

STEPHEN SHONIWA  
versus  
GEOFFREY NYAROTA  
and  
BUFFALO COMMUNICATIONS

**Civil Trial**

HIGH COURT OF HARARE  
MATANDA-MOYO J  
HARARE, 23, 26 January 2015 and 17 June 2015

*Ms E. Mupanduki*, for the plaintiff  
*C. M. Jakachira*, for the defendants

MATANDA-MOYO J: Plaintiff sued the defendants, jointly and severally for the following relief:

1. Eviction from 15 Bodle Avenue Eastle Harare
2. Payment of arrear rentals in the sum of \$10 500-00 as at 29 July 2013.
3. Payment of holding over damages at the rate of \$1 500-00 per month from 1 August 2013 to date of vacation of 15 Bodle Avenue.
4. Payment of City of Harare bill of \$10 642-92 as at 30 April 2013.
5. Payment of outstanding ZESA bill of \$763-92 as at 7 June 2013
6. Payment of any other City of Harare or ZESA that may accrue from 1 May 2013 and 8 June 2013 respectively to date of vacation of the premises.
7. Interest, on \$10 500-00 at the prescribed rate from date of summons to date of full and final payment.
8. Costs of suit.

The defendants opposed the plaintiff's claim on various grounds. The first defendant denied being a tenant of the plaintiff but only accepted acting as the representative of the second defendant. In that respect he denied being indebted to the plaintiff in terms of arrear rentals, rates

or electricity bills. He averred that the proper defendant is the second defendant. The second defendant admitted entering into a lease agreement with Quadstar Real Estate for the occupation and use of 15 Bodle Avenue, Eastlea Harare. As a company such premises were to be used for commercial purposes. The second defendant admitted failing to meet its rental obligations owing to the economic challenges bedeviling the country. The first defendant admitted offering to pay arrear rentals and arrear utility bills in respect of 15 Bodle Avenue, Harare. The first defendant was expecting payment from his former employees in respect of an arbitral award granted in his favour.

The defendants however disputed the amount of arrear rentals. They alleged that the plaintiff had not taken into account various amounts received by him amounting to \$2 350-00. The defendants put into issue amounts owed to City of Harare as they alleged the figure included charges levied against the plaintiff's Cold Comfort Property. The defendants put into issue the inclusion of rates into amounts payable by the defendant. They averred that rates are payable by the owner of the property and not by the tenant. On the ZESA bill defendants denied owing the amount claimed. They allege that certain bills included are owed by the plaintiff's former tenants. The plaintiff is also said to have failed to deduct an amount of \$400-00 paid to ZESA by the defendants in July 2013.

The defendant's denied the plaintiff was entitled to the eviction sought and prayed for dismissal of the plaintiff's claims as they had been lodged prematurely.

The second defendant made a counterclaim of \$166 998-00 for damages suffered by the second defendant for loss of business. The second defendant averred that on or about 3 May 2013 the plaintiff locked them out of the premises. Such action was unlawful and in contravention of a verbal agreement entered into by the parties. The second defendant's tools of trade were locked inside, thus causing the second defendant to fail to complete its works. That failure by the second defendant in failing to complete some of the works resulted in cancellation of some of the contracts. The second defendant lost income in the sum of \$166 998-00 and averred that the plaintiff is liable to pay such damages occasioned by his unlawful conduct. The second defendant also sought interest on the said amount at the prescribed rate from 17 July 2013 to date of actual payment plus costs of suit on a legal practitioners client scale.

The plaintiff denied the existence of a lease agreement between himself and the second defendant for commercial purposes. He averred that the second defendant is not entitled to any damages as he was occupying the plaintiff's property unlawfully. The plaintiff averred that the second defendant failed to mitigate his losses by seeking a spoliation order earlier. The plaintiff also averred that it would be unfair and unjust to award damages to second the defendant who admitted to not paying rentals for four months at the time. The plaintiff prayed for dismissal of the second defendant's counter claim with costs on a higher scale.

On the trial date the second defendant consented to owing \$24 150-00 in arrear rentals. The issue of whether the plaintiff was paid \$2 350-00 remained an issue for trial. The second defendant accepted to pay the City of Harare Bills for its consumptions and denied it had obligations to pay rates. The defendants have since moved out of the premises and therefore the claim for eviction fell away.

The plaintiff testified on his own behalf. He said he knew the first defendant as his tenant at number 15 Bodle Avenue, Eastlea, Harare. He confirmed that sometime in 2010 he engaged Quadstar Real Estate Agent to secure a tenant for his Eastlea house. Quadstar entered into a lease agreement with the defendants. The plaintiff travelled from the United Kingdom in August 2011 to nullify the agreement entered in to between Quadstar and the defendants. He did so. He then approached the first defendant and entered into a lease agreement whereby the first defendant was to lease the property for residential purposes. In violation of the agreement the first defendant operated his company from the property. The parties agreed at monthly rentals of \$1 500-00 and the lease commenced 1 November 2011. The plaintiff prepared the lease agreement which was never signed by the defendants. He also testified that at the time of occupation of the premises by the defendants, the plaintiff owed City of Harare \$5 000-00. The Plaintiff agreed that the first defendant would pay to the City of Harare \$500-00 monthly from the rentals and the balance of \$1 000-00 was to be deposited into his personal account with Metropolitan Bank. Since the inception of the lease agreement, the defendants failed to pay the rentals and as at 31 July 2013 the defendants owed the plaintiff the sum of \$10 500-00. The first defendant made several promises to settle the arrear rentals to no avail. It was also a term of the lease agreement that the first defendant would settle City of Harare bills inclusive of rates and also ZESA bills.

As at the date of the summons the defendants failed to settle arrear City Council bills in the sum of \$10 642-27 and ZESA bills in the sum of \$763-93. Such bills are in the name of Roadmakes (Pvt) Ltd which is a non-trading company owned by the plaintiff. The plaintiff testified that to date such amounts remain owing.

The plaintiff testified that the defendants used his premises for commercial purposes without having converted the use from residential. As a result the City of Harare penalized the plaintiff and such penalties as appearing on their schedule ought to be settled by the defendants. The plaintiff prayed that an order be granted for the defendants to settle the City of Harare arrears of \$19 560-69 which is the balance as per City of Harare's statement on 30 April 2014. The plaintiff submitted that a figure of \$5 000-00 that was owing to the City of Harare before the defendants occupied the premises ought to be deducted from the above amount.

The plaintiff denied receiving total cash of \$2 350-00 from the first defendant. He testified that all monies were deposited into his Metropolitan account and he never received cash from the defendants.

The plaintiff insisted his lease agreement was with the first defendant. He produced email communications with the defendant and denied the first defendant was doing so in a representative capacity. He insisted that the defendants pay arrear rentals of \$26 500-00, City of Council bills in the sum of \$19 560-00 less \$5 000-00 owed by previous tenants, and \$763-92 ZESA bills.

Under cross-examination the plaintiff admitted that he engaged Quadstar Estate agent to look for a tenant for his property. The plaintiff was evasive when questioned about an advert which appeared in the Herald of 4 November 2011, advertising the plaintiff's property for commercial use. The advert indicated there were eight offices to let. He was asked if he would be able to deny that the defendant responded to the advert for commercial premises. The plaintiff could not deny that. The plaintiff admitted that the defendants did not sign the lease drafted by Quadstar because the lease included a clause that the defendants were responsible for rates, a clause the defendants did not agree with. The plaintiff also admitted that according to the lease agreement drawn by Quadstar the tenant was the second defendant, being represented by the first defendant. The plaintiff also admitted that he had not placed before the court documentary evidence to show that he had cancelled the initial lease but he insisted he travelled to Zimbabwe

to sort out the misunderstanding between Quadstar and the second defendant. On being asked why the lease he drafted in favour of the first defendant was never signed the plaintiff said the first defendant kept postponing the issue until he flew out. He however, agreed that they could not agree on the rates issue.

The plaintiff also agreed that the premises were owned by his company. On the \$2 350-00 the plaintiff denied ever receiving cash from the defendants. He stuck to his story that he never met the first defendant outside Jameson Hotel to receive cash. He also denied that his gardener was paid cash by the defendants.

On the counterclaim the plaintiff admitted he locked out the defendants from his premises without a court order. He however denied that his actions caused any loss to the defendants as they were failing to pay rentals due to lack of business. He said he was not aware there were computers for printing as he had only seen desks. He denied the defendants had pending projects with the Chamber of Mines, Watershed and the Zimbabwe Agricultural Show Society.

On re-examination the plaintiff said he locked them out due to frustrations on their non-payment of rentals. He denied being liable for any damages.

The first defendant Geoffrey Nyarota testified on behalf of the defendants. He testified that he is the Chief Executive Officer of the second defendant. The second defendant initially operated from the first defendant's place of residence in Alexandra Park. They then decided to expand and sought offices. On 4 November 2011 he saw an advert in the Herald for the leasing of 15 Bodle Avenue Eastlea. They approached Quadstar and agreed to lease the property. They moved onto the property. He testified that the second defendant is a publishing house and its major tools of trade are computers. They had 6 – 7 computers which were very visible. There was a big computer for designing purposes. On being asked who the tenant of 15 Bodle Avenue, was, the first defendant answered that the second defendant was the tenant. He as the Chief Executive Officer of the second defendant represented it in the transaction. The lease agreement was prepared but he could not sign it as they disagreed on the defendant having to pay rates.

Quadstar Estate Agent allowed them to move in before signing the lease agreement as they were desperate for a tenant. The signing of the lease agreement was deferred to allow the agent to contact the plaintiff to try and resolve the impasse on payment of rates. The estate Agent

later wrote to inform the defendants that they had failed to convince the plaintiff to be responsible for rates.

On being asked to explain the lease agreement drafted by the plaintiff, the second defendant explained that the plaintiff came and wanted to convert the property to residential. The first defendant could not accept that as he had his own residential address. They had moved to 15 Bodle to accommodate his company, the second defendant. The plaintiff went on to prepare the lease without agreeing with the defendants and left the lease on the first defendant's desk whilst he travelled back to the United Kingdom. The first defendant insisted that the second defendant was the tenant of 15 Bodle Avenue up to the time they moved out. At all-time he only acted as the representative of the second defendant.

On the issue of rates, the first defendant denied ever taking responsibility for arrear, current nor future rates. He explained that when he offered to settle \$6 000 rates, it was meant to avert an imminent disaster of preventing City of Harare from closing the place. It was never an acceptance to pay rates.

The first defendant accepted that they managed to pay rentals upto end of 2012. Thereafter business became difficult and the second defendant could not pay its rentals and other obligations. The first defendant looked at ways to settle arrear rentals including disposal of a residential stand. Unfortunately the purchaser failed to pay. The defendant always had the desire to settle rental arrears. That explains why the first defendant offered to settle arrear rentals with his benefits from Associated Newspapers of Zimbabwe. An award was given in his favour and he advised the plaintiff of the development and promised to use the proceeds to settle arrear rentals.

On the issue of the \$2 350-00 it was the first defendant's evidence that the plaintiff phoned him and informed him he needed money to pay his lawyers. The first defendant secured \$1 000-00 and drove to Jameson Hotel where he handed that amount to the plaintiff. The plaintiff requested some more money and again the first defendant secured \$500-00, drove to Jameson Hotel where he paid the \$500-00 to the plaintiff. The plaintiff again phoned the defendant for money for the treatment of his sister who was then admitted at Parirenyatwa hospital. The first defendant raised \$700-00 and gave the amount to the plaintiff. The first defendant said at one point the plaintiff requested for money for subsistence and he gave him \$1

00-00. The plaintiff again requested for money for fuel and was given \$50-00. All in all the first defendant paid \$2 350-00 to the plaintiff. No receipts were given for the amounts. The first defendant at all times believed the plaintiff was off setting the amounts from the arrear rentals. The first defendant testified that he wanted the amount to be set off against arrear rentals.

The first defendant also testified that at one time he paid a certain amount to the plaintiff's gardener. Since he could not remember the amount he excluded it from amount he requested to be set off against arrear rentals.

The first defendant also admitted owing amounts from City of Harare for Consumption. He produced a schedule which showed that the defendants were liable to pay \$919-02. He claimed the figure was inserted in ink by City of Harare officials.

On the issue of the counter claim Mr Nyarota testified that on 3 May 2013 the second defendant was locked out of 15 Bodle Avenue by the plaintiff. On coming to work on 3 May 2013 they found that the plaintiff had changed the locks to the gate. They could not enter the premises and their gardener and wife were locked inside and could not leave premises. Mr Nyarota tried to talk to the plaintiff to be allowed to access computers but the request was turned down.

The plaintiff only unlocked the gate after the second defendant successfully applied and secured spoliation order against the plaintiff.

It was the first defendant's evidence that they had secured three major contracts, that is, chamber of Mines, Agricultural Show Society of Zimbabwe and Watershed College in Marondera. The second defendant only managed to produce the magazine for Watershed in 2013 and was paid \$6 291-00. The second defendant thereafter lost the contract as it delayed with the magazine due to the lock out. The second defendant got a contract to produce a magazine for the Agricultural show. The second defendant would make its money through advertising. Because of the 3 May 2013 lockout the second defendant failed to produce the magazine it wanted to. It only managed to produce a small one. The second defendant was also forced to offer massive discounts in order to attract advertisers after the lockout, thereby incurring huge losses.

He estimated the potential revenue they were to receive at \$312 460-00. They managed to receive a revenue of \$36 500-00 during the period in question. The loss was \$275 260-00. The expenses they were to meet were \$108 962-00. Taking out the expenses and revenue actually

received from the expected revenue would leave a figure of \$166 998-00 which represents, the amount claimed as damages. Under cross-examination this witness testified that they did not start any production whilst at Alexandra Park. They only started looking for clients whilst at 15 Bodle Avenue. He admitted he had not produced any books of accounts to prove the amount of business the company was enjoying then. He also admitted that during that period the company was failing to meet its financial obligations especially to pay rentals.

On the issue of advertisers who pulled out he was questioned on proof which he could not provide. He maintained his position that others pulled out whilst some negotiated prices downwards.

On being questioned why he waited so long before applying for spoliation Mr Nyarota said the second defendant did not have funds for legal fees. This witness insisted the second defendant was entitled to judgment in its favour in respect of the counter claim.

The first issue falling for determination is who was the tenant at 15 Bodle Avenue, Eastlea? Initially it is obvious from the evidence of advertisements that the premises were offered for commercial use at \$1 500 per month. The second defendant was clearly the tenant as represented by the first defendant. The initial contract prepared by Quadstar reflected the second defendant as the tenant. Such lease agreement was not signed by the second defendant as it felt that rates should be paid by the owner. From the evidence it was also clear that the first defendant had his residential property in Alexandra Park where he and his family were residing. It is highly unlikely that he would seek to rent another residential property. The first defendant's version is the more probable one regard being had to the totality of the facts.

It is also apparent that when the residence in question was advertised for commercial purposes, no changes had been made with the relevant authority for the conversion of the premises to commercial use. Quadstar Real Estate Agent was for all intents and purposes an agent of the plaintiff and in law, was acting on behalf of the plaintiff. The actions of an agent exchanged with a third party binds the principal.

The plaintiff's testimony that he flew home and agreed with the first defendant to substitute the first defendant as the tenant in place of the second defendant is not believable. When the plaintiff arrived on the scene, the second defendant had already moved on to the premises and was already a tenant thereat. The other problem with the plaintiff's version is that



the lease agreement he purportedly drafted with the consent of the first defendant was not signed, even up to the date of trial. Such actions do not point to any agreement having been reached between the plaintiff and the first defendant on the issue of the substitution of tenancy. I am of the view that the lease agreement was entered into between the plaintiff and the second defendant but the two had failed to agree on one issue; that is on who was responsible for payment of rates. In law rent is the essential element of a lease agreement: See *Estate Ismail v Sayed* 1965(1) SA 393 (C) @ 397 A-B. Once there was an agreement of rent payable, then the second defendant was the tenant of the plaintiff. The disagreement on who was to pay rates was not an essential element of a lease agreement. The first defendant bound himself and undertook to pay arrear rentals from his personal money. He promised to pay arrear rentals using his presumed package from his former employers ANZ. On the foregoing the first defendant bound himself as surety on the outstanding rentals and the plaintiff could proceed against him in that respect, not as a tenant. In these proceedings since the plaintiff did not bring the action against the first defendant as a surety, but as a tenant I am unable to find that he was properly sued.

The plaintiff argued that because he issued receipts in the name of the first defendant that made him the tenant. The receipts emanated from the plaintiff and do not show that there was an agreement by the first defendant to be substituted as the tenant. Accordingly that argument does not find favour with the court.

Once I have found that the second defendant was the tenant at 15 Bodle Avenue, Eastlea, it follows that the premises were leased for commercial purposes. The plaintiff visited the premises whilst being occupied by the second defendant, and to believe that he never saw desks and computers therein, would be unbelievable. There is evidence of the plaintiff visiting 15 Bodle Avenue. There is clear evidence that there were desks and computers at the place. The reasonable presumption to be drawn from the facts is that plaintiff was aware that the premises were being used for commercial purposes. When the plaintiff came to Zimbabwe, it was apparent that he was aware that Quadstar had rented the premises for commercial purposes and that the second defendant was already in occupation of the premises. There is no evidence that the plaintiff evicted the second defendant but there is evidence that he drafted a lease agreement with the first defendant as the tenant which lease agreement was never signed. From the totality of the evidence I am of the opinion that the premises were leased for commercial purposes.

Let me deal with amounts owing. The second defendant accepted owing \$24 150-00 in arrear rentals and disputed owing the amount of \$2 350-00 in unpaid rentals. It was the first defendant's evidence that such amount was paid to the plaintiff on five occasions. On all those occasions the first defendant received no receipts. Such amounts were not even accounted for in defendants' books. It is hard for the court to believe the story. In any case the rules of the game are clear, 'he who alleges must prove'. Once the figures were disputed by the plaintiff, the defendant had to show some proof that indeed such amounts were withdrawn from company funds or from wherever and paid to the plaintiff. Without such proof the court has no option but agree with the plaintiff that such amount remains outstanding.

The plaintiff submitted that the defendant should be made to pay for City of Harare bills inclusive of rates. The defendant argued that there was no agreement entered into between the parties for the defendant to pay rates. The defendant only agreed to pay for the water consumed by it. The plaintiff argued that the defendant's conduct showed that he had accepted to pay rates. The plaintiff submitted that between November 2011 and January 2012 the total bill for water consumption was only \$1 512-80 yet the defendant paid \$2 315-00. The excess amount was obviously going towards payment of rates. It was also the first defendant's testimony that they promised to pay City of Harare rates so they would not terminate water supplies. It is therefore a fact that the defendant was paying rates to City of Harare. The defendant did not write to the plaintiff, offsetting rates payment with rentals, which showed that there was an understanding between the two parties that the defendant was now responsible for the rates. By its conduct the defendant acquiesced to paying rates. Accordingly the defendant should pay the City of Harare bill inclusive of rates.

The defendant argued that the lease agreement entered into between the parties was illegal as it was in conflict with the zoning of the premises in question. The defendant argued therefore that rentals should not be recovered. The defendant referred me to the case of *Latimer Manley & Associates (Pvt) Ltd* 1990(1) ZLR 200 (H) where the court said at p 203;

"It is not open to the parties to negotiate terms which are clearly illegal and then turn around and invite the court to recognise or enforce their illegal activity".

The defendant is seeking to argue that rentals and other bills are not recoverable as the plaintiff had rented out his property as "Commercial in violation of City of Harare zoning of the

premises. This argument does not find favour with me as the defendant has already consented to paying rentals. This was never his defence from the onset. I shall not labour the point. The argument is no longer available to the defendant.

Let me just move on to deal with the counter-claim. The parties in claim in reconvention will be referred to simply as the plaintiff and the defendant. The second defendant claimed damages in the sum of \$166 998-00 for business lost whilst it was unlawfully locked out of the premises by the plaintiff. It is common cause that the second defendant applied for spoliation which order was granted by the magistrate court. Such ruling was never appealed against. It is my view that, there is no dispute on the question of liability but what is in dispute is quantum of damages. The plaintiff accepted in his own evidence that he was frustrated by the defendant's non payment of rentals resulting in him locking the defendant out of the premises.

However the plaintiff challenges the figures claimed by the defendant. The plaintiff was required to prove the damages he suffered during the period of lock out. He claimed that he produced magazines and papers of poor quality because most advertisers had pulled out. The defendant failed to prove that he had been contracted to produce each of the magazine and the claimed prices. Proof of the contracts involved with each particular magazine or paper would have sufficed to prove the existence of his engagement to produce the productions. In the absence of proof that he had such contracts, I am unable to find that he has proved his damages on a balance of probabilities.

Also considering that the defendant was failing to pay the rentals it is improbable that suddenly he had such paying contracts. In the result is ordered as follows:

1. That the second defendant be and is hereby ordered to pay the sums of:
  - a) \$26 500-00 being arrear rentals for 15 Bodle Avenue, Eastlea Harare
  - b) \$14 560-00 owed to City of Harare
2. Interest on the above sums at the prescribed rate from date of judgment to date of payment.
3. The second defendant's counterclaim be and is hereby dismissed.
4. That the second defendant pays costs of suit.