THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 20 OF 2011

S.R.S (U) LIMITED:: ::::::::::::::::::::::PLAINTIFF

V E R S U S

AZIZ ISMAIL T/A PAVEMENT TANDOORI:::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff brought this action against the defendant claiming US$ 25,083 as special damages for breach of contract, general damages, interest and costs of the suit.

The background of the plaintiff's case is that sometime around 15th December 2008, it entered into an agreement with the defendant whereby the defendant would rent the former's premises situated at Plot 15 Cooper Road, Kisementi for a period of two years at US$ 3,500 per month plus VAT. It is alleged that the defendant defaulted on payment of the said rental terms as a result of which it is indebted to the plaintiff for rent amounting to US$ 25,083.

The defendant filed a written statement of defence in which it is averred that the plaintiff entered into a tenancy agreement with a company called Pavement Café & Bar-beque Limited (Pavement Tandoori). Generally liability is denied and it is instead averred that at all material times the defendant had paid rentals to the plaintiff.

At the hearing of this suit, the plaintiff was represented by Mr. Asa Mugenyi while the defendant was unrepresented despite being served by advertising the hearing notice in the news paper after counsel had indicated that they no longer had instructions to continue with the matter. No explanation was furnished to court for the defendant's absence on the date of hearing and on that basis this court ordered the hearing of the suit to proceed ex parte.

During the scheduling conference two issues were framed as follows:

1. Whether the defendant breached the tenancy agreement.
2. Remedies available, if any.

Issue 1: Whether the defendant breached the tenancy agreement.

The plaintiff called only one witness, Mr. Steven Lewis, its accountant. He testified that the parties entered into a tenancy agreement marked Exhibit P1 in respect of 15 Cooper Road, Kisementi on 15th December 2008 for a period of two years. Agreed rent was US$ 3,500 per month. Mr. Lewis also testified that the defendant was using the premises for a restaurant, a business he started after execution of the agreement.

Counsel for the plaintiff submitted that the tenancy agreement shows that the plaintiff entered the agreement with Pavement Tandoori and the agreement was signed by Aziz Ismail. On the allegation in the written statement of defence that the plaintiff entered into a tenancy agreement with Pavement Café & Bar-beque Limited (Pavement Tandoori), counsel submitted that the defendant did not indicate in the agreement that the plaintiff was dealing with a limited liability company. He contended that the word "limited" or "Ltd" was missing and a search at the Uganda Registration Services Bureau showed that there was no company in the name of Pavement Tandoori. He then argued that it is trite law that when a person enters into a contract or makes a bill and does not indicate that it is a limited company that person becomes personally liable. For that position of the law, he relied on the cases of ***Penrose vs Martyr (EB & E 499)/ 28 L.J QB 28*** and ***Nassu Stream Press vs Tyler and Others (1894) 7 L.T 376,*** *copies of which he did not avail to this court*. The case of ***Alimadhi Osman vs Mombasa Salt Works Ltd & another HCMA No. 157 of 2001*** was also cited where the court held that the plaintiffs were free to proceed against the defendant trading in his business name that is not yet registered or incorporated company and call evidence on all the issues but without reference to a limited company.

Counsel submitted that in the instant case Mr. Steven Lewis signed Exhibit P1 for and on behalf of the Landlord, S.R.S. (U) Ltd while Mr. Aziz signed for and on behalf of the tenant, Pavement Tandoori. He referred to a search of the computerized database of Uganda Registration Services Bureau attached to his submission which revealed that the name Pavement Tandoori did not exist as an incorporated entity. It instead showed that Pavement Café & Bar-beque Ltd (Pavement Tandoori) was incorporated on 10/7/2001 under No. 48896. Counsel pointed out that its shareholders bare no semblance to the defendant. According to him the defendant was clear as to which tenant he was signing for and that was Pavement Tandoori.

I have considered the above submissions and also taken into account the averments in the written statement of defence. Although no preliminary point of law was formally raised as this matter proceeded ex parte, I take it that the defendant by its defence as per paragraphs 4 and 6 (i) intended to challenge the capacity in which it was sued. It is therefore imperative that this court addresses this point before delving into the merits of the case. To that end, I have looked at paragraphs 4 and 6 (i) of the defence vis-à-vis the subsequent paragraph 6 (iii) where it is averred that the defendant has at all material times paid rentals to the plaintiff. Reference is also made to paragraph 6 (iv) where it is averred that the defendant was not in arrears for the

period 1st January 2009 to 31st December 2010 since on 15th September 2010 a special certificate to levy distress for rent, (annexture "B") to the defence was issued pursuant to which on 23rd September 2010 Pavement Tandoori paid rent in the sum of US$ 7,000 claimed as per annexture "D" to the defence. To my mind this averment contradicts the contention that the plaintiff entered into an agreement with a company and shows that Mr. Aziz was well aware that he was purporting to act for Pavement Tandoori a legally non-existent entity. Otherwise why would the defendant pay rent under that agreement if it was not the tenant?

In the case of ***British India General Insurance Company Limited vs Mohanlul Solanki alias Dolatrai Mohanlala Mulji Civil Appeal No. 30 of 1997*** the Court of Appeal of Uganda held that where a person professes to contract on behalf of a principal and the principal is a fictitious or non-existent person, the person so professing to contract may sometimes be presumed to have intended to contract personally and is personally liable on the contract. On the basis of that authority, I find that in the absence of a certificate of incorporation showing that Pavement Tandoori was incorporated as a limited company, Aziz Ismail entered into a tenancy agreement on behalf of a non-existent entity and in so doing is presumed to have intended to contract personally thereby making him personally liable on the tenancy agreement.

Having disposed of that preliminary point, I now turn to the first issue as to whether the defendant breached the tenancy agreement. It was the evidence of Mr. Lewis that the defendant paid rent for 1st Jan 2009 up to July 2010 as per the payment receipts marked Exhibit P3 but thereafter did not pay rent and VAT for three months, that is, October, November and December 2010. He further testified that the defendant paid rent for August and September but did not pay VAT for those two months leaving the total outstanding rent plus VAT at US$ 13,704.

Counsel for the plaintiff referred to Exhibit P.2 which showed the outstanding amount due to the plaintiff was US$ 16,823. He then submitted that the plaintiff had given the defendant a discount of US$ 3,119 during the period from 1st January to 30th June 2009. The plaintiff's counsel also referred to Exhibit P3 which shows the receipts of the rent paid by the defendant as well as Exhibit P6 which shows that the plaintiff filed a case to recover rent for the months of July and August 2010 amounting to US$ 7,000 which the defendant paid. It is the plaintiff's case that from the months of October to December 2010 the defendant has not paid rent.

Breach of contract was defined in the case of ***Ronald Kasibante vs Shell Uganda Ltd HCCS No. 542 of 2006*** reported in ***[2008] ULR 690*** as:

> *"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Part renounces the contract or makes the performance impossible or substantially fails to perform his promise;*

> *the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."*

In the instant case, it has been proved that on 23rd September 2010 the defendant trading as Pavement Tandoori paid rent in the sum of US$ 7,000 for the months of July and August 2010. The defendant has not provided proof of any other rent payments made to the plaintiff from that period onward. It is not disputed that the tenancy agreement was executed for a period of two years with effect from 1st January 2009 to31st December 2010. Without the defendant's proof of payment of rent for the period in issue and on the basis of the plaintiff's evidence on record, this court is satisfied that the plaintiff has on a balance of probabilities proved that the defendant breached the tenancy agreement by failing to pay rent for the period October to December 2010 plus VAT for that period and August to September 2010. This answers the first issue in the affirmative.

Issue 2: Remedies available, if any.

The plaintiff claimed for special damages, general damages, interest and costs of the suit.

(a) Special damages

It is trite that special damages must be specifically pleaded and strictly proved. The plaintiff in its plaint filed in court on 18th January 2011 pleaded the special damages of US$ 25,083 as being outstanding for the period 1.1.2009 to 31.12.2010. However, at the trial evidence was adduced to prove that the defendant did not pay rent plus VAT for three months, that is, October to December 2010. Further, that while rent for August and September was paid the VAT for that period was never paid. The total outstanding rent plus VAT was stated to be US$ 13,704. If at all this amount was arrived at by calculating the rent plus VAT for three months plus VAT only for two months as explained by the witness then there was a slight arithmetical error because my own calculation gave me a figure of US$ 13, 650 and not US$ 13,704. This amount was arrived at by calculating thus: ((US$3500+18% of 3500) x3=12,390 + (18% of 3500x2=1,260) =US$13,650.

The witness never alluded to Exhibit P2 but counsel submitted that the sum of US$ 16,823 indicated on that exhibit less the discount of US$ 3,119 allowed to the defendant resulted into the sum of US$ 13,704 which was being claimed by the plaintiff. I cannot rely on that evidence from the bar. Counsel should have led the witness to testify on the same instead of him submitting on it without any basis. I find the evidence of the witness more straight forward and so I will treat the slight disparity in the figures as an error and allow US$ 13,650 as special damages proved on a balance of probabilities.

(b) General damages

In the case of ***Thunderbolt Technical Services Ltd vs Apedu & Another HCCS No. 340 of 2009*** Kiryabwire J. (as he then was) observed that general damages were intended to make good to the sufferer as far as money can do so, the losses he or she has suffered as the natural result of the wrong done to him.

In the instant case the plaintiff led no evidence to support its claim for general damages in order for this court to assess if it is a worthy remedy. Consequently, the plaintiff has failed to prove that it suffered any actual damages due to the defendant's actions that would justify an award of general damages. However, according to ***Paragraph 813 of Harlsbury's Laws of England Vol. 12(1)*** a plaintiff is entitled to nominal damages where *inter alia* his rights have been infringed, but he has not in fact sustained any actual damage from the infringement, or he fails to prove that he has. On the basis of the facts before this court and the above principle, I would award nominal damages in the sum of UGX 3,000,000/= to the plaintiff.

(c) Interest

The plaintiff prayed for interest at a rate of 25% from the date of judgment till payment in full. The general principle governing the award of interest is premised on the fact that the defendant has taken and used the plaintiff's money and benefited. Thus the defendant ought to compensate the plaintiff for the money. See ***Sietco vs Noble Builders SCCA No. 31 of 1995.***

It is this court's finding as indicated above that from 1st October 2010 to date the defendant has kept the plaintiff's money and benefited. If it had been paid, perhaps the plaintiff would have put the money to use in its business and earned a profit. I must however observe that the interest of 25% per annum prayed for would be unconscionable because the principal sum is in United States Dollars. I would instead award the plaintiff interest at a rate of 10% per annum on the special damages from the date of judgment till payment in full.

(d) Costs

Since costs must follow the event the plaintiff as the successful party is awarded costs of this suit.

In the result, judgment is entered for the plaintiff against the defendant for orders that:-

(a) US$ 13,650 be paid by the defendant as special damages.
(b) UGX 3,000,000/= be paid by the defendant as nominal damages.
(c) Interest of 10% p.a is awarded on (a) above from date of judgment till payment in full.
(d) Costs of the suit are awarded to the plaintiff.

I so order.

Dated this 13th day of February 2014.

Hellen Obura
JUDGE

Judgment delivered in chambers at 3.30 pm in the presence of Mr. Asa Mugenyi for the plaintiff.

JUDGE
13/02/14