

NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND
versus
JTN PROPERTIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 15 JULY, 2013

Opposed Matter

T Pasirayi, for the applicant
R T Mugabe, for the respondent

HUNGWE J: At the end of argument I gave judgment granting the application. These are the reasons for that judgment.

Applicant seeks an order confirming the cancellation of a lease agreement between it and the respondent, eviction of the respondent as well as costs of suit. The application is premised on the following facts which are common cause or not seriously disputed. The applicant and the respondent entered into an agreement for the lease of a portion of a multi-storey building in the city centre. CB Richard Ellis were duly appointed agents by the landlord. CB Richard Ellis drew up an agreement of lease setting out the terms and conditions of the lease. The respondent took occupation in terms and conditions spelt out in the lease agreement drawn by the agents. In terms of that agreement, rent was paid by the respondent through CB Richard Ellis offices in the same block. In terms of clause 20.1.1 of the lease agreement, the respondent was obliged to pay rent in advance on or before the 1st day of each month to which the rent related. Failure to make payment in terms of this clause entitled the applicant to cancel the lease and retake possession of the premises.

It is not disputed by the respondent that rent for the month of November 2012 was not paid on or before 1st November 2012 in terms of the lease agreement. Further, it is not in dispute that by that date there were other outstanding arrears which applicant had demanded through the estate agent CB Richard Ellis who were the managing agents. CB Richard Ellis, acting for and on behalf of the applicant, instructed the applicant's legal practitioners of record to demand payment for the November 2012 rentals on 3rd November 2012 together

with the outstanding arrears in rent and operating costs. In the same correspondence dated 3rd November 2013, the legal practitioners gave notice that as the respondent had breached the lease agreement, the applicant had cancelled the lease. They demanded that the respondent vacates the premises as a result. The respondent did not vacate the premises but instead paid the November rentals on 5 November 2012. The applicant then filed the present papers.

The respondent opposes the order sought. It raises two points *in limine*. The first point *in limine* was that the court ought not to grant audience to the applicant as it comes to court with dirty hands arising from the applicant's failure to pay the costs tendered when applicant withdrew a matter similar to the present one. The second point was that the deponent to the applicant's founding affidavit lacked authority and capacity to institute and carry through legal proceedings on behalf of the applicant. As such, so the argument went, the deponent had no *locus standi in judicio* to institute legal proceedings. In reply, the applicant confirmed that the costs tendered had not, at the time of the hearing, been paid. This was not due to any unwillingness or inability to pay by the applicant but this had been occasioned by the delay in bringing taxation proceedings to finality. As such the dirty hands principle cannot be invoked against the applicant. I agree. Had the applicant shown a clear disdain of the rules of this court regarding the issue of costs then in that case there would have been some merit in the first point *in limine* taken by the respondent. In the absence of any contempt for the rules of court I am unable to hold that failure to have paid the costs amount to a disdain of the rules. There is therefore no merit in this point.

As for the second point, which is that the deponent lacked authority to institute legal proceedings on behalf of the applicant, it seems to me that the fact that the proceedings have been brought in applicant's name, that the applicant's agents have initiated the action, taken in the context of the general thrust of the lease agreement, point to authority having been granted by the landlord who is the present applicant. It is true that where a body corporate institutes legal action, the best evidence of the authority to institute the action would be a board resolution by such corporate body authorising the institution of the action. However, in my view it does not follow that in every instance where such board resolution is not filed such action would not have been duly authorised. In the present case, the parties have been dealing with each other through their agents. There is no suggestion that the issue of lack of authority was ever raised. Each party realised and recognised the other party's agent's power to make demands and compromised their principal's case. Each case has to be considered on its own merits. Had there been any suggestion that in fact the applicant's other agents had

compromised its case, I would have been inclined to consider seriously the absence of a formal board resolution authorising its agents to institute action. In the circumstances of this case and relying on the dicta in *Direct Response Marketing (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (HC) (per ADAM J), I am satisfied that the averment that deponent in the present matter is authorised to swear to the affidavit clothes him with sufficient authority to initiate the proceedings.

Mr *Mugabe*, for the respondent, asked for the matter to be adjourned soon after I ruled against him on the points he raised *in limine* on the basis that he was ill-prepared to argue the matter on the merits. I declined the invitation to postpone the matter for that purpose. He could not point to any rule of practice which admitted of a procedure in which a matter would be held in a piece-meal fashion. Where a matter is properly set down in terms of the rules of court, counsel should always appear prepared to present their full submissions on every aspect of the case. It will only be when an unforeseen circumstance or point is raised during argument, which point was not reasonably foreseen by the parties as ordinarily arising on the papers, that counsel could seek a postponement of the matter in order to acquaint itself with the point, that a postponement could be granted. In the present matter, the heads of argument reflect that Mr *Mugabe* would raise points *in limine* and that he would also argue the matter on the merits. Although his heads of argument dwelt more on the points *in limine*, they clearly show which points would be argued on the merits. I therefore asked him to proceed to address me on the merits and dismissed his application for adjournment.

On the merits Mr *Mugabe* argued that as the parties continued to regulate their affairs in terms of the written contract of lease, the applicant was not entitled to cancel the lease in light of the payment, on demand, of the November rentals. This argument overlooks one important point. The applicant cancelled the lease for non-payment of rent before 1st November. It was entitled to do so by virtue of the provisions in clause 20. Unlike the usual breach clauses this clause does not provide for the requirement of a notice to remedy the breach before cancellation. It may be draconian but it is a term which the respondent had been aware of throughout the tenure of the lease. The respondent had remained on the premises in November. That entitled the applicant to receive rent for that month without prejudice to its rights to cancel the lease for the breach.

In the event I granted the order for the eviction of the respondent at the end of hearing in terms of the draft. I however declined to award costs on a higher scale.

Gill, Godlontons & Gerrans, applicant's legal practitioners
Nyakutombwa Legal Counsel, respondent's legal practitioners