set out the material facts on which that defence is based in a manner that is not inherently or seriously unconvincing. In Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S-139-86 at pp 4-5 of the cyclostyled judgment MCNALLY JA referred to the degree of particularity and completeness which the facts averred by the defendant in its affidavit filed in opposition to an application for summary judgment must achieve as being that:

``... while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence (Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426D).

... the statement of material facts [must] be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim .... if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of bona fides (Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 at 228D-E)... he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts (District Bank Ltd v Hoosain & Ors 1984 (4) SA 544 at 547G-H)."

The submission by counsel for the applicant that a court can grant summary judgment in respect of part of the claim is provided in the rules of court. Order 10 Rule 73 of the Rules of The High Court provides that-

"If on the hearing of an application made under this Order it appears -
(*a*) that a defendant is entitled to leave to defend and some other defendant is not so entitled; or
(*b*) that a defendant is entitled to leave to defend as to part of the claim; the court may—
(i) give leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or
(ii) give leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim; or
make both orders mentioned in (i) and (ii)."

What then remains to be determined is whether the court can grant summary judgment in respect of the claim for respondent's ejectment whilst granting respondent leave to defend the claims for arrear rentals and holding over damages.

It is difficult to make out what is the respondent's defence to the claim for ejectment. The respondent claims to be a statutory tenant by virtue of the lease between him and the applicant having expired in January 2010. He also claims that there had been no agreement on rent. He therefore disputes failing to pay rent as claimed. On the other hand he contends that he is entitled to retain possession of the property since he is owed money for the renovations and repairs he made to the property.

The applicant's cause for seeking the respondent's ejectment is that the lease expired. He is the owner of the property. Is the respondent entitled to retain possession of the property pending settlement of his claim for improvements and repairs? This issue was dealt with succinctly by GILLESPIE J in *Omarshah v Karasa* 1996 (1) ZLR 544 (HC). The facts of that case are similar to the present matter save that the defendant was a sub-lessee. It appears from the brief facts of the matter that after expiration of the sub-lease defendant was given notice to vacate the premises. After failing to vacate the premises the plaintiff issued summons commencing action to which the defendant filed appearance to defend. The defendant then raised the defence of *ius retentionis* when the applicant applied for summary judgment. Commenting on the defence of lien for improvements GILLESPIE J had this to say at 589-

"The next defence may be dealt with even more shortly. It is that the defendant may persist in occupation of the property in order to enforce a claim for compensation against the landlord. Assuming in the defendant's favour, although it is by no means clearly established on the papers, that the defendant effected improvements for which he is entitled to compensation, nevertheless he may not hold over in occupation. On this point of law I can do no better than to refer with respect, and to adopt with diffidence, the statement of law expounded by van Zyl J in Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd 1989 (1) SA 106 (W). From 109H to 111B the learned judge embarked upon a thorough discourse of the jurisprudential basis of a ius retentionis and the extent to which such a lien has been recognised as enforceable by lessees according to the Roman-Dutch law.

His treatment of the subject can leave one in no doubt that such a right of retention, which might on first principles otherwise have been available to lessees as bona fide possessors of the property concerned, was removed from them by the Placaat van die Staten van Hollandt, techens die Pachters ende Bruyckers van de Lande. This measure limited the lessee's right to claim compensation to a claim to be brought only after the property had been vacated by the lessee, thus removing the right of retention. The learned judge noted the reception of this law into South Africa, as acknowledged in the matter of de Beers Consolidated Mines v London and South African Exploration Co (1893) 10 SC 359 at 368-9 (and thence into the law of Zimbabwe) and found (at 112B) that the law applies equally to rural and urban tenements.

The effect of this law is unequivocally that a lessee, and consequently the defendant, has no right of retention of occupation of leased property after the termination of the lease as a lien against compensation for improvements. The second defence therefore also fails."

In the present matter the respondent has not been able to justify why he wants to retain occupation of the property apart from the claim for compensation. That claim for compensation can still be pursued after the respondent has vacated the premises.

Accordingly, it is ordered as follows-

a) Summary judgment in case number HC 5526/10 is granted for the ejectment of respondent from 37 Hillview Road, Philadelphia, Harare.

b) Leave is given to the respondent to defend the claim for arrear rentals and holding over damages.

c) The respondent shall pay the costs of this application.

Sawyer & Mkushi, applicant's legal practitioners

I.E.G. Musimbe & Partners, respondent's legal practitioners