



**IN THE COURT OF APPEAL OF THE REPUBLIC OF
BOTSWANA HELD AT LOBATSE**

**COURT OF APPEAL CIVIL APPEAL NO. CACLB-0009-09
HIGH COURT CIVIL CASE NO. CC-3323-02**

In the matter between:

PIOFINE (PTY) LTD

APPELLANT

And

**WATER & SANITARY ENGINEERING
(PTY) LTD**

RESPONDENT

Mr. Attorney T.S. Chilume for the Appellant
Mr. Attorney S. Kebonang for the Respondent

JUDGMENT

**CORAM: DR. TWUM, JA
HOWIE, JA
LORD ABERNETHY, JA**

DR. TWUM JA:

1. On 4th November 2002, the respondent issued a writ of summons against the appellant claiming:-
 - (i) Payment of the sum of P32, 000
 - (ii) 10% interest thereon a tempora morae
 - (iii) Costs of suit
 - (iv) Further and/or other alternative relief.
2. In the Particulars of Plaintiff's Claim it averred that on or about 3rd September 2001, the plaintiff and the defendant entered into a written lease agreement for a fixed period of 24 months commencing from 3rd September, 2001 and ending on 30th September 2003. The agreed monthly rental was P2000.00.
3. The plaintiff further pleaded that without any just cause the defendant vacated the demised premises at the end of August 2002 and failed to pay the rental for September and October 2002 and also for the rest of the lease period.
4. Despite repeated demands the defendant failed or neglected to pay the sum of P32 000.00 owed to it, or any sum at all. The plaintiff therefore instituted the action to claim it.

5. In its plea the defendant admitted signing the lease agreement with the plaintiff. It also admitted that it vacated the premises at the end of August 2002 but denied that it owed the plaintiff the sum claimed or at all.
6. The defendant pleaded that on 31st July 2002 it gave the plaintiff notice of its intention to terminate the lease on account of the plaintiff's breach of the lease agreement.
7. The defendant gave particulars of the breach. First it claimed that the plaintiff defaulted in constructing an extension to the demised premises as it had agreed to do under clause 9 (c) of the lease agreement within three (3) months of the coming into effect of the lease or alternatively, within a reasonable term thereafter.
8. The defendant further claimed that the plaintiff kept considerable quantities of its building materials for projects other than the construction of the extension of the demised premises, on the premises, particularly sand and cement and these items were removed in such a haphazard manner that it created dust and other debris in the premises. Finally, the defendant alleged that the plaintiff's workers assembled in the premises for work without any regard for the defendant's convenience. The occupants of the

premises had to keep the gates open and they could not let loose their dogs, thereby compromising the security of the premises.

10. At the close of the pleadings both the plaintiff and the defendant gave evidence through their accredited representatives. Both counsel offered to submit written addresses to the court.
11. On 16th February 2009, the learned High Court judge gave judgment. He held that the defendant's neglect or refusal to pay the rentals to the plaintiff was unjustified. He reckoned that the defendant therefore owed rentals for 10 months "because on the uncontested evidence, it took the plaintiff 6 months, out of the remaining 16 months to find a tenant".
12. The learned trial judge made the following order against the defendant.
 - (a) Payment of the sum of P20 000.00.
 - (b) Interest at 10% *a tempora morae*.
 - (c) Costs of suit.

13. The defendant was dissatisfied with that judgment and on 20th March 2009 it noted an appeal against it. It filed copious grounds of appeal:

“GROUNDS OF APPEAL

1. The learned Judge in the court a quo erred when he held that Plaintiff was entitled to rental income for a period of 10 months when he had under the same breath held that it had taken Plaintiff a period of 6 months to find a new tenant.
2. The learned Judge in the court a quo erred when he held that the reasons advanced by Defendant for vacating the premises were not valid when Plaintiff himself had not adduced any evidence to challenge Defendant's evidence and when Defendant had further failed to replicate to Plaintiff's Plea on that particular aspect of its evidence.
3. The learned Judge in the court a quo erred when he held that nothing much turned on the issue of Plaintiff's non-replication to Defendant's Plea when Defendant's Plea raised new issues which called for a reply by Plaintiff.
4. The learned Judge in the court a quo erred when he held that the Plaintiff proved its claim against Defendant on a balance of probabilities when in fact Plaintiff had failed to challenge crucial evidence led on behalf of Plaintiff regarding breach of the lease agreement by Plaintiff.
5. The learned Judge in the court a quo erred by awarding Plaintiff rentals for a period of 10 months when he had held that it took Plaintiff a period of only 6 months to find a new tenant.

6. The learned Judge in the court a quo erred when he awarded Plaintiff interest at the higher scale 'a tempore morae' without giving reasons for doing so and when Plaintiff had not motivated such an award and without calling upon the parties to argue the matter of interest."
14. These grounds of appeal were elaborated in the Appellant's Heads of Argument filed on its behalf by its Counsel. Counsel for the respondent similarly filed Respondent's Heads of Argument.
 15. During the hearing of the appeal Counsel for the respondent made these concessions:-
 - (i) That the correct amount which the court a quo ought to have ordered to be paid by the appellant to the respondent should be P12, 000.00 and not P20,000.00 since the appellant was only entitled to rentals for the 6 months when it had no tenant in the premises.
 - (ii) The interest should be reckoned in accordance with section 4(1) of the Prescribed Rate of Interest Act (Cap 11:05). This meant that the interest should be calculated from the date of judgment and not from the date of mora.
 16. In the result the grounds of appeal that were argued before us were:-
 - "2 The learned judge in the court a quo erred when he held that the reasons advanced by the defendant for vacating the premises were not valid when the plaintiff itself had

not adduced any evidence to challenge defendant's evidence and when defendant(?) had further failed to replicate the plaintiffs (?) plea on that particular aspect of its evidence.

3. The learned judge in the court a quo erred when he held that nothing much turned on the issue of plaintiff's non-replication to defendant's plea when defendant's plea raised new issues which called for a reply.
4. The learned judge in the court a quo erred when he held that the plaintiff proved its claim against the defendant on a balance of probabilities when in fact plaintiff failed to challenge crucial evidence led on behalf of plaintiff (?) regarding breach of the lease agreement."

17. It is quite clear to me that grounds 3. and 4 are based on the appellant's grievance that the plaintiff failed to file a replication and the consequences thereof on the success of the respondent's case. I deal with those first.

18. Counsel for the appellant dealt with this issue briefly as follows in the Appellant's Heads of Argument:-

- “(a) Replication is the Respondent's reply to the Appellant's plea.
- (b) No replication is required if it would merely serve the purpose of a joinder of issue or a bare denial of allegations in the plea. See also Order 26 rule 2 of the High Court Rules.

- (c) When a plea contains new allegations it is a salutary practice and elegant form of pleading to respond to those allegations by way of replication.”

19. Upon these statements, Counsel for the appellant submitted that “in this matter, when the Appellant filed a plea introducing new allegations as to his disturbance by the Respondent on the leased premises, the Respondent was duty bound to respond to those allegations and failure to respond means that the Appellant’s case has gone unchallenged and judgment should have been entered for the appellant”.

20. Counsel’s submission is clearly erroneous. It ignores the concluding part of Order 26 rule 2 which is here set out in italics:-

“No replication or subsequent pleading which would be a mere joinder of issue or further denial of allegations in the previous pleading shall be necessary, *and issue shall be deemed to be joined and pleadings closed in terms of rule 1 of Order 21.*”

My understanding of Order 26 rule 2 is that if no reply is served, all material statements of fact in the opposing party’s pleading will be put in issue. There is no provision in the whole of Order 26 which enables a party to be given judgment merely because of the non-replication of the other party. In all pleadings, when a statement of fact is denied, the burden of persuasion is on the

party who stands to lose on that particular issue joined if he does not provide the requisite evidence to tilt the scales in his favour. The standard of proof will, of course, be on the balance of probabilities.

21. In this particular case, the appellant pleaded two main reasons why it vacated the demised premises. One of them was that the respondent breached its right of quiet enjoyment of the premises. It was up to the appellant therefore to persuade the court a quo that indeed the allegations of interference with its quiet enjoyment did play a significant role in its decision to vacate the premises by the evidence it produced.
22. At paragraph 45 of the judgment, the learned High Court judge held as follows:-

“Whilst it may be true that the plaintiff kept some building materials at the leased premises and that its workers occasioned some inconvenience by gathering there on occasions, I find that the probabilities are that this was not the cause of the defendant vacating the premises”.

In other words, the evidence did not go further to show that it informed, at least, in part, the respondent’s decision to vacate the premises.

23. The remaining ground of appeal is ground 2. In a nutshell, the appellant's grievance as captured by that ground is that the learned High Court judge erred when he held that the reasons advanced by the defendant for vacating the leased premises were not valid. In the judgment the learned judge held that the lease agreement did not fix a time limit for the construction of the extension to the leased premises. Indeed, the agreement itself contained no stipulation of time. The appellant's plea and evidence were predicated on the alleged duty of the respondent to complete the construction within 3 months or failing that, within a reasonable time thereafter. The appellant's evidence on this matter was quite lukewarm. Its evidence was that if the construction was done it would please the appellant's representative and his wife. Under cross-examination, Mr. Happel (the appellant's representative) conceded that the validity of the lease "was not subject to Mr. Lessau's extending the premises". On the contrary, the lease agreement stated that after the erection and completion of a new living room the rent would be increased by P500.00
24. These findings made by the learned trial judge are based squarely on the evidence adduced by both parties at the trial. The cardinal rule is that an appellate court should not set aside findings of fact made by a trial court unless those findings of fact are not

warranted by the evidence adduced at the trial or they are ultra vires or infringe a rule of law. The findings made by the learned judge were unexceptionable.

25. In the circumstances, grounds 2, 3 and 4 of the appellant's grounds of appeal are not sound. However grounds 1, 5 and 6 were conceded by counsel for the respondent and the appeal must succeed in respect of the points they raise.
26. The appeal is allowed, with costs. The order of the court a quo is altered to read:-

“Judgment is entered for the plaintiff against the defendant as follows:-

- (i) Payment of P12 000.00;
- (ii) Interest thereon at the rate of 10% from the date of this order.
- (iii) Costs of suit.”

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JULY 2009.

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DR. S. TWUM
JUSTICE OF APPEAL

I agree:
C.T. HOWIE
JUSTICE OF APPEAL

I agree:
LORD ABERNETHY
JUSTICE OF APPEAL