LIKVEE INVESTMENTS (PVT) LTD

versus

OLD MUTUAL PROPERTY INVESTMENTS

CORPORATION (PVT) LTD

HIGH COURT OF ZIMBABWE

KWENDA J

HARARE, 6, 7 & 20 June 2018

**Civil Trial**

*J Ndomene,* for the applicant

*A Muchandiona*, for the respondent

KWENDA J: The plaintiff is a tenant of the defendant at premises situated at stand no. 14947 Harare also known as Beatrice Corner along Simon Mazorodze Road.

The plaintiff has sued the defendant for the payment of the sum of $244 584.00 described as ‘payment for clothing material’. (See face of the summons). Actually, plaintiff’s claim is for damages. Plaintiff avers, in its declaration, that its stocks of clothing materials were damaged on five occasions due water leaks at the leased premises. It alleges that the defendant is to blame because it negligently failed to attend to the leaks. The damage complained of is as follows;

1. On 21 March 2013 stock worth $115 784.00 was damaged.
2. On 6th September 2013 stock worth $80 466.00 was damaged and defendant allegedly

paid $25 088.00 as part compensation.

1. On the 16th June stock worth $22 294 was damaged
2. On the 9th July 2014 stock worth$32 875.00 was damaged
3. On the 23rd June 2015 stock worth $18 225 was damaged.

It is alleged that the leaks in March and September 2013 occurred after some heavy rains. The other leaks are not explained and the months during which they occurred are not associated with the rain. The plaintiff averred that the parties’ lease agreement obligated the defendant to ensure the leased property was in good condition and safe. If further averred that, reports having been made, defendant unsatisfactorily attended to the same. The word ‘same’ probably refers to the complaints of the leaks. The plaintiff averred that defendant admitted liability when it he paid $25 088.00 but has not compensated for the rest of the damage.

The defendant was obliged, in terms of Clause 26 (1) of the parties’ lease agreement to “…. maintain the exterior of the premises as well as the main exterior walls and roofs thereof in good order and repair.” On the other hand the plaintiff was required to give the landlord written notice within seven days after the commencement date of lease of defects in the premises. See Clause 26 (2).

The defendant resisted the claim. Firstly it submitted that the claim for $115 784.00 arising on the 21st March 2013 had been extinguished by prescription after the expiry of three years. Summons in this matter was issued two months after the period of three years had expired. Secondly, it submitted that the manner of the damage was not reasonably foreseeable and the plaintiff failed to insure its goods despite undertaking to do so. The defendant averred that it had no knowledge of the goods destroyed and put plaintiff to the proof thereof. It relied on clauses in the lease agreement exempting it from any liability for any damage to the plaintiff’s goods. The exemption is contained in Clause 8 of the lease agreement which is worded as follows:

“The tenant shall not under any circumstances be entitled to cancel the lease or have any claim or right of action whatsoever against the landlord for any damages loss or otherwise nor be entitled to withhold or defer payment of rent by reason of the premises … being in a defective condition or falling with disrepair or any particular repairs not being effected by the landlord or for any reason whatsoever…”

DID THE DEFENDANT ADMIT LIABILITY?

I have to decide whether or not the defendant admitted liability. In September 2013 the plaintiff wrote to the defendant on the 12th September 2013.

“Please note that on Friday 6th September 2013 we arrived to find water leaking through the walls and ceilings with our premises from upstairs as a result of some structural problems. Some of our products were damages as a result.

We hope you will address this issue immediately as this is not the first time that it has happened…”

The defendant respondent on the 1st October 2018;

“We refer to your letter dated 12 September 2013 in connection with the above. We are sorry on the sad loss. We will on our part do everything possible to prevent future incidents like this one.

While we appreciate the loss could have been minimized if you had insurance cover. We felt we should also assist as much as possible. To this end we are giving you a rent concession for three (3) months amounting to $25 088.10 net. Please not that this concession is for rent only and expect you to pay operating costs.

We hope this goes a long way in mitigating your loss.”

Plaintiff has claimed that defendant admitted liability by giving the rent reprieve. The defendant on the other hand submitted that the concession was in consideration of the fact that a portion of the building was covered in water and therefore unusable. I find that Clause 18 provides that the premises shall be deemed partially untenantable if not more than 50 % of the area is destroyed or damaged by fire or other cause and substantially untenantable if more than 50% of the area is damaged or destroyed. The significance of this clause is that in the event of damage to the property which affects less than 50% of the rented area, the landlord will expeditiously attend to restoring full use and while that is happening, plaintiff is entitled to reduction in rent corresponding to the space that it is unable to occupy beneficially. So the clause provides for rent remission and not damages. In evidence, it became clear that what the plaintiff referred to as payment of $25 088.00 was actually a rent remission contemplated in terms of clause 18. What happened on this particular occasion can only be explained in terms of the provisions of clause 18 which provided for rent reprieve commensurate with the area rendered unusable. The defendant did not give remission equivalent to the damage of $80 466.00. On the first occasion the plaintiff had written to the defendant advising it of damage to its goods worth $115 784 due to water leaks. The defendant responded as follows on 25 March 2013:

“We refer to the above matter and your letter dated 21 March 2013 with list of products damages attached. We are deeply sorry for the total loss of $115 784.00 you say you suffered was a result of water leaking into your premises. We are still carrying out investigations as to the cause of the leakage and will advise in due course.

In the meantime we advise that you urgently lodge a claim with your insurer for compensation. This is in line with clause 33.3 of the lease agreement which state that the tenant shall insure and keep insured all its goods – and all goods in the premises.”

Accordingly defendant did not admit liability. To the contrary, it reminded the plaintiff odf its contractual obligation to insure its stock.

PRESCRIPTION

Defendant specially pleaded that plaintiff’s claim in the sum of $115 00 arising from the loss of goods damages on the 21 March 2013 has prescribed. Plaintiff‘s counsel conceded in argument that the claim has prescribed because plaintiff’s summon was issued two months after the period of 3 years has lapsed. He argued however that the plaintiff’s failure to take action before the claim prescribed is excusable. He submitted that the delay of two months is not inordinate taking into account what was happening. Meetings were held and promises made. I reject the plaintiff’s argument. In the first place there is no evidence of several meetings and promises. The evidence is that when plaintiff notified the defendant of the water leak which occurred on 21 March 2013, the latter’s response was to advise the plaintiff to lodge a claim with its insurers. The contents of the letter reveal that the defendant actually thought the plaintiff’s goods were insured as promised in clause 33.3 of the lease agreement.

“.. we advise you to urgently lodge a claim with you insurer for compensation…”

The defendant reiterated the need for insurance cover when the second leak occurred. See letter dated 1 October 2013

“… the loss could have been minimized if you had insurance cover, …”

Section 14 of the prescription Act [*Chapter 8:11*] provides for “Extinction of debts by prescription.”

“1. Subject to this part and Part V a debt shall be extinguished by prescription after the

lapse which in terms of the relevant enactment applies in respect of the prescription of

such debt.”

In this case a period of 3 years applies. The Act does not provide for exceptions for

failure to act in excusable circumstances. The only exceptions are that a debtor who chooses to pay debt after it has prescribed cannot claim restitution even if he/she did not realise that the debt had prescribed at the time of payment. The Act also provides for circumstances that

1. delay the onset of the period of prescription see s 16
2. delay the completion of the period see s 17
3. interrupt the running of prescription see s 18 & 19

In this matter there are no circumstances delaying either the commencement of the

prescription or completion thereof. The running of the prescription was not interrupted in any way.

I therefore uphold the special plea and find that the claim for $110 000 based on the events of 21 March 2018 has prescribed.

DEFENDANT’S LIABILITY FOR NEGLIGENCE.

I only need to determine is the issue of defendant’s liability and not quantification of damages since the value of the damages goods was put to the defendant in writing each time the damage occurred and was not contested. My findings concerning the events subsequent to the claim which has prescribed would have applied to it had it not been extinguished by prescription.

In terms of clause 18 any dispute as to whether the premises have at any time during the operation of the lease become untenantable to any degree or remission of remission of rent shall be submitted to the landlord’s (defendant’s) architect whose decision shall be binding. The exact nature of the problem or defect is not known because the parties did not involve an expert as was contemplated in clause 8.

The defendant’s witness testified that water was leaking through the concrete roof deck. Plaintiff avers that the mere fact that the roof leaked means the defendant failed to discharge its obligation to maintain the building in a state of good repair yet it owed that duty to the plaintiff in terms of the lease agreement. Failure to prevent the leaks was wrongful and it is liable for the damages goods. On the other hand, the defendant says it did not give warranty. It maintains that on all five occasions it sent workmen who repaired the building or roof concrete deck of the storey building. That, the defendant sent workmen to attend to the plaintiff’s complains was admitted in evidence. In any event it cannot be denied because the fact that the leak stopped means that the roof would have been attended to. The defendant also relied on the exemption clases. I note that the exclusionary or exemption clauses in the lease agreement are unambigous. However, while acknowledging that the lease contains clauses which exempt the defendant from liability, plaintiff’s counsel submitted that the defendant cannot, at law, exempt itself from liability arising from its negligence and the failure by the plaintiff to insure its goods is not a defence to a claim based on the defendant’s negligence. I understand the plaintiff to be submitting that where there is a causal connection between the defendant’s neglect of a contractual obligation towards the plaintiff and the conduct complained of caused patrimonial loss to the plaintiff, the conduct is wrongful and defendant is liable to compensate the plaintiff for the loss.

The plaintiff’s counsel was not clear in argument whether plaintiff’s claim is based on a breach of a contract or *delictual aquilian* action. Plaintif’s counsel simply argued claim is based on the four corners of the lease agreement. By that I understood him to be saying that the contract imposed on the defendant, a duty of care towards the plaintiff. Paragraph 8 of the declaration reads:

“ It is not in dispute that it is the responsibility of the defendant to ensure the safety and good condition of the property in operation rented by the plaintiff as the owner or manager of the same for the plaintiff rents and pays in rentals for a proper, safe and good premise.”

Reference to clause 26 (1) of the lease agreement was therefore merely to underscore the

defendant’s obligation towards the plaintiff. The alleged wrongful conduct by defendant is in the form of an omission.

It is trite that the defendant would be liable in delict if it omitted to act in circumstances where it had a legal duty to act. A contract or undertaking can give rise to a legal duty.

See p 49 *A Guide to the Zimbabwean Law of Delict* by G Feltor 3rd ed at p 49.

The contract imposed a duty on the defendant to maintain the premises in a good state or tenantable, to use the term in the lease agreement. This must be understood in the context of the other stipulations in the contract. The defendant did not give warranty that the premises were fit for the plaintiff’s business. [See clause 13 as read with clause 11]. The plaintiff undertook to notify the defendant of any structural defects within 7 days of occupation. [See clause 26.2]. In the event of any portion of the premises becoming unsuitable for beneficial use, the defendant was entitled to rent remission commensurate with the extent of the deprivation of use. In my view all these clauses mean that the defendants did not give a warranty. It was within the contemplation of the parties that structural defects could develop. I am sure; it is that context that the plaintiff undertook to insure its goods. The defendant could not give a warranty against structural defects. It is not an expert in construction work. It cannot warrant workmanship. It can only accept responsibility to meet the cost of maintaining the building in a good state. Both parties were unaware of any structural defects at the time of signing the lease agreement. Actually, we do not know whether the roof was leaking at the inception of the lease in the February 2012. Certainly it did not leak when it during the rain-season in 2012. The plaintiff was within its rights to cause the building to be examined for structural defects within 7 days and bring same [if any] to the attention of the defendant.

I find that it was within the contemplation of the contracting parties that defects in the building could exist or occur in the passage of time it is the reason why the defendant inserted exclusionary clauses and required the plaintiff to insure its goods. Exemption clauses are legally enforceable in this country. The principle of the binding nature of signature to a contract *caveat subscriptor* is part of our law. See *Business Law in Zimbabwe* by RH Christie 201 4ed on p 65. The consumer Contracts Act [*Chapter 8:03*] does not apply to a contract of lease. A party to a lease agreement can exempt himself from liability for his own negligence although the court may restrict the application of the exemption clause in appropriate circumstances. In this matter the application of the exemption must be interpreted in the spirit of the whole contract and conduct of the parties. I reject the argument that the exemption clause operated unfairly against the plaintiff. The defendant dispatched workmen each time a leak was reported. The actual nature and cause of the leak was not known. However the leak was not a daily occurrence. Therefore whenever it occurred the defendant attended to the problem. The actual nature of the rectification carried out is also not known. Suffice it to say that the roof has leaked on only five occasions. The plaintiff remains or at least was in occupation at the time this action was instituted. The defendant thus fully discharged its obligation in terms of clause 26 (1) of the lease agreement to be responsible for repair and maintenance of the rented premises. In any event its exemption from liability is sustainable in the circumstances.

I however would not award costs on a higher scale because the claim was not frivolous or an abuse of court process.

I order as follows;

The plaintiff’s claim is dismissed with costs on the ordinary scale.

*Maposa & Ndomene,* plaintiff’s legal practitioners

*Dansiger & Partners,* defendant’s legal practitioners