

CHATPRILL ENTERPRISES (PVT) LTD
versus
TABETH MAHERE

HIGH COURT OF ZIMBABWE
CHIWESHE JP AND CHITAKUNYE J
HARARE, 13 January 2016

Civil Appeal

J. Mandevere, for the appellant
Respondent in default

CHITAKUNYE J. This is an appeal against a magistrate's decision dismissing appellant's claim for the eviction of respondent and a claim for arrear rentals against the respondent.

The appellant and respondent entered into a lease agreement in 2009. The appellant was represented by a Mr. Nhamo (in his capacity as the Manager) whilst the respondent represented herself. Initially the lease agreement related to No. 37 Chinhoyi Street, Harare. Later the parties agreed that respondent should move to No. 38B Cameroon Street, Harare, which she did.

The appellant was the lessor and the respondent was the lessee. After Mr. Nhamo's demise Mr. Maromo apparently took over as the lessor's representative in place of Mr. Nhamo.

At the time of entering into the lease agreement appellant portrayed itself as the owner of the premises being leased. However in mid-2013 the respondent discovered that the appellant was in fact not the owner. She discovered that the property was in fact owned by M.S.I POONJA PROPERTIES (PVT) LTD and that appellant was just a tenant. She was thus a sub-lessee. The owner's representative NAJAMUN-NISA POONJA, is the one who informed the respondent that the premises were owned by M.S.I POONJA PROPERTIES (PVT) LTD and that the appellant was subletting the property without the owner's authority.

As a result the owner and respondent purported to enter into an agreement whereby if

the respondent wished to continue occupying the premises she had to pay rentals to the owner and not to appellant whose subletting was without authority.

It is apparent that as a consequence of this the respondent stopped paying rentals to the appellant.

On 11 November 2013, the appellant issued summons out of the Magistrate's Court seeking the eviction of the respondent from No. 38B Cameron Street, Harare and the payment of rent arrears in the sum of USD1950.00.

The action was contested by the respondent. After a full trial the trial magistrate found in favour of the respondent and thus effectively dismissed the appellant's case for eviction and for arrear rentals.

Being dissatisfied with the decision appellant appealed to this court.

The first issue for consideration is the Notice of Appeal and Grounds of Appeal. A valid notice of appeal must comply with the rules. Rule 7 of the Supreme Court (miscellaneous appeals and references) Rules 1975, as amended, states that:

- "A notice instituting an appeal shall state—
- (a) The tribunal or officer whose decision is appealed against; and
 - (b) The date on which the decision was given; and
 - (c) The grounds of appeal; and
 - (d) The exact nature of the relief sought; and
 - (e) The address of the appellant or his legal representative."

In *casu*, whilst most of the aspects of a valid notice of appeal were complied with, the aspect of the grounds of appeal left a lot to be desired.

Grounds of appeal must be clearly stated and should not be in general terms. Equally they should be meaningful and concise, specifying the findings of fact or rulings of law appealed against. A notice without meaningful grounds of appeal has been held not to be a notice of appeal. See *R v Jack* 1990 (2) ZLR 166

In this case, the grounds of appeal were imprecise and are akin to heads of arguments.

The grounds of appeal read as follows:-

- "1. The learned court *a quo* grossly erred and misdirected itself in strangely granting judgment for the respondent thereby effectively dismissing appellants claim for eviction against Respondent by holding that the appellant had not made a case for Respondent's eviction because Appellant was not the owner of the property nor was Appellant authorised to sublet the property especially when regard is had to the following decisive factors:-
 - (a) The lease agreement between Appellant and Respondent was valid and binding as between Appellant and Respondent and consequently the claim for damages ought to have succeeded.

- (b) It was admitted and not in dispute that the respondent was a subtenant of Appellant.
 - (c) It was admitted and not in dispute that Respondent was given free and unhindered occupation of space by Appellant.
 - (d) It was admitted and not in dispute that at some point, the Respondent paid rentals to Appellant.
 - (e) It was admitted and not in dispute that Respondent subsequently stopped paying rentals to Appellant.
 - (f) It was not in dispute that the written lease agreement between Appellant and the owner of the property in question did not expressly prohibit sub-letting and that in the absence of an agreement on that, the common law position is that the Appellant is entitled, without its landlords consent, to sublet the property.
 - (g) Further, and critically so, authority to sublet is not a necessity for the validity of a sublease agreement as long as the sub-landlord provides undisturbed occupation of space and the sub tenant pays rentals.
 - (h) If the Respondent contended that it entered into the sub-lease through a material misrepresentation by Appellant, such misrepresentation does not entitle the Respondent to continued occupation but vitiates the sub-letting agreement between the parties and consequently entitles the sub-landlord to evict the sub tenant.
 - (i) It is not in dispute that Respondent breached the terms of the sub-lease by neglecting to pay or to timeously pay rentals to Appellant.
2. The court *a quo* grossly erred and misdirected itself in strangely granting judgment for the respondent and holding that the appellant had failed to establish why it is entitled to rentals and thereby effectively dismissing appellant's claim for arrear rentals and holding over damages particularly when regard is had to the following decisive factors:-
- (a) The Respondent entered into a sub-lease agreement with Appellant in terms of which Respondent paid rentals to Appellant.
 - (b) The Respondent at some point regarded Appellant as the Landlord and paid rentals.
 - (c) The Respondent stopped paying rentals to Appellant.
 - (d) Lack of authority or otherwise to sublet by Appellant does not entitle the Respondent not to pay rentals as long as the Appellant tendered vacant possession to Respondent of the property in question.
 - (e) Any purported breach of the principal lease agreement between Appellant and the owner of the property has no effect on Appellant's rights in so far as its relationship with Respondent is concerned."

A careful analysis of the above grounds of appeal shows that the subparagraphs are akin to heads of arguments.

In *Hubert Davies Employees Trust (Pvt) Ltd & Others v Croco Holdings (Pvt) Ltd* 2009(2) ZLR 53 (S) the Supreme Court when faced with the issue of a defective notice of appeal stated that: -

"This court has on a number of previous occasions stated that non-compliance with r 29 has the effect of nullifying a notice of appeal."

In this case we however decided to hear the appeal on the merits in order to bring finality to the matter.

MERITS

A careful perusal of the record of proceedings in the court *a quo* shows that after a

protracted trial, the trial magistrate concluded that appellant had not proved that it was entitled to the claim for arrear rentals and to evict the respondent. The trial magistrate's conclusion was premised on his finding that the appellant had misrepresented to the respondent that it owned the property when that was not so and that the appellant's lease agreement with the owner of the property was verbal and did not permit subletting. In the circumstances the subletting was unauthorised.

In the process of trying to conceal the sublease from the owner appellant had asked respondent to depose to an affidavit stating that she was a wife to appellant (whatever that meant since appellant is a company). Such attitude tended to confirm that subletting was not allowed.

It may also be noted that the conduct of appellant appeared morally reprehensible in some respects. It is clear that whilst the appellant was being charged USD12.00 per square metre by the owner, it in turn was charging respondent and other subtenants USD250-00 per the same square meter. The appellant had fiercely resisted the owner's attempts at increasing rent from USD12-00 per square metre per month to about USD35-00 per square metre per month. The appellant was also in serious rental arrears to the owner despite the exorbitant rentals it was charging subtenants. Such conduct may have influenced the trial magistrate to view appellant as an entity lacking any form of acceptable business ethics and simply there to make exorbitant profits out of another's investment and to the impoverishment of subtenants.

The appellant's situation was exacerbated by the fact that even after the owner had discovered the sublease, and had now asked respondent to be paying rentals to her and not to appellant, appellant kept on demanding rentals from respondent.

In her testimony Ms. Poonja made it clear that she told respondent that if she wanted to continue with her business she had to pay rentals to her as the owner of the premises. At p 30 of the record of proceedings the following exchange took place between respondent's counsel and Ms. Poonja:-

- “Q. What is your relationship to the defendant?
A. She is the sub-tenant and I advised her she was illegal activity (sic) and advised her to deal with me and it was my order.
Q. She is now dealing with you as Landlord?
A. Yes.”

The appellant was apparently fleecing respondent whilst misrepresenting to the owner of the premises on the realisable rentals from the premises.

The respondent as a business person intent on continuing trading was caught in between a rock and a hard surface.

It is in these circumstances that the court *a quo* concluded that appellant was not entitled to its claim.

The appellant argued that the lack of authority to sublet is not a valid legal ground to dismiss its claim.

The issues that fall for determination include whether the lack of authority to sublet disentitles a sub land lord from claiming rentals from the sub-lessee and whether the sub landlord's acts of misrepresentation to respondent and to the landlord disentitles it from claiming rents from the sub tenant.

The appellant argued that even if it were to be found that there was no authority to sublet, that would not disentitle it to the rentals.

It may be noted that the appellant's lease agreement with the landlord was valid. This was a contract privy to those parties. When the appellant sublet the premises to the respondent that was a separate contract which required each party to fulfill its respective contractual obligations. This contract was not dependent or conditional upon appellant being the owner of the property leased out or even being authorised to sublet. The appellant was simply required to perform its part of the contract by providing vacant and undisturbed possession and occupation to the respondent.

The ownership or authority to sublet the premises by appellant was not a prerequisite for the validity of the sub lease as long as the sub-landlord provided *vacuo* possession and the sub-tenant paid rentals.

In *Robinson v Grimm* 1996 (2) ZLR73(S) KORSAN JA quoted with approval the words of Solomon J in *Clark v Nourse Mines Ltd* 1910 TS 512 at 520-521 wherein the judge opined that:-

"It seems to me that the rule (that a lessee cannot dispute a lessor's title) may be based on one or other of two very simple grounds. The first is, that the lessor, having performed his part of the contract, and having placed the lessee in undisturbed possession of the property, is entitled to claim that the lessee should also perform his part of the contract and should pay him rent which he agreed to pay for the use and enjoyment of the premises. The second ground is that the lessee, having had the undisturbed enjoyment of the premises under the lease, and having had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property."

In *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) at p 453B-D GUBBAY CJ had this to say:

“It is trite law that where a contract of lease contains prohibitions against subletting, cession or assignment, either absolutely or without the lessor’s consent, a sub-lease, cession or assignment, entered into by the lessee, without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has. Thus, if the third party enters into occupation of the leased property, the lessor is entitled to an ejectment order against him. See *Stalson v Brook* 1922 WLD 143; *Akoon v Jhavary* 1934 NPD 282 at 285; *Hissaias v Lehman & Another* 1958 (4) SA 715(T) at 719B-C; Wille, *Landlord and Tenant in South Africa* at pp 123 and 124. A further obvious consequence of the prohibition is that the court will refuse to enforce the sub-lease, cession or assignment, at the instance of the lessee. To do otherwise would be to confer a right upon the lessee not given him by the lessor.”

In that case court held that:-

“...., that the fact that the respondent had entered into the agreement with appellant in breach of the clause in the lease to buy contract requiring the prior consent of the owner-lessor to subletting or assignment did not preclude the respondent for suing for eviction of the appellant. In effect, the respondent was seeking to undo the sublease or assignment entered into in breach of the clause the lease-to-buy agreement. The in *pari delicto* rule applied to an illegal sub-lease; it did not apply to a sub-lease invalid on account of lack of compliance with formal requirement. The purported sub-lease or assignment was not illegal; it was invalid because of the failure of the parties to the agreement to obtain the necessary prior consent. This was a matter of contractual formality. A lessee in occupation under a lease that is invalid due to its form maybe evicted by the lessor; so, too, a sub-lessee in occupation under a sub-lease which is invalid due to its form may be evicted by the lessee. If the sub-lessee is ignorant of the defect in the lessee’s title at the time he contracts, his remedy is to claim damages for the disturbance in the use and enjoyment of the property.”

In *casu*, the sublease was invalid by virtue of it not having been permitted by the landlord. In the circumstances appellant was entitled to undo the breach by seeking the eviction of respondent. The respondent’s contention that appellant had no *locus standi* to seek her eviction is thus not sustainable. The appellant’s claim for eviction ought to have been granted but was only to be effective if respondent’s continued occupation was on the basis of the invalid sub lease.

The trial magistrate therefore erred in dismissing the appellant’s claim for eviction on the basis that appellant was not the owner of the premises and that as tenant he had no authority to sublet.

It is however my view that the issue of eviction has been overtaken by events in that respondent’s continued occupation is no longer on the basis of the invalid sub lease but on the terms and conditions set by the owner of the premises. It was now a new agreement between the owner and respondent.

The appellant also contended that the trial magistrate erred in not granting his claim for arrear rentals and holding over damages.

It is common cause that from the time appellant and respondent entered into a sub-lease agreement respondent had been paying rentals. The respondent apparently stopped making rental payments to appellant after the owner of the property had come onto the scene. It is in this scenario that the arrear rentals of US\$1950-00 were apparently accrued.

The respondent contended that when she discovered that appellant was not the owner of the leased premises in mid-2013, in July of the same year she started dealing with the owner of the building. She thus did not owe appellant any arrear rentals as she had been paying rent to the owner of the premises. A Ms. Poonja who testified for the respondent confirmed the same that respondent was now dealing with her as the owner of the premises. She is the one who had ordered so.

The issue that arises pertains to the effect of the landlord's intervention.

The point was made that the tenant's role in a sublease is to place the subtenant in undisturbed possession of the leased premises. It is because of the provision of undisturbed possession that the sub tenant is expected to pay rent in terms of the agreement without challenging the tenant's title. In *casu*, the undisturbed possession was enjoyed up to the time when the owner of the premises intervened and ordered respondent to pay rentals to her and not to appellant as appellant had no authority to sublet. Thus from May 2013 respondent no longer enjoyed undisturbed possession and occupation. The appellant did not deny that the owner intervened and that from that time respondent was not paying rent to appellant. If therefore the basis for requiring a sub-lessee to pay rent, despite the invalidity of the sub-lease, is that she has been granted and is enjoying undisturbed possession of the property, where there is no more undisturbed possession should respondent continue paying rent to appellant? I am of the view that the circumstances of this case are such that it would be an act of injustice to order respondent to pay rent to the appellant whilst appellant has in effect failed to continue providing undisturbed possession. The respondent's continued occupation of the premises was now on the terms of the landlord. It is to the landlord that the appellant should look to for any recompensate. Since the sublease agreement between appellant and respondent was invalid due to lack of authority to sublet, it means that on the intervention of the owner of the property, appellant could not continue receiving rent from respondent when the landlord had herself told respondent in no uncertain terms that if she wished to continue in occupation she had to pay rent to her as the owner and not to appellant.

The intervention, in my view, was such that it brought to an end the already invalid

sub-lease between appellant and respondent. All the respondent could be expected to pay for was for the period she had enjoyed undisturbed possession before the owner intervened. Thus, if there were any unpaid rentals before that intervention that is what appellant should claim. The respondent's continued occupation of the premises was no longer on the terms she had entered into with appellant, but on the terms laid before her by the owner of the premises.

From the pleadings filed of record the rent arrears prior to the owner's intervention are not clear. If anything they are not part of the claim. In the summons and particulars of claim the arrears being claimed are from August 2013 to November 2013. The claim, as per the summons, is for:

- "1. An eviction order against the Defendant and all those claiming right of occupation through him.
1. Defendant to pay US\$ 1 950-00 being rent arrears
 2. Costs of suit."

In his evidence in chief Mr. Maromo, for the appellant, testified that the total arrears of US\$ 1 950-00 were for August \$450-00; September\$ 500-00; October \$500-00; and November \$500-00.

He then went on to say for January – March respondent did not pay and all in all USD3950-00.

It is apparent from the summons and the particulars of claim that there was no claim for holding over damages or for rent arrears for the period prior to August 2013. There was no amendment of the pleadings to include a claim for holding over damages. Somehow in his evidence Mr. Maromo found himself testifying on sums appellant had not claimed in its summons.

Under cross examination Mr. Maromo could not justify the new sum of US\$3950-00 as this figure was not claimed in the summons. At p 16 of the record of appeal the following exchange took place:

- "Q. How do you justify \$ 1950-00?
- A. That is rentals arrears
- Q. How much does she owe you since 2011?
- A. \$ 2 400-00
- Q. What is \$2 400 for and how did you arrive at that sum?
- A. She was failing to pay."

The above exchange shows that the appellant's witness was contradicting himself regarding the amount owed and for which appellant was seeking to be paid. The summons

states USD1950.00, Mr. Maromo confirms that figure but further states a sum of US\$3950-00 and US\$2400-00 as owing at different intervals. No explanation was given as to why, if respondent owed US\$2400-00 since 2011, such was not claimed in the summons. Equally no explanation was proffered as to why holding over damages were not claimed in the summons but were now being brought in through Mr. Maromo's evidence. The situation is not ameliorated by the appellant's closing submissions wherein it is stated that appellant's claim in the summons was for a sum of US\$ 3950-00 when this was not so.

I am of the view that this serves to show the uncertainty in appellant's claim.

I thus come to the conclusion that the circumstances of this case are such that the plaintiff's claim for arrear rentals for the period after the owner had intervened and put respondent on her own terms cannot be sustained. At the most appellant is limited to rentals that accrued before the intervention of the owner. As highlighted above appellant lamentably failed to prove such arrear rentals.

In the circumstances no arrear rentals have been proved.

The appellant also argued that the trial magistrate erred by dismissing a claim for holding over damages. As already alluded to above no claim for holding over damages is reflected in the summons. This ground is thus without merit.

Accordingly the appeal is hereby dismissed with each party to pay their own costs of this appeal.

CHIWESHE JP agrees _____

Kadzere, Hungwe & Mandevere, appellant's legal practitioners.

Obedience Machuwaire Attorneys at Law, respondent's legal practitioners.