

DHLIWAYO RODGERS
versus
SHAUN MANDAA KUDINGA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 7 May 2008

Opposed Application

Advocate *Mehta*, for the applicant
F M Katsande, for the respondent

MTSHIYA J: This is an opposed application wherein the applicant seeks the following order:

- “1. The notice to terminate the lease agreement entered into between the applicant and the respondent on 28 August 2003 in respect of number 5 Jacaranda Close, Hatfield, Harare be and is hereby declared null and void.
2. The applicant shall be entitled to renew the lease agreement every three years effective from 1 October 2007 until 30 September 2013.

Alternatively

3. The respondent shall pay the applicant damages in the sum of \$204 billion for the loss of income incurred by the applicant due to the premature termination of the agreement of lease entered into by the parties on 28 August 2003.
4. The respondent be and is hereby ordered to pay costs of this application”.

The order in the alternative was correctly abandoned at the commencement of proceedings since the relief sought was not properly before the court.

It is common cause that on 28 August 2003 the parties entered into a lease agreement in respect of a property known as number 5 Jacaranda Close, Hatfield. In terms of the lease agreement the applicant was to use the premises as lodges. The lease agreement commenced

on 1 October 2003 for an initial period of twelve months subject to the following renewal option contained in the ninth clause of the lease agreement:

“The lessee shall at the conclusion of the above mentioned period, be entitled to a renewal of this lease for a period of twelve months renewable for three years up to ten years maximum at a monthly rate of \$ and otherwise on the same terms and conditions (except as regards renewals): provided that written notice of renewal be given by the lessee to the lessor at least one month before hand”.

On 20 August 2007 a Miss Winnie Samukange (“Samukange”), whose signature appears on the original lease, sent the following letter to the applicant:

“Dear Sir,

Following our phone discussions regarding the above property, I would like to inform you that the owner Mr Shoorayi Mandaa will be returning to Zimbabwe from the USA where he has been residing for the past twelve years. He would want to live on the property and has asked that the property be availed to him by 20 November 2007 thus giving a three months notice from the date of this letter.

You will recall that the current lease (copy attached) was initially for twelve months then renewable every three years pending his return. We would like to emphasize the fact that the above property is strictly residential although it was running as Benzuu Lodges when we bought it in 2000. It is therefore not licensed to run as a Lodge Business.

We would also want to advise Prime Real Estate by copy of this letter about the position Mr Mandaa would want the next three months rental to be paid at number 70 St Patrick’s Road, Hatfield as from 31 August 2007 when Prime Real Estate closes the file for the property.

We wish you all the best in future business.

Yours Sincerely

Winnie Samukange

cc: Prime Real Estate”

The above letter led to this court application wherein, in his founding affidavit, the applicant, in part, states:

“On 20 August 2007, the respondent’s representative, Mrs Winnie Samukange, wrote a letter to me notifying me of three months notice of the respondent’s intention to terminate the lease agreement. Annexure “B” hereto is a copy of the said letter.

Annexure “B” is in breach of annexure “A1 – A3” in that according to the first and ninth clause thereof, after the expiry of the initial twelve months, I am entitled to renew the lease agreement every three years up to a maximum period of ten years.

In that regard, the lease agreement having commenced on 1 October 2003, I am entitled to renew the lease agreement every three years up to the year 2013.

The intended termination of lease is therefore premature by six years”.

Samukange apparently signed the lease agreement on behalf of the respondent.

On 19 November 2007 Samukange filed an opposing affidavit whose opening part reads as follows:

“I Winnie Samukange duly authorized thereto by a Power of Attorney granted to me by Shorayi also known as (Shaun) Mandaa Kudinga the respondent attached hereto as annexure ‘D’ do hereby take oath and state that the under-mentioned facts are true and correct to the best of my knowledge and belief”.

There was no power of attorney attached to the affidavit.

In the opposing affidavit Samukange goes on to state the following:

- “3.1 The lease agreement was subject to renewal on condition that the owner does not want to use the property.
- 3.2 In the notice referred to by the applicant, para 2 in particular states that the option to renew is only available if the owner does not require the said property for his use.
- 3.3 I am advised by my legal practitioners of record and verily believe the same to be true that such option is not a clear right and the tenant’s right can not take precedence over the owner’s rights of the property.
- 3.4 In terms of the Commercial Rent Regulations the owner of a building is entitled to cancel the agreement on good and sufficient grounds. The respondent submits that he has good and sufficient grounds for the ejection of the applicant for the following reasons:
 - (i) as stated in the notice the respondent requires the property for his own use;
 - (ii) as the owner of the property his rights takes precedence over that of the tenant; and

- (iii) it has come to my attention that the applicant has not been maintaining the property in good condition and his continued stay will result in the depreciation of the property in value.
- 3.5. I am thus advised that the notice given to the applicant is valid and in any event, the applicant was not entitled to an automatic renewal of the lease. Further, the applicant is guilty of causing material damages to the said property in that he has caused the following damages:
- (a) Sewage piping in and out of the house is blocked and the septic tank has not been emptied and is over flowing this is a health hazard to the occupants and neighbours. If this status is not urgently addressed the respondent will incur exorbitant costs to address the same.
 - (b) Leaking thatch on one of the outside buildings. Again, if the same is not urgently attended with the rain season coming the building might be damaged extensively.
 - (c) Walls are dilapidated.
- 3.6. Furthermore, he had been operating illegally without the requisite licenses from the City Council and Zimbabwe Tourism Authority. To date he has since been fined twice for contravening the regulations. The Zimbabwe Tourism Authority has given him an ultimatum for him to regularize the same, failing which the applicant will be forced to close the said business”.

After the applicant’s answering affidavit filed on 27 November 2007, Samukange filed a “supplementary affidavit” on 18 January 2008. This affidavit was filed together with another “affidavit in support of counter application”. The record does not reveal the filing of a formal application in respect of a counter claim in the form specified in the rules of this court. However, the purported counter claim was for the following relief:

“It is ordered that:

- 1) Within ten days of the service of the order on him, the applicant Mr Rodgers Dhlwayo and those claiming through him vacate with their goods and other belongings stand 5 Jacaranda Road, Hatfield.
- 2) Failing compliance the Deputy Sheriff Harare is hereby authorised to eject him in terms of para 9.
- 3) Pending vacation on the premises the applicant shall pay to the respondent \$100 000 000-00 (one hundred million dollars) per month as holding over damages from the date of the application to the date of vacation.

- 4) The applicant shall pay the cost of the Counter application”.

On 5 February 2008 the applicant responded to the respondent’s supplementary affidavit. He stated, in part, -

- “2. On 24 January 2004 my legal practitioners were served with the respondent’s supplementary affidavit sworn to by Winnie Samukange, I wish once again to bring the court attention to the fact that Winnie Samukange has got no *locus standi* to swear to such affidavit in this matter because she does not have the power of attorney from the respondent to swear to any affidavit in this matter.
3. Annexure ‘D’ referred to in her opposing affidavit was not attached and I have not had sight of such power of attorney to date.
4. I am also informed by my legal practitioners that no party to legal proceedings has the right to file a supplementary affidavit without leave of court. No leave to file the supplementary affidavit has been sought and granted; and as such the supplementary affidavit is not properly before the court.
5. In this regard I am only responding to the supplementary affidavit simply to put my position on record as regards the contents of the supplementary affidavit”.

The applicant also responded to the issue of a counter claim in the following terms:

- “5. Ad Paragraph 6

- (i) If the respondent wants to take over the premises for his own use before the expiry of the period agreed then he is in breach of the agreement. As for the issue of the licence, I have made efforts to obtain one but my efforts yielded no results. I refer to paragraphs 6(e)-(g) of my answering affidavit in the main claim in this matter, and wish to incorporate the contents thereof as if they were specifically stated herein.
- (ii) I am not sure of what is meant by “permitted the premises to predominately to offer commercial sexual intercourse services”. I have not employed anybody to offer sexual services to anyone at the premises. I therefore deny any wrongdoing. I challenge the author of this affidavit, to produce evidence to the court proving what she mean by offering commercial sexual intercourse services. In the absence of proof of what she means, then this becomes a bold allegation which should be thrown out by the court.

6. Ad Paragraphs 8 – 10

There are no valid reasons why I should vacate the premises and so the given notice should be declared null and void. I am not trying to delay vacating the premises but exercising my rights with the agreement. I have paid all the rentals to date and I have got no objection to payment of the rental at the rate of \$100

000 000-00 (one hundred million dollars) per month until this matter is finalized.

However the rest of the terms of the order sought should be dismissed with costs”.

At the commencement of the proceedings Advocate *Mehta* for the applicant raised two main points in *limine*.

He submitted that the failure by Samukange to produce a power of attorney under which she claimed authority to act on behalf of the respondent, meant that she had no *locus standi*. He argued that without the power of attorney Samukange could not:

- a) issue the notice of 20 August 2007 appearing on page 2 herein.
- b) Depose to affidavits in this matter
- c) File a counter-claim; and
- d) Instruct legal practitioners

Notwithstanding lack of authority on the part of Samukange, Advocate *Mehta* also argued that the counter-application purportedly filed was not in compliance with r 229 A of the High Court rules.

In response to the lack of authority on the party of Samukange, Mr *Katsande* for the respondent conceded that no power of attorney had indeed been produced. He, however, believed that there must have been a power of attorney when the notice was issued. Relying on *Chiadzwa v Paulkner* 1991 (2) ZLR 33 (SC). Mr *Katsande* argued that, the fact that Samukange’s founding affidavit clearly set out the cause of action, there was no need for a power of attorney. He then urged the court to take a robust view on the issue of Samukange’s authority, thus urging the court to accept that the absence of a power of attorney should not invalidate the proceedings.

I shall now deal with the first point raised in *limine*. If I find that Samukange should have been empowered by a power of attorney from the respondent, that will then mean that she had no *locus standi* and the proceedings will stand invalidated. That would in turn dispose of this matter.

Samukange’s first statement in her opposing affidavit is to the effect that she derives her authority from a power of attorney but unfortunately she fails to produce such a power of attorney. All we are told is that there must have been a power of attorney which might have gone missing. The argument goes further to say she is the one who signed the lease agreement

which was binding on both parties. The applicant, it is argued, should not start questioning her authority at this stage. This submission is made despite the fact that Samukange herself knew that in order to legally represent the respondent she needed authority in the form of a power of attorney. This is what she states in the first statement of her opposing affidavit.

Notwithstanding the existence of a binding lease agreement, I am not persuaded by the respondent's argument. There might indeed have been authority to sign the original agreement, but again we do not have proof of that authority except that no issue was raised then.

It must be borne in mind that a power of attorney may be general or special. The authority from a power of attorney may, apart from being general or special, be for a specific purpose and for a specific period. In *casu* the absence of proof of the existence of any power of attorney makes it impossible to establish a link between Samukange and the respondent. It is also not possible to establish the kind of authority she had. There is no single document in the papers establishing a link between Samukange and the respondent.

It is my belief that the case relied on by the respondent namely, *Chiadzwa v Paulkner* 1991(2) ZLR 33 (SC), could only have assisted if there was evidence that Samukange had authority to act for the respondent. In the main that case related to matters of evidence. In the said case GUBBAY CJ, as he then was, states:

“Thus the affidavit must fulfil three requirements –

- (a) it should be made by the plaintiff himself or by any other person who can swear positively to the facts;
- (b) it must verify the cause of action and the amount, if any, claimed; and
- (c) it must contain a statement by the deponent that in his belief there is no *bona fide* defence to the action . . .

Where the affidavit is not that of the plaintiff himself, the deponent, while not requiring any special authority from the plaintiff to make the affidavit, must belong to a particular class of persons, namely, those who can swear positively to the facts.” (my own underlining)

There is nothing before me which describes or identifies Samukange. I cannot establish who she was. The document that could have told me to what class of persons Samukange belongs has not been produced. I do not believe that the capacity “to positively swear to the facts” can also entitle a deponent to initiate legal processes without the specific and proven

authority of the plaintiff or respondent. Consequently my finding is that Samukange could not issue the notice of 20 August 2007 and could also not swear to the affidavits filed in respect of this case. Samukange had no *locus standi* in this case.

Having ruled that Samukange had no *locus standi*, it follows that the notice of 20 August 2007 must be declared null and void. The finding also means that the purported counter-claim by the respondent is not properly before the court since it was filed by a person with no *locus standi*.

All in all and given the nature of the valid points raised *in limine* by the applicant, there is no way a robust approach can be applied to condone the irregularities on the part of the respondent. The application should therefore succeed.

It is therefore ordered as follows:

1. That the notice issued by the respondent on 20 August 2007 terminating the lease agreement entered into between the applicant and the respondent on 28 August 2003 be and is hereby declared null and void.
2. The counter-claim filed by the respondent on 18 January 2008 be and is hereby dismissed; and
3. The respondent shall pay the costs of this application.

Mkuhlani Chiperesa, applicant's legal practitioners

FM Katsande & Partners, respondent's legal practitioners