Judgment No. HB 107/08

Case

No. HC 2982/07

Xrefs Case No. HC 1023/08

Xrefs Case No 2758/07, 2749/07

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**NOBLE BAFANAH**

**VERSUS**

**GIZZLERS INVESTMENTS (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 3 APRIL 2007

*Mr R. Ndlovu* for the applicant
*Mr J. Sibanda* for the respondent

Judgment

**BERE J:** On 14th May 2008 after hearing arguments from both the Applicant and Respondent's counsel I granted the following order;

"**IT IS ORDERED**

1. That the Applicant's cancellation of the lease agreement between the Applicant and the Respondent be and is hereby confirmed.
2. that the Respondent be and is hereby ordered to vacate stand Lot 1 of Lots 84, 101 and 102 Orange Grove, Bulawayo otherwise known as the 747 Bar and club on or before 30 June 2008 failing which the Deputy Sheriff, Bulawayo be and is hereby ordered to evict the Respondent and all those claiming through it.
3. that the Respondent be and is hereby ordered to pay costs of suit."

I indicated then that my elaborate reasons would follow. Here are the reasons.

**The Background**

On the 5th of October 2005, the Applicant and the Respondent entered into a lease agreement over the latter's use of Applicant's property on agreed monthly rentals of $13 million dollars to be paid to the Applicant on the 21st day of every month.

The lease agreement was reduced to writing and was kept fairly simple and straightforward.

Clause 10 of the lease agreement signed by the parties provided as follows:

"**Cancellation.**

**Tenth**:- should the lessee fail to pay any monthly rental on the day the same becomes due or at the latest within one week thereafter or commit any breach of the terms or conditions of this lease the lessor shall have the right at once to cancel this lease and to re-enter and take possession of the said premises and dispose thereof as he may think fit anything to the contrary herein contained notwithstanding and without prejudice to any claim on the lessor's part for arrears or rent, damages or otherwise."

In November of 2007 the Respondent defaulted in paying its rentals. The Respondent failed to remedy the default in rental payments within the time stipulated in the lease agreement. The Applicant wrote to the Respondent and cancelled the lease agreement. In doing this the Applicant was invoking Clause 10 of the agreement above-referred to.

Annexure 'C' captures in detail the cancellations and the reasons which prompted that cancellation. Annexure 'C' was written on 4th day of December 2007.

On the 12th day of December 2007, exactly 8 days after the cancellation of the lease agreement the Respondent wrote Annexure 'D'. In that annexure the Respondent conceded its default and pointed out that the default had been inadvertent. The Respondent went further to provide a detailed lecture to the Applicant on the application and implications of what it referred to as as the "Commercial rent Regulations."

The import of Annexure 'D' by the Respondent was to emphasize to the Applicant that the Commercial Rent Regulations as understood by the Respondent did not recognize Clause 10 of the parties' lease agreement and that such Clause violated the provisions of the Rent Regulations- so the argument went.

On 13th day of December 2007, the Respondent transferred $42 000 000-00 (before revaluation) into the Applicant's account purportedly to cover the rentals for the month it had defaulted and for other subsequent months. On realizing this Applicant simply reversed the transfer and notified the Respondent that he stood by his decision to terminate the lease agreement. This application is meant to bring about the cancellation and the subsequent eviction of the Respondent in terms of Clause 10 (supra).

At the hearing of this matter the issues were narrowed as both parties' legal practitioners were in agreement that Clause 10 of the agreement had been breached.

The thrust of Respondent's counsel was that Clause 10 of the lease agreement was unenforceable because he reasoned it violated some unspecified sections of the Commercial Rent Regulations. He also took his argument further to say that in his view the court was supposed to declare Clause 10 of the parties' lease agreement unenforceable because it was oppressive to the defaulting party. He further contended that it was a clear violation of the Contractual Penalties Act as perceived by counsel.

Applicant's counsel's position was simply that both the Contractual Penalties Act [Chapter 8:03] and the Commercial Premises (Lease Control) Act [Chapter 14:04] as well as the Commercial Premises (Rent) Regulations 1983 were simply not applicable. I am in total agreement with the position adopted by the Applicant's counsel.

A simple perusal of the preamble to the Contractual Penalties Act clearly shows that the instant case falls outside its ambit. The preamble reads as follows;

> "An Act to provide for enforcement of penalty clauses in contracts; to regulate the rights and obligations of parties to contracts for the sale of land by installments; and to provide for matters connected or incidental to the foregoing."

The Act speaks for itself, and I think it is inconceivable that this Act could be argued to apply to the instant case which is a simple agreement of lease.

I have had to painstakingly stretch my mind to try and see which section of the Commercial Premises (Lease Control) Act and the allied regulations could be deemed to be applicable to the instant case. I found none.

It has been stated on numerous occasions that it is not the function of the court to make a contract for the parties.

The lease agreement now in issue was fairly clear and straightforward. The Clause in question specifically stated the time within which the rental were supposed to be paid. Where there was breach, the clause went further to state that such breach had to be cured within a week failing which the lessor would be entitled to cancel the lease at once.

In my view Annexure 'D' from the Respondent was clearly in bad taste. The tone of that letter coupled with the empty threats therein were uncalled for. I think where a party to a contract is in breach of provisions of that contract such a party must not seek to get indulgence from the innocent party by demonstrating unbridled arrogance as in this case.

The Applicant has done nothing wrong in this case except to enforce a contract entered into by the parties with their eyes wide open.

This is one case where one cannot avoid concluding that the notice of opposition filed by the Respondent was clearly calculated to obstruct a clear application founded on good cause.

It was for these reasons that I granted the order of the 14th May 2008

*Messrs R. Ndlovu and Company*, Applicant's legal practitioners
*Job Sibanda and Associates*, Respondent's legal practitioners.