AISHA MANIYAH
versus
IMPRAAN PATEL

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 March 2025

Civil Trial

S Noormohamed, for the plaintiff
B Pabwe, for the defendant

CHITAPI J: The parties are as cited in the heading to this judgment. The plaintiff owns a premises called Shop No1 72 Charter Road Cameron Street, Harare. She leased the property to the defendant in terms of a verbal lease agreement. In terms of the declaration the plaintiff pleaded that the agreed rental was USD$500.00 payable on or before the 7th day of each mouth. The date of the verbal agreement was not pleaded. The plaintiff pleaded that the defendant had paid rentals for the months of October 2020 and November after due date and that the defendant further failed to pay in full, rentals for the months of December 2020, through to March 2021 or on due dates. The plaintiff pleaded without specifying the amount of the shortfalls or dates of late payment that the outstanding amount of shortfalls totalled USD$2000.00. She pleaded further that the defendant also owed an outstanding rental of USD$100.00 for the month of April, 2020.

The plaintiff pleaded that in consequence of the pleaded defendants' breaches, the verbal lease agreement was cancelled. She also pleaded that she gave three months notice to the defendant to vacate the premises on the grounds that she required the premises for her own use before following on that verbal notice with a written notice dated 2 November 2020. The plaintiff pleaded that the defendant failed to vacate the premises despite demand and despite having committed material breaches of the lease agreement. She prayed in the declaration for the following relief:

(a) Payment in the sum of United States two thousand one hundred dollars (USD 2100), together with interest at the prescribed rate from date of service of summons to date of final payment.

(b) Payment of holding over damages in the sum of USD$16-66 per day from the first April 2021 to date of ejectment of the defendant and all those claiming occupation through him.

(c) Ejectment of the defendant and all those claiming occupation through him from the premises situated at shop No 1, 72 Charter Road, Cnr Cameron Street, Harare.

(d) Costs of suit.

In the plea, the defendant pleaded a denial of breach of the verbal lease agreement as pleaded by the plaintiff. He pleaded that rentals have always been paid in arrears since 2020 but did not specify the date by which the arrears rental payments ought to have been said. The defendant also pleaded that in respect of rentals for January 2021 March 2021, the "parties agreed to relax the payments due to the national lockdown which was in place." The details of the relaxation were not pleaded.

In relation to the claim that the defendant owed the sum of USD$2100 in unpaid balances of rental, the defendant pleaded that he did not owe the plaintiff anything and challenged the plaintiff to prove the claim. He further pleaded that the rentals claimed were not due because an agreement had been reached to suspend the payment of rentals during the national lockdown period. He further pleaded that he was not in breach of the verbal lease agreement but that the plaintiff was the one attempting to vary the terms of the lease agreement. The details of the agreement to suspend payment were not pleaded. Lastly, the defendant pleaded that the plaintiffs' cancellation of the lease agreement was "illegal in terms of the rent regulations. Details of the illegality were not pleaded. He also averred that the notice to vacate was illegal as" it falls foul of the rent regulations for commercial properties and therefore invalid."

By just going through the pleadings, the declaration and the plea are in the same league. They are clearly vague and embarrassing. They lack specificity of facts necessary to ground the claim or avoid liability as the case may be. It is a rule of pleadings that in the declaration the plaintiff should not plead evidence to prove the factual averments pleaded. The factual averments only must be clearly and concisely pleaded. To state as the plaintiff did that part payment of rentals

was made leaving balances, without pleading specifics of payments made and balances due makes the averment vague and embarrassing as it is too generalized and likely to be met with a generalized response. Equally, for the defendant to plead that there were variations of the agreements suspending rentals and to state that the cancellation of the agreement is illegal in terms of the rent regulations without further ado is equally vague and embarrassing.

The rules of court S.I 202/2021 in Rule 12(5) is clear and reads as follows; "5" Before issue, every summons shall set forth-

(a)-(c)……..

(d) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action and

(e) the date of issue"

Rule 13 provides for a declaration which is required to be filed as an annexure to a summons in matters in which the plaintiffs claim is not for a debt or liquidated demand. The rule provides as follows:-

> "Declaration
> 13. (1) In every case in which the claim is not for debt or liquidated demand the summons shall have annexed to it a statement of the material facts relied upon by the plaintiff in support of his or her claim, to be called a declaration which shall state truly and concisely-
> (a) the name and description of the party suing and his or her place of residence or place of business; and
> (b) if the plaintiff sues in representative capacity, the capacity in which he or she sues; and
> (c) the name of the defendant and his or her place or residence or place of business; and
> (d) if the defendant is sued in representative capacity, the capacity in which he or she is sued; and
> (e) the nature, extent and grounds of the cause of action.
> (2) Every declaration shall state precisely the relief which the plaintiff claims, either simply or in the alternative.
> (3) Where the claim is for a debt or liquidated amount which includes capital and interest on the capital, the declaration shall state suck of the particulars set out in rule 12(9) to (10) as may be relevant to the claim.
> (4) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separately and distinctly.
> (5) The provisions of rule 12(11) relating to amendment of summons shall apply with the necessary changes to amendment of a declaration."

In respect of the defendant, r 37provides that the defendant should in the plea deal with allegations in the declarations. Significantly and relevant to this case is subrule 4 thereof which provides that:

> "(4) The defendant shall in his or her plea either admit or deny or confess and avoid all the material facts alleged in the combined summons and declaration or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which he or she relies."

Rules 12, 13 and 37 are to be read with rule 36 which elaborates what form every pleading must take and its containments. In particular rule 36(1)(d) which must be read conjuctively with other subrules provides that every pleading shall:

> "(d)contain a clear and concise statement of the material facts upon which the party pleading relies for hiss or her claim or defence or answer to any pleading as the case may be with sufficient particularity to enable the opposite party reply thereto, but not the evidence by which they are to be proved,…"

It follows in my view that it is unacceptable pleading for a defendant as done in this case to simply allege that there was a variation agreement without giving its specifics. Pleadings delineate and identify issues which if resolved will determine the outcome of the proceedings. In the case of *Medlog Zimbabwe (Pvt) Ltd* v *Cost Benefit Holdings (Pvt)* SC 24/18 GARWE JA with the concurrence of GOWORA JA and GUVAVA JA (the first two now JCCs) in para 25 of the judgment took time to deal with the issue of the function of pleadings. The learned judge cited various authorities and quoted pronouncements made therein on the function of pleadings. Some of the authorities cited were *Durbach* v *Fairway Hotel Ltd* 1949 (3) SA 1081 where it is stated"

> "The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to the action the issues upon which reliance is to be placed."
> And also *Courtney- Clarke* v *Bassingth Waiglite* 1991(1) SA 684 (Nm) at p 698 where the following is stated:
> "In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action not pleaded, alternatively there is no authority for ignoring the pleadings… and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case, the least a party can do if he requires a substitution of or amendment of his cause action, is to apply for an amendment."

It appeared to me that the pleadings in this matter amounted to a cat and mouse game where neither party pleaded specific and clear facts. The problem with this type of pleading is that it is not rule compliant. Real issues are not articulated nor addressed by the parties. This makes it difficult for the court to understand what issues exactly it is required to answer. In *casu*, the parties were lucky that at the pre-trial conference, the matter was referred to trail. The referral to trial does not atone for the atrocious pleadings.

In the joint amended pre-trial conference minute filed on 14 September 2002 two issues were agreed between the parties. They were stated as follows:

> "1. Whether or not the plaintiff requires the premises for her own use?
> 2. Whether or not the defendant breached the lease agreement in a material manner by failing to pay the monthly rentals on due dates."

Thus, if one considers the declaration and plea, the issues must arise from disputed facts. The court makes determinations firstly on disputed facts before applying the law to the facts found proved by the plaintiff.

The second agreed issue presupposes that monthly rentals were not paid on due date but what does the court make of the issue as expressed in that manner? I pose that rhetoric question because, from the declaration the plaintiff pleaded that rentals were due by the seventh day of every month. The defendant however, pleaded in the plea that rentals were paid one month in arrears. There was therefore no agreed due date for rentals yet the issue presupposes that there was an agreed due date. If there was an agreed due date, the issue would then have been whether or not parties varied the agreement in relation to the dates of payment of the rentals. The issues were therefore detached from the pleadings showing that not much thought was put into their composition.

In *the Medlog Zimbabwe (Pvt) Ltd* case (*supra*) the learned GARWE JA quoted with approval other decisions as follows in para 25.5 of the judgment.

"25.5 *In Imprefect (Pty) Ltd* v *National Transport Commission* 1993(3) SA 94(A), 108, the court cited with approval the case of *Robinson* v *Randfontein Estates GM. Co. Ltd* 1925AD 173 where at p 198 it was stated as follows:-

> "The object of pleading is to define issues and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court and not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been thorough and as patient as in this instance, there is no justification for interreference by an appellate tribunal, merely because the pleading of the opponent has or been as explicit as it might have been."

As I understand the above dicta, the court reiterated the general rule that parties should be beholden strictly to their pleadings and that whilst pleadings should not hamstring the court's discretion to allow a party to depart from them, the circumstances of each case will determine the

exercise of the discretion to allow a departure which is never to be given as a matter of course but for justifiable cause.

Having commented adversely on the atrocious pleadings the court must nonetheless. consider the case and the evidence as presented and try and relate the evidence to the agreed issues notwithstanding that there appears to be no correlation between them unless one really stretches to find the congruency between them.

The plaintiff gave evidence to the following effect. She testified that the defendant has been a tenant at the property in issue for the past ten years with their relationship governed by a verbal lease agreement. The defendant was required to pay USD$500.00 by the seventh day of each month. She stated that she owned four other shops at the same complex and that the tenants for the other shops also paid rentals by the 7th day of each other. She denied that there had been a variation of rentals and payments dates in 2012 for payment of rental to be made in arrears. The plaintiff claimed that the defendant had not paid rental for the month of October – December 2020 and January – March 2021. She denied that rentals were suspended because of COVID 19 and averred that she was not aware of any law which suspended payment of rental for commercial properties. In relation to outstanding rental for April 2020, the witness testified that the defendant paid US$400 leaving a balance of USD $100.00.

The plaintiff further testified that as at the date of issue of summons the defendants was in arrears of US$2100.00 which however, had been paid by the date of trial. She however, stated that the rental for September 2022 in the sum of US$500.00 was outstanding although it should have been paid by the seventh day of September.

The plaintiff produced documentary exhibits as follows:

Annexure A was a letter dated 2 November 2020 addressed to the defendant by the plaintiffs' legal practitioners. The letter gave the defendant three months notice to vacate the premises from 2 November 2020 to 31 January 2021 it being noted that the defendant had earlier been given a verbal three months notice to vacate the premises commencing 1st August 2020 to vacate on or before 31 October 2020. The letter noted that the defendant would now have been granted six months notice altogether if regard is had to both the new notice conveyed in the letter and the earlier verbal notice. The plaintiff stated that the defendant did not protest the letter nor did he vacate as demanded.

Exhibit B was another letter dated 9 November 2020 addressed to the defendant by the plaintiffs' legal practitioners. The letter was a demand for rentals for the months of October and November 2020 in the combined sum of US$1000.00 as well as USD $200.00 in arrear rentals. The letter demanded payment of US$1200.00 within seven days of receipt of the letter failing which legal proceedings for cancellation of the verbal lease agreement would be instituted together with claims for outstanding rental and holding over damages. Ex B was responded to by letter dated 17 November 2020 from the defendants' legal practitioners. The letter asserted that rentals were paid a month in arrears such that October rental was due at the end of November and November rental was due end of December. It was stated in the letter that rentals for October 2020 would be paid on or before 30 November 2020. With regard to the US$200.00 the letter asserted that it arose from rentals for the lockdown period which it had been agreed that, they be paid in instalments.

Annexure C dated 2 December 2020 was another letter to the defendants' legal practitioners by the plaintiff legal practitioners. The letter disagreed with the defendants contentions that rentals were due to be paid a month in arrears. The letter asserted that rentals were due in advance and that rentals for October and November 2020 had therefore not been timeously paid. Legal action was again threatened. The plaintiff averred that no response was received to that letter much as there was no response to annexure D. Annexure D was a letter dated 7 December 2020 written by the plaintiffs' legal practitioners to the defendants' legal practitioners. It reminded the defendant of the notice to vacate the premised and that the defendant should confirm that he would vacate the premises by not later than 31 January 2021. No response was received to the letter according to the plaintiff.

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The plaintiff also averred that's she required the shop leased to the defendant for her own use. She averred that she required the shop to establish the business of selling electronic products cellphones and related goods. The shop was ideal because it was the smallest of her rented shops at the premises. She produced without objection as annexure E a letter of confirmation of the supply of electronics and cellphones for sale on credit by a Mozambican company MZ Electronics with the plaintiff being granted a credit facility whereby she would pay for the supplied goods within thirty days of delivery of the goods. The letter was not challenged. The letter was dated 10 July 2020.

The cross examination of the plaintiff was not eventful. She stuck to her testimony. She was asked to confirm whether there was a family relationship between her family and that of the defendant and she confirmed so. She denied that relations between her and the defendant had soured because of some misunderstandings and stated that the landlord tenancy relationship between her and the defendant was a business relationship. The plaintiff denied that she gave a rental moratorium because of Covid 19 and lockdowns. She reiterated that rentals were supposed to be paid in advance and not in arrears. The plaintiff fared well in giving a coherent and consistent account of the facts as she set them out and the court easily followed her evidence which remained unscatched despite her cross examination which was subdued and done as a matter of course without any conviction to discredit the evidence of the plaintiff. The plaintiffs' case was closed without calling any witness.

The defendant gave sworn evidence too. He testified that he had a verbal lease agreement with the plaintiff to occupy the shop in issue herein. He averred that the terms of the tenancy were adjusted as the situation demanded since there was a family friendship between him and the plaintiff. He testified that rentals were paid monthly in arrears and that payments were made in cash. He admitted that he was given a verbal notice to vacate the premises in August 2020 following a misunderstanding of the families at a dinner hosted by the defendant at his house. He averred that there was no genuine reason for the plaintiff to kick him out of the shop and that

exhibit E was a contrived document meant to justify the plaintiffs' made-up story that she wanted the shop to conduct business. He testified that he was not the only tenant and should not be a target.

Under cross examination on why he did not protest the verbal and written notices he responded that he spoke to one Ahmed of the plaintiffs' legal practitioners firm. He averred that rentals were due by the 21st – 23rd of the month and that the plaintiff had said that he could pay by the end of the following month. He said "Why not get the benefit of it?" when asked to confirm that he did not pay rentals for January- February and March. He said that he did not pay because of COVID 19 lockdown and that the plaintiff agreed to that. He gave an example that rent for January could be paid on "any date in February." He stated that he cleared the arrears for those months. When asked to give the reason why he opposed plaintiff's claim, the defendant responded that the plaintiff did not have a reason to evict him except that it was a vendetta arising from a misunderstanding that happened at the dinner. He also averred that the plaintiff had been heard to say that she would fix the defendant. He averred that this was said within the hearing his legal practitioners Mr *Samukange*. Mr *Samukange* did not testify to confirm this. He also averred that he had been renting another shop belonging to the plaintiff which he gave up and that the plaintiff now wanted him to be without a place to operate from.

The defendants demeanour was not impressive. He showed signs of pride and arrogance. For example, when asked about whether rentals were to be paid in arrears or in advance, he said that he could pay on any date in the following month and further stated "why not take advantage of the benefit." To him it was an issue of manipulating the verbal agreement to his advantage. As a witness the defendant did not impress the court. Where his evidence conflicts with that of the plaintiff, the evidence of the plaintiff will be preferred. The defendant had no witness to call and closed his case.

The parties counsel filed written submissions. It was submitted on behalf of the plaintiff that she had proved her case and that the defendant had not advanced a plausible defence. It was submitted that the defendant created new defences that the plaintiff had a vendetta against him when his plea did not deal with that defence. It was submitted that the defendant failed to establish his assertion that rentals were due monthly in arrears. It was submitted that the plaintiff had made out a case for the cancellation of the verbal lease agreement and the eviction of the defendant as

evidence had shown that the defendant did not pay rent on due date for several months and that the plaintiff required the shop for his own use.

Counsel for the defendant submitted that the plaintiff had failed to prove her case on a balance of probabilities. It was averred that the verbal and written notices did not specify the reason for cancellation of the verbal lease agreement. This of course is not true. In annexure A, the letter was clear that the first notice of August 2020 which the defendant admitted in evidence to have been given gave the reason of owners own use. Annexure A reiterated the same reason. It should be noted that the declaration pleaded non payment of and late payment of rent as the principal reason but it also incorporated the letter of notice referred to the need for recovery of the premises for the owners' own use.

Counsel submitted that the owners' use as a ground for cancellation of the lease agreement was brought as a last minute addition to the plaintiff's claim on the eve of the pre-trial conference. This of course is not altogether true because the letter of notice provides this principal ground. Further the issue was adopted by the parties at the pre-trial conference and it was adopted by the parties. It was open to the defendant to amend the plea by specifically traversing this ground. The defendant did not do so. There was in any event no evidence led to show that the defendant protested the notice nor asked for grounds of cancellation which was something he could have done had he wished to nor taken the matter with the seriousness which it deserved.

Counsel for the defendant submitted that no rentals were owing as at the date of hearing. He submitted that the plaintiff did not prove that rent was not due monthly in arrears. It was also submitted that holding over damages had not been substantiated. This latter part is best disposed of on the turn. The holding over damages were simply calculated at the daily rate of US$16.16 arrived at taking into account that the agreed monthly rental was UD$500.00. If one divides the amount by the number of days per month. In *casu*, the factor of thirty (30) days would have been used and its common sense. The issue really would be whether any such rentals are due or the payments are up to date.

Despite my observations on how the issues were cast, the court must determine whether "good and sufficient grounds" were established by the plaintiff on a balance of probabilities to entitle her to cancel the verbal lease and obtain consequential relief. Whether or not such grounds have been established is a matter of fact to be determined on the basis of the circumstances of each

case. As was stated by GUBBAY JA (as he was then) in *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986(2) ZLR 148(S) at 154 C – D.

> "It is hardly possible in my opinion, certainly undesirable to attempt any definition of the words "good and sufficient grounds" which appear in the latter part of S 22(2) of the Regulations. Whether the lessor succeeds in overcoming the burden they create depends on the particular circumstances of each case "to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing the tenants rents unjustifiably. The court is enjoined to exercise a value judgment which is arrived at without caprice or bias or the application of a wrong principle."

The approach of the court is further elucidated in the case quoted by plaintiffs' counsel of *Paget*. *Pax Endowment Trust* v *Highlife Investments* (Pvt) Ltd 2015(1) ZLR 833(H) at 844 B – E wherein MAFUSIRE J stated:

> "It is now trite in my view that the judicial officer looks at the position of the lessor and not that of the lessee, to determine whether there are good and sufficient grounds for the lessor wanting his premises back, if the lessor has good sufficient grounds, that is the end of the position of the matter…"

In the case of *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006(1)ZLR 451(S) 457 A-C 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 lease who resists ejectment to bring toward circumstances casting doubt on the genuineness of the lessors claim. See *Filmond Video Trust* v *Mahovo Enterprises (Pvt) Ltd* 1993(2) ZLR 191(H). See also *Newman* v *Biggs* 1945 EDL 51, 54 and 55…In determining what constitutes good and sufficient grounds the court makes a value judgment which is arrived at without caprice, bias or the wrong application of principle, will not lightly be set aside on appeal."

The evidence of the plaintiff which was not out in dispute or denied was that she had secured a credit time for the supply of electronic accessories and cellphones from a supplier in Mozambique. The plaintiff would be supplied with the goods on a thirty day credit. The plaintiff produced a letter confirming the credit line. The defendant did not object to the production of the letter. The defendant was content to only dwell on what he considered to be *mala fides* by the plaintiff because of a vendetta. I am satisfied that the plaintiff proved on a balance of probabilities that she required the shop being the smallest of her shops at the complex for personal use to run the business the details of which she shared with the court in evidence. On this score alone she is entitled to recover her premises.

The issue of non payment of rentals and late payment of the same as pleaded in the declaration was also proved on the evidence. The defendant was and as admitted by him in default of payment of rentals for January to March 2021. The defendant attributed the non payment to the national lockdown and that the plaintiff relaxed the payments. No details of the relaxation were given by the defendant. The plaintiff denied that she gave any moratorium on rental payments and averred that the law did not provide a moratorium for rentals of commercial properties. I find that there was no evidence adduced to show that there was a relaxation of rentals. The defendant literally said nothing to show that the plaintiff relaxed them because he gave no details of the content of the relaxation or its terms. The defendant was by not paying rentals as agreed in serious breach of the verbal lease agreement, thus providing a further ground for cancellation of his tenancy and his eviction. The plaintiff's case was proved on the balance of probalities. It is unnecessary to deal with the issue of whether rentals were due in advance or in arrears because of the finding of breach by non payment of due rentals. The rentals for January to March were in any event not paid on due dates be it they should have been paid in advance or in arrears.

The issue of holding over damages does not present a problem because the defendant can always show by proof of payment that no holding over damages are due. It was admitted that no arrear rentals were due as at the date of hearing. An appropriate order will be issued.

In relation to costs they must follow the event. It is accordingly ordered as follows:

1. The verbal lease agreement between the plaintiff and the defendant for the defendants' occupation of shop 1, 72 Charter Road, Corner Cameron Street Harare is hereby cancelled.
2. The defendant shall vacate the said property within 48 hours of service of this order failing which the Sheriff shall evict him and remove his goods there from.
3. The defendant shall if he does not vacate the premises within 48 hours service of the date of this order be liable to pay holding over damages to the plaintiff at the rate of US$16-67 calculated at the ZiG equivalent at the rate prevailing on the date of payment of the date of his eviction.

4. The defendant to pay costs of suit.

CHITAPI J:…….

Ahmed and Ziyambi, plaintiff's legal practitioners
Venturas and Samukange, defendants legal practitioners