

FIRST MUTUAL INVESTMENT (PRIVATE) LIMITED
versus
ROUSSALAND ENTERPRISES (PRIVATE) LIMITED t/a
THIRD WORLD BAZZAR
and
SMITH C. OKONKWO
and
DADIRAI V.T. OKONKWO

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 22 February, and 15 May, 2017

Opposed Matter

T Chagudumba, for the applicant
K Gama, for the respondents

MANGOTA J: Losely defined, a lease is an agreement in which one party (lessor) offers his property (subject matter of contract) on hire to another (lessee) for a certain fixed sum of money (rent) which is paid periodically. The lessor-lessee agreement is either written or verbal. Where it is written, its clauses spell out the rights and obligations of the parties and all matters which are ancillary to the contract.

The applicant and the first respondent entered into a written lessor-lessee relationship respectively. The first respondent leased from the applicant shop number 13, First Mutual Centre, 82-86 Herbert Chitepo Street, Mutare (“the property”).

Clause 1.2 of the lease stipulates the rent which the first respondent was to pay to the applicant. The second and third respondents stood as surities and co-principal debtors for the due and punctual payment of the first respondent’s indebtedness to the applicant.

The parties’ relationship subsisted from September 2010 to February, 2016 when the applicant cancelled the lease. It did so on the allegation that the respondent(s) had breached the terms of the lease. It contended that these failed to pay the rent and operating costs as was stipulated in the lease. It alleged that the respondents were indebted to it in the sum of \$10 249.30 *in toto*. It moved the court to:

- (i) enter judgment against all the three respondents in the sum of \$ 10 249.30 – and
- (ii) order that the respondents:
 - (a) be evicted from its property
 - (b) pay to it holding over damages at the rate of \$66.87 per day with effect from 1 June, 2016 to the date of their eviction from the property – and
 - (c) pay costs of this application on a higher scale.

The respondents opposed the application. They raised one preliminary matter. They averred, on the merits, that the lease agreement which, according to them, expired on 31 August 2013 discharged the suretyship agreement. They stated that any claim against the second and third respondents was, therefore, without any basis. They submitted that no claim lay against the second respondent as the latter did not sign the contract of suretyship. They denied breaching any terms of the lease. They insisted that, if any term(s) was/were breached, the applicant condoned such breach. They contended that the court did not have the jurisdiction to hear and determine the application. They relied on clause 6.1 as read with clause 34.1 of the lease agreement in the mentioned regard. They stated that the applicant should have referred the rent dispute to an arbitrator. They submitted that the arbitrator, and not the court, should have determined the rent which they were enjoined to pay. They maintained the position that after 31 August 2013, the parties did not renew their lease and the first respondent became a statutory tenant. The first respondent, they stated, paid and continues to pay what it considered reasonable rentals for the property. They denied that they owed the applicant any money. They challenged the applicant's statement of account. They insisted that the statement did not capture the parties' transactions accurately. They moved the court to dismiss the application with costs on an attorney and client scale.

In the *in limine* matter which they raised, the respondents challenged the authority of the deponent to the founding affidavit. They submitted that he was not clothed with the applicant's authority to depose to the affidavit on its behalf as he did. They, on the mentioned basis, insisted that the applicant was not before the court and that the application should, therefore, be dismissed.

The deponent to the founding affidavit, one Innocent Mupfururirwa, a property manager in the employment of the applicant, stated to the contrary. He said he was authorised to depose to the affidavit. He stated, in the answering affidavit, that it was not necessary for him to attach proof of authority to depose to the affidavit. He insisted that the respondents

knew that he had the requisite authority. He said they knew of that matter because he had dealt with them on the matter which was then in dispute. He attached to his answering affidavit Annexures E, F and G. The annexures were, according to him, evidence of the letters which he respectively addressed to the respondents on 10 December 2013, 20 May 2015 and 12 February, 2016. The letters related to the issue of rent for the property. He contended that it was on the basis of the mentioned letters/annexures that the respondents were made aware of his authority to sue for, and on behalf of, the applicant.

The deponent's argument is devoid of any substance. Authority to speak or act for, and on behalf of, the applicant can never be derived from the correspondences which he made to, or with, the respondents as he claimed.

A company, as a legal person, has no mouth through which it articulates its intentions. It has no ears with which to hear. It has no sense of sight or smell. It has no mind of its own. It speaks to no one except through its directors, not individually but collectively, through resolutions which they pass when they are assembled in one room for the purpose of transacting the business of the company. Directors and no one else are, together, the eyes, ears, nose and mind of the company.

Hahlo brings out the above stated principle in a clear and lucid manner in his *South African Company Law* through cases, 6th ed. The learned author makes reference to the board of directors and their powers. He states at p 343 as follows:

“The powers of the company vest in the directors as a board, and not as individuals. Directors exercise their powers by passing resolutions at board meetings; of which proper notice must be given to all directors, and at which a quorum must be present” [emphasis added].

Just as the mind is the controlling faculty of a person's whole being, directors are the controlling mind of the company. They manage it and they act on its behalf.

The Supreme Court restated that obvious position in *Madzivire & Ors v Zvarivadza & Ors*, 2006 (1) ZLR 514 (S) the headnote of which reads:

“A company, being a separate legal entity from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle which the courts cannot ignore. ... The fact that a person is the managing director of the company does not clothes him with the authority to sue on behalf of the company in the absence of a resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting” [emphasis added]

It is evident, from the foregoing, that the assertion of the deponent to the founding affidavit which is to the effect that he did not need to produce proof of authority was misplaced. The law is clear on the matter. Authority to sue is a *sine qua non* of applications of the present nature. He said his statement was anchored on the advice which his legal practitioners tendered to him. That advice was unfortunately for him a very poor one. A *fortiori* when his authority to sue for, and on behalf of, his employer was being challenged. He did not say the applicant fell into the category of exceptions which the Supreme Court enunciated in *Madzivire's* case. *Madzivire v Zvarivadza* over-ruled the case which he cited in support of his position on the matter at hand. *Direct Response Marketing (Pvt) Ltd v Shepherd*, 1993 (2) ZLR 218 (H) was decided by this court before *Madzivire v Zvarivadza*.

I mention in passing that the citation which counsel for the respondent referred in *Tattersal and Anor v Nedor Bank Ltd*, 1995 (2) SA 222, 228F did not match the names of the parties. I was, therefore, unable to derive any benefit from that case as I did not find it in the 1995 (2) set of case authorities. *Tattersal v Nedor Bank* was, at any rate decided earlier than *Madzivire v Zvarivadza*. The latter case therefore, over ruled the *Tattersal* case as it did the *Direct Response Marketing* case.

The deponent to the founding affidavit had every opportunity to attach to his answering affidavit a resolution of the applicant's directors as the law required him to have done. The resolution would have constituted clear evidence of his authority to depose to the founding affidavit. His decision not to attach the resolution left the applicant's case standing on nothing. He failed to convince the court that he was clothed with the requisite authority to speak for, and on behalf of, his employer. The application cannot, on the mentioned basis, be allowed to stand.

The respondents' assertion which was to the effect that the court did not have the jurisdiction to hear the application fell more into the realms of a wild goose chase than it fell into the domain of reason. They hinged that statement on clause 6.1 as read with clause 34 of the lease agreement.

The respondents know as much as I do that s 171 (a) of the Constitution of Zimbabwe did not, and does not, allow them to enter into a contract which ousts the jurisdiction of this court. It reads:

“171 JURISDICTION OF THE HIGH COURT

(1) The High Court-

- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
- (b)

- (c)
- (d)"

GARWE JA lucidly stated the inherent jurisdiction of this court in *Gawa & Anor v Willoughyhy's Investments (Pvt) Ltd*, 2009 (1) ZLR 368 (S) wherein he remarked at 383 that:

“... In terms of jurisdiction, the distinction between the Supreme Court and the High Court may be summarised as follows: Except where specifically empowered, the Supreme Court has no jurisdiction to hear or determine any matter and may only exercise powers in respect of an appeal in terms of the provisions of the Act and Rules of the court. The High Court on the other hand has the jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid.” [emphasis added].

For the abovementioned reason, it was perfectly in order for me to hear the application. I would, in any event, have heard it for the other reason that the lease agreement which the parties signed contained a condition precedent which the respondents did not fulfil. The condition rendered the contract inoperative until it was satisfied. Reference is made in this regard to clause 38 of the lease agreement. It reads:

“38. SURETYSHIP IF TENANT IS A COMPANY

In the event that the Tenant is a private incorporated company, it is a condition precedent to this Agreement that at the time of signature thereof the Tenant shall furnish to the Landlord with written deeds of suretyship and co-debtorship signed by at least two (2) of the directors of the Tenant (or in the event that the Tenant has only one director, that person plus one other person of equivalent financial means), binding themselves jointly and severally to the Landlord and as co-principal debtors with each other and as co-sureties for each other and renouncing the benefits of excursion and division owed to the Landlord by the Tenant in terms of this Agreement” [emphasis added].

Annexure B which the deponent to the founding affidavit attached to the application is the Deed of Suretyship. Only one director of the first respondent signed the deed. Dadirai V. T. Okonkwo signed it. The other director, Smith Okonkwo, did not. No reasons were advanced in regard to the observed matter.

It is evident that the lease contains a suspensive condition. It is also clear that the condition remained unfulfilled from the time that the parties signed the lease to date.

A suspensive condition suspends or postpones the operation of a contract or obligation until the condition is fulfilled. (See Innocent Maja: *The Law of Contract in Zimbabwe* p 88). A suspensive condition, also known as a condition precedent, is an event or a state of affairs that is required before something else occurs. It is an event which must occur unless its non-occurrence is excused before performance becomes due, i.e, before any contractual duty exists (Wikipedia: the free encyclopedia). *Duhaime's Law Dictionary*

defines a condition precedent as a contractual condition that suspends the coming into effect of a contract unless and until a certain event takes place.

The condition to which the parties subscribed when they signed the lease is clear and unambiguous. It falls within the ambit of the remarks of GREENBERG JA who, in *Worman v Hughes & Ors*, 1948 (3) SA 495 (A) stated at 505 as follows:

“It must be born in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties intention was, but what the language used in the contract means, i.e what their intention was as expressed in the contract.”

The condition, in my view, should have been fulfilled *informa specifica* and not *per aequipollens*. *In forma specifica* because the contract of suretyship required the signatures of at least two of the first respondent’s directors and not one. The fact that the first respondent has two directors means that the signatures of those two to the suretyship deed would have sufficed. That would have made the lease agreement operative with rights and obligations of the parties to the lease flowing from the same.

Clause 39.2 of the lease provides that the agreement represents the parties’ entire contract and that no amendment, *etcetera*, shall be valid until it is reduced to writing and signed by them. No such amendment of the agreement was made by the parties. That, it is evident, constitutes the parties’ acknowledgment that their agreement was to be carried out in its original form.

The duty to comply with the deed of suretyship lay on the respondents. They did not fulfil their obligation in the mentioned regard. They proffered no reason for their non-compliance with the mandatory provision of the lease which they signed with the applicant.

The suspensive condition which existed in the deed of suretyship suspended the rights and obligations of each party to the lease agreement. The suspension is still extant until the condition is fulfilled.

It follows from the foregoing that, but for the lack of authority by the deponent of the founding affidavit, the applicant could have lawfully terminated the contract of lease. It, however, cannot do so as it remained out of, instead of inside, the court.

The applicant is not before the court. The application is, accordingly, dismissed with each party being ordered to bear its own costs.

Atherstone & Cook, applicant's legal practitioners
Gama & Partners, respondents' legal practitioners