MASHONALAND TURF CLUB
versus
MICHELLE NYAMANGUNDA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 13 & 28 November 2008, 23 December 2008 & 4 March 2009

Ms *Halimani*, for plaintiff
Mr *Mawere*, for defendant

MTSHIYA J: This is an action for the eviction of the defendant and all those claiming occupation through her from the plaintiff's premises situate at the Borrowdale Park Race Course, Harare.

It is common cause that on 23 April 2007 the plaintiff entered into a lease agreement with a company called Lunar Graphics Products (Pvt) Ltd (Lunar Graphics). The plaintiff was represented there in by Mr Howard Mukundu (Mr Mukundu) who gave evidence *in casu*. Clause 6 of the lease agreement allowed the lesee to sublet part of the premises to a licensed book maker such as the defendant.

On 31 January 2007 the plaintiff, represented by a Mr Shingirai Tanyanyiwa, entered into an Agreement of Lease which, in clause 1, provided as follows:-

> "The lessor hereby lets and the subtenant hereby hires a portion of the Lessor's property commonly known as the Zimbabwe Betting and Sport at the Borrowdale Park Race Course".

The defendant signed the agreement as "The sub-Tenant". The 12 months agreement which commenced on 1 January 2007 was in terms of clause 3 thereof renewable.

It is not clear whether in entering this agreement directly with the defendant, the plaintiff was doing so on behalf of Lunar Graphics in terms of clause 6 of the agreement signed between the plaintiff and Lunar Graphics on 23 April 2007. The agreement between the plaintiff and the defendant is silent on that aspect. However, in paragraphs 4.1 and 4.2 of its declaration the plaintiff states as follows:

> "4.1. Accordingly on the strength of clause 6.1 of the lease agreement Lunar Graphics Products (Private) Limited sublet the premises to the defendant.
>
> 4.2. Further to the above referred sublease agreement between Lunar Graphics Products (Private) Limited and Defendant, Plaintiff formally acknowledged the

subtenant through a memorandum signed to that effect. A copy of the memorandum is hereto attached for case of reference marked as 'B'

On 27 August 2007 the plaintiff gave Lunar Graphics notice of termination of the agreement of 23 April 2007. Lunar Graphics duly vacated the plaintiff's premises on 31 December 2007.

On 29 August 2007, two days after signing the notice to Lunar Graphics, the plaintiff also gave notice to the defendant in the following terms:-

"Att: Michelle Nyamangunda
Borrowdale Park Race Course
Box 376
Harare

Dear Madam

Re: Termination of sub-lease

Please be advised that three months notice to terminate the principal lease agreement between Mashonaland Turf Club and Lunar Graphics has been given. The notice period shall run from the 1st September 2007 and shall terminate on the 30th November 2007. You are accordingly expected to vacate the property on or before 30th November 2007 following the termination of the principal lease. The three calendar months notice period is in line with clause 14 of the sub-lease agreement.

Should you have any queries concerning the contents of this letter, please kindly contact the undersigned within the next few days so that any issues arising may be discussed.

Yours faithfully

S, TANYANYIWA
Mashonaland Turf Club"

The defendant did not comply with the above notice and on 28 September 2007 she wrote to the plaintiff in the following terms:-

"Mashonaland Turf Club
Borrowdale Race Course
Borrowdale
HARARE

ATTENTION: MR S TANYANYIWA

Dear Sir

REF: RENEWAL OF SUBLEASE AGREEMENT

In terms of Clause 3.1. of our Lease Agreement, I hereby notify you of our intention to renew our Sub Lease Agreement for another year to run from 1st of January 2008 to December 2008.

Yours faithfully

M Nyamangunda
Bookmaker"

The above letter was followed by another one from the defendant's legal practitioners dated 27 November 2007. The letter was for the attention of Mr Mukundu and it read as follows:-

"Dear Sir

Re: MICHELLE NYAMANGUNDA: TERMINATION OF SUB-LEASE

We refer to the above matter. We thank you for furnishing us with the various documents which we had requested to enable us to respond to your letter to our client dated 29th August 2007. This is our response:

1. Contrary to what is stated in your letter aforesaid, our client's occupation of the premises namely the premises commonly known as the Zimbabwe Betting and Sport at Borrowdale Park Race Course is not in terms of any sub lease with Lunar Graphics. It is actually in terms of an agreement of lease between yourselves and our client. We attach hereto a copy of the said agreement of lease for your information.

2. It is clear in the premises that our client's rights in the lease agreement do not flow from any sub lease with Lunar Graphics but from the lease with yourselves. In the premises whether or not the lease agreement between yourselves and Lunar Graphics has been terminated or is being terminated, is not a factor in determining our client's right to occupation of the premises.

3. The lease agreement that you have with our client is for a specific period of twelve months terminating on the 31st December 2007. At the expiry of the lease agreement our client has an option to renew for a further year commencing on the 1st January 2008 to 31st December 2009. Our client has already given your notice of her intention to exercise her firth to renew the

lease agreement. A copy of her letter to yourselves dated 28th September 2007 is attached hereto for ease of reference.

4. As far as our client is concerned, clause 14 which provides for the termination of the lease agreement on three calendar month's notice contradicts the provisions of clauses 2 and 3 of the same lease. Clause 14 is therefore clearly not enforceable in the premises.

In the premises, our client does not recognise your notice as valid. Our client will therefore not be vacating the premises as demanded by yourselves on the 30th November 2007. Any action which you may want to take to eject our client from the premises will be strongly resisted. To that end we write to advise that we have the authority to receive service of summons on our client's behalf should you think of suing her for eviction.

Yours faithfully

Mawere & Sibanda
T. Mawere"

The defendant's position reflected in the above letter is what led to the issuance of a summons by the plaintiff on 21 January 2008 claiming:-

"(a) That defendant and all those claiming right of occupation through her be evicted from plaintiff's premises within seven (7) days from the date of this order being served upon her.

(b) That plaintiff shall be entitled to holding over damages from 1 January 2008 to the date of vacation (*sic*)

(c) Interest in the sum calculated in (b) above at the prescribed rate from 1 January 2008 to the date of payment.

(d) Costs of suit at the Attorney and Client scale".

Before and during the trial the defendant raised a preliminary issue. The issue, which is in corporated in the joint pre-trial conference minute, is:

"Whether or not the plaintiff is properly before the court"

In support of the point *in limine*, Mr *Mawere* for the defendant submitted that the defendant had raised the preliminary issue before the commencement of the trial and during the trial. He said whereas the plaintiff had the capacity to sue, the issue *in casu* was whether or not the plaintiff was properly before the court and/or was the plaintiff indeed being represented

by the persons empowered to institute or defend legal proceedings on its behalf. He said the plaintiff had failed to comply with the provisions of clause 6 of its own Rules and Bye-Laws (the Rules). There was no resolution from the plaintiff confirming that those instituting legal proceedings had its authority as required by Clause 6 of the plaintiff's Rules. Furthermore, the plaintiff's representative, Mr Mukundu, had confirmed under oath that he was neither a trustee nor steward.

Mr *Mawere* pointed out that in *Mashonaland Turf Club v Dunvale Investments (Private) Limited* HC 1013/08 the court had not at all dealt with the issue of whether or not the plaintiff was properly before the court. The issue was not before the court then. He urged the court not to rely on that case for its ruling. **The plaintiff, he argued, had failed to demonstrate through evidence** that it was properly before the court. This was so despite the fact that the plaintiff had ample time to do so. He therefore urged the court to dismiss the plaintiff's claim on the ground that it was not properly before the court.

In response to the defendant's submissions on the preliminary issue, Mr *Halimani*, for the plaintiff argued that the plaintiff, a voluntary association, had legal capacity to institute and defend proceedings in court. He said the plaintiff had recently done so in the recent case (i.e. *Mashonaland Turf Club v Dunvale Investments (Private) Limited* HC 1013-2008 where MAKARAU JP had disregarded that argument. He therefore urged the court to be guided accordingly.

I shall start by confirming that a reading of MAKARAU JP's judgment in, *Mashonaland Turf Club v Dunvale Investments (Private) Limited* does not reveal that the same issue before me was raised. I can only assume that the decision to proceed in that case was based on the fact that the plaintiff has capacity to institute legal proceedings. In the absence of a challenge such as the one before me, I have no reason to question whether or not clause 6 in that case was complied with.

Clause 6 of the plaintiff's Rules spells out how that capacity can actually come by. The said clause 6 provides as follows:-

> "**Legal Proceedings**
> **The club may sue and be sued in any court of Law in its name. It shall be represented in any legal proceedings by the Trustees for the time being, who shall have power to institute and defend any legal proceedings on behalf of the club when authorised to do so by the stewards"**

My reading of clause 6 of the plaintiff's Rules as read together with clauses 22-24 therein leaves me with no doubt that the plaintiff did not comply with its own Rules in order to be able to acquire capacity to institute these proceedings. The power of Stewards is spelt out in clauses 22-24. Clauses 22-24 provides as follows: (i.e. relevant portions of the sections).

> "22. The Stewards shall in addition to the powers and authorities by these Rules specially conferred upon them have the entire management and control of all the affairs of the Club, but subject to any Resolution passed at a General Meeting of members enjoying voting rights, PROVIDED that no Resolution of the members enjoying voting rights in General Meeting shall invalidate any prior act of the Stewards which would have been valid if such Resolution had not been passed.
>
> 23. Without prejudice to the general powers conferred by the last preceding clause and the powers conferred by these presents, it is hereby expressly declared that the Stewards shall have the following powers, that is to say:.
>
> (a)…
> (b) …
> (c) …
> (d) …
> (e) …
> (f) To institute, conduct, defend, compound or abandon any legal proceedings by and against the Club or its officers or otherwise concerning the affairs of the Club.
>
> (g) To authorise the execution of all Deeds, Powers of Attorney and other documents for and in the name of the Club which they may from time to time think necessary, PROVIDED, however, that every instrument executed on behalf of the Club shall be signed by the Chairman or the Deputy Chairman, or another Steward, duly authorised thereto by a meeting of the Stewards, and by the Secretary of the Club or such other Executive officer appointed in terms of Rule 26 hereof, who has been duly authorised thereto by a meeting of the Stewards or by some duly authorised person acting in the capacity of either Secretary or of such Executive officer.
>
> (h) …
>
> (i) …
>
> 24, The Stewards shall have the power from time to time to make, amend or repeal any by-laws for giving better effect to any of the Rules of racing, and for regulating their own proceedings as they may deem expedient, PROVIDED that such bye-laws shall not be inconsistent with these Rules or with the Rules and Regulations of the Jockey Club under whose authority and in accordance with

> whose rules and race meetings and other functions referred to in Rule 52 are held (in these Rules referred to as "The Jockey Club)".

There is no argument that in terms of clauses 6 of its Rules, the plaintiff can sue and be sued in its own right provided it has the necessary authority granted under that clause.

It is unfortunate that submissions by plaintiff's counsel on the point *in limine* were primarily based on whether or not the plaintiff could institute legal proceedings in its own name. That was not the issue before me. The issue before me was whether or not in instituting the proceedings before me the plaintiff followed its own Rules. The answer is no. All Mr Mukundu could tell the court was that he believed that his Chief executive who had authorised him to represent the plaintiff had authority from the Trustees. Under cross-examination he testified that although he had not seen the authority from the Stewards he believed it was in existence. He said he had confidence in the systems followed by the plaintiff.

It should be noted that notwithstanding the fact that this issue was raised before the trial commenced, Mr Mukundu maintained that the authority for him to proceed with the legal action 'was at the office'. In the circumstances I am satisfied that no such authority ever existed. Mr Mukundu and his Chief Executive were not Trustees. They were acting on their own and therefore outside the requirements of clause 6 of the plaintiff's own Rules. This finding invalidates the proceedings before me. The finding also disables me from proceeding to consider the merits of the case.

The plaintiff has a clear procedure that it set for itself regarding instituting legal process. The plaintiff has, *in casu,* violated its own procedures. Setting out clear procedures regarding the process of instituting legal proceedings is a highly commendable action by the plaintiff, but violating these same procedures is legally deplorable. The purpose of setting them is lost.

I find SANDURA JA's finding in *Mugwebie* v *Seed Co Ltd & Anor* 2000(1) ZLR 93(S) applicable to this case. This was a finding made in a labour dispute where the employer, in suspending an employee, had failed to follow its own code of conduct. For the sake of clarity, I quote here below extensively from SANDURA JA's judgment.

> "In the first place, the appellant was suspended by the company's marketing manager who was not the company's designated officer. This was in breach of para 4.2. of the code, which provides that it is the designated officer who suspends an employee whom he suspects to have committed an offence. It should be noted that in terms of para 4.2 of the code the power to suspend an employee only arises when the penalty for the

alleged offence is dismissal. In terms of Part IV of the code the penalty for fraud is dismissal.

Secondly, Mr Mupotaringa was appointed the company's designated officer and instructed to proceed against the appellant on 5 March 1999, about four months after the appellant had been suspended by the company's marketing manager. He should have been appointed before the appellant was suspended. In fact, in terms of para 4 of the code, no disciplinary proceedings can be instituted against any employee unless it appears to a designated officer that the employee in question has committed an offence. Even then, it is the designated officer, and no-one else, who is empowered by the code to notify the employee in writing of the nature of the alleged offence and the impending investigations. And it is he, and he alone, who is empowered to suspend the employee and determine whether such suspension is with or without pay, where the penalty for the alleged offence is dismissal.

The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. I can do no better than quote what LORD BENNING said in *MacFoy* v *United Africa Co Ltd* (1961)3 All ER 1169 (PC) at 11721:

> 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse' (emphasis is mine).

In my view, these comments apply to the facts of the present case with equal force. The suspension of the appellant was a nullity and all the subsequent proceedings were of no force or effect. It is, therefore, unnecessary to consider the effect of the failure to give a decision within fourteen days.

As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null and void so that the parties knew their respective positions".

In my view, the above case emphasizes the importance of adhering to existing and established procedures in any operating system. Failure to do so negates the whole purpose of ever putting the procedures in place.

Applying the above principles of law to the case before me, it is clear that failure to comply with Clause 6 of its Rules as read together with the relevant parts of clauses 22, 23 and 24, means that, in law, the plaintiff never instituted any legal proceedings at all against the defendant.

The procedural irregularity *in casu* was therefore fatal and accordingly the plaintiff is not properly before the court. Even if one were to invoke the principle of substantial compliance, the plaintiff's omission cannot be saved. The proceedings are a nullity. As already stated, I cannot, under the circumstances, proceed to deal with the merits of the case.

The plaintiff's claim is dismissed with costs.

Wintertons, plaintiff's legal practitioners
Mawere & Sibanda, defendant's legal practitioners