Judgment No. S.C. 87/99
Civil Appeal No. 155/98

(1) VISION ELECTRONICS (PRIVATE) LIMITED

(2) MULTI-TECH ELECTRONICS (PRIVATE) LIMITED v

LEBENA BISCUIT MANUFACTURERS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, JUNE 1 & AUGUST 27, 1999

A J Dyke, for the appellants

J C Andersen SC, for the respondent

MUCHECHETERE JA: This is an appeal against the judgment of the High Court, Harare, on 23 April 1998 in which the court held that an agreement of lease in connection with premises situate at 21 Eddison Crescent, Graniteside, Harare ("the said property") had been concluded between the respondent and the appellants and that the respondent had suffered damages in the matter. The appellants were therefore ordered to pay damages to the respondent together with interest and costs of suit.

The facts in the matter are that one G C Bushby ("Bushby"), a shareholder and managing director of both the first and second appellants, and Knight Frank & Rutley ("Knight Frank"), who were acting on behalf of the respondent, entered into discussions for the lease of the said property. On 11 September 1995

Knight Frank communicated to Bushby by telefax the respondent's offer to let the said property on certain terms and conditions. Some of the terms and conditions were to the effect that the lease was to be for a period of three years commencing from 1 October 1995, with an option to renew for a further period of two years. The rental for the initial period was:-

> "$90 000.00 per month for the period 1 October 1995 to 30 September 1996
>
> $103 500.00 per month for the period 1 October 1996 to 30 September 1997
>
> $119 025.00 per month for the period 1 October 1997 to 30 September 1998."

And the rent for the renewal period was to be negotiated three months prior to the expiry of the initial term of the lease. The appellants were also required to provide a guarantee relating to the rent and other obligations under the lease. The other terms and conditions of the lease were to be in accordance with the standard lease agreement of Knight Frank.

The telefax letter went on to state:-

> "I trust that you are agreeable to the principal terms and conditions of the agreement as given above and would be grateful if you would indicate your acceptance below by signing one copy of this letter and returning (it) to me as a matter of urgency. …
>
> I am in the process of drawing up the full memorandum of agreement of lease for signature and shall provide you with a draft copy prior to finalising the document. Please provide me with the full names of the person responsible for signing the lease together with the company which will hold the lease, in this respect …".

Bushby signed the letter. The acceptance he signed reads:-

> "I Geoffrey Bushby acting on behalf of, and with the full authority of, the tenant, accept in full the principal terms and conditions of the lease relating to the subject premises as herein stated and agree to be bound by them in full.
>
> (Signed) 13/9/95
> Signed Date".

After the signature Bushby endorsed the following:-

> "Subject to confirmation of points attached on Addendum 1
>
> Addendum 1
>
> In agreement subject to confirmation of the following:
>
> i) Number of working telephone lines;
>
> ii) Additional costs, i.e. insurances etcetera.
>
> G C BUSHBY (Signed)."

On 15 September 1995 Knight Frank wrote two separate minutes to Bushby advising that there were seven working lines to the said property and that the additional expenses would be approximately $20 000.00 per annum, payable monthly, in respect of insurance and $6 156.50 per month in respect of rates. The minutes also indicated that the information the appellants required was complete. A letter of acceptance previously faxed to the first appellant on 11 September 1995 was also hand-delivered to the first appellant on 15 September 1995 and to it was attached a standard form of agreement of lease. On 20 September 1995 the second appellant, represented by Bushby, wrote a letter saying it was enclosing a signed letter of acceptance and asking for the keys to the said property. The letter indicated that a company guarantee was in the process of being drawn up. And it gave the full names

of the two persons who would be signing the lease which was to be held by the second appellant. The letter was received by the respondent on 26 September 1995.

It is the respondent's contention that a consideration of the above facts leads to the conclusion that an agreement to lease the said property was entered into. This is because as at 20 September 1995, when the said letter was written by Bushby on behalf of the second appellant, there were no outstanding queries. And that when the signed letter of acceptance was eventually returned on 26 September 1995 by the appellants all the issues raised had been attended to.

The appellants admit that they entered into correspondence with Knight Frank on the possible lease of the said property. They, however, state that the second appellant's acceptance was conditional upon certain conditions being met. They go on to state that the response to the conditions was never accepted. And that in the circumstances no agreement was concluded between the parties. The appellants also state that whilst Bushby had authority to negotiate terms of the lease on behalf of the appellants he had no authority to conclude any agreement without reference to the board of directors. At a later stage the appellants also raised the issue of the ownership of the said property. In this connection they contend that as the respondent was not the owner of the said property at the time the agreement was allegedly concluded, it could not have suffered damages and that in the circumstances no cause of action had been established.

I, however, agree with Mr *Andersen's* submissions in this matter. These were to the effect that an examination of the documents in this matter, the

conduct of the appellants and the evidence of their witnesses supports the finding of the learned trial judge, which was to the effect that an agreement for the lease of the said property was concluded. The appellants' failure to express any reservation that conditions expressed in the letter of commitment had been satisfied signified that they no longer had any reservations.

The above was the perception of the appellants' witnesses. One Fowler, a director of the first appellant, accepted the above position during cross-examination. Bushby admitted also during cross-examination that the information was acceptable to him and that the letter of commitment was provided to the respondent to satisfy it that an agreement had been entered into in order to obtain the keys. He also, after some prevarication, in the end admitted that the keys were required to commence occupation of the said property. Bushby in addition executed the form of guarantee which signified that agreement had been reached.

The above is also fortified by the appellants' failure to raise any objection to Knight Frank's letter of 5 October 1995, which stated that an agreement had in fact been entered into and that the appellants had stated that they wished to cancel the agreement due to financial constraints. The contents of the letter were confirmed by one Jeffrey Nicholas Brakspear, a partner of Knight Frank, and his evidence on this was not challenged.

On the appellants' contention that it was intended that there would be no agreement unless recorded and signed, I also agree with Mr *Andersen's* submission that the evidence does not support the contention. In the first instance, that

contention was not put to the respondent's witnesses in cross-examination. And the contention is not consistent with the terms of the said letter of commitment, or the said letter of 20 September 1995 or the guarantee or the appellants' stance as indicated in the said letter of 5 October 1995. Further, the matter was not raised in correspondence until 26 February 1996. I therefore agree with the following sentiments by the learned trial judge at p 13 of his cyclostyled judgment (H-H-70-98):-

> "The position is now well established that an oral agreement is binding even if the parties intend to reduce this to writing - *Patrikios v African Commercial Company* 1940 ST 45 at 57.
>
> On the evidence before me, at no time was it ever agreed that the agreement was to be of no force or effect until reduced to writing - see *Karedzera v Geoman Construction and Nembawane* SC-76-96. The formal lease was intended to record what had been agreed to orally."

In connection with the second ground of appeal which was concerned with the identity of the landlord for the purposes of the agreement, I am also in agreement with the submissions of Mr *Andersen*. These were to the effect that although the owner of the said property and beneficiary was a company called Ben Brack (Private) Limited, that company and the respondent had the same shareholders and directors. It was, however, intended that the respondent would represent Ben Brack for all purposes. Mr *Andersen* further submitted that the question as to who would suffer damages, that is the ultimate beneficiary in respect of the rent payable, was irrelevant. He went on to state that it mattered not whether the respondent was the beneficiary or not provided it had authority to institute proceedings, and accordingly the necessary *locus standi*. And that, in view of the fact that the appellants do not dispute that an agent may institute proceedings on

behalf of an undisclosed principal, the learned trial judge's finding on the matter is unassailable.

The learned trial judge found that the respondent was acting on behalf of an undisclosed principal. For this finding he relied on the evidence of one Lynette Rubin, a director and shareholder of the respondent, which was to the effect that the respondent entered into the lease on behalf of Ben Brack.

On the law on an undisclosed principal, see De Villiers and Macintosh's *The Law of Agency in South Africa* 3 ed at p 594, where the learned authors say:-

> "Here the agent, as the 'only known and ostensible principal', can sue on the contract, even after the existence of the principal has become known to the other party. It makes no difference that the principal can also sue; but intervention by the principal destroys the agent's right. It has been held that a principal and his agent may join as plaintiffs and claim judgment in their favour in the alternative, where they are doubtful as to who is entitled to sue."

See also Kerr's *The Law of Agency* 3 ed at p 262, where the learned author states that "the (above) doctrine of undisclosed principal has been adopted into our law".

Further to the above, once it is held, as it has already been, that an agreement to lease was entered into the appellants cannot dispute the landlord's title. For this principle see *Robinson v Grimm* 1996 (2) ZLR 83, where KORSAH JA stated the following at pp 85-86:-

> "The general rule of the common law is that a lessee may not dispute the lessor's title. This rule that a lessee may not dispute the lessor's title has been applied where a lessee, upon termination of the lease, refused to vacate the property. See *Loxton v Le Hanie* (1905) 22 SC 577 at 578, where BUCHANAN ACJ said;

> 'The defendant has set up the defence that the title of the ground is in dispute, and, therefore, the magistrate has no jurisdiction. But it is not competent to dispute his landlord's title.'

So also in *Kala Singh v Germiston Municipality* 1912 TPD 155 at 159-160, where, upon the point being taken that the municipality, being a statutory body, was not entitled to let the stand to the appellant, DE VILLIERS JP expressed himself thus:

> 'But, in answer to this, we have the rule of the English law, which it was decided amongst others in *Clark v Nourse Mines Ltd* (1910 TS 512) is also a rule of our law, that as between lessor and lessee it does not lie in the mouth of the lessee to question the title of his landlord. He could be met by the *exceptio doli mali*; and this exception, in my view, would lie equally between the parties even if the relationship between them is not, strictly speaking, that of landlord and tenant' (emphasis added).

The opinion of SOLOMON J in *Clarke v Nourse Mines supra* at 520-521, which received approval in *Hillock and Anor v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 516E, is as follows:

> '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 the 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' (emphasis added)."

In any event, I consider that the application by Mr *Andersen* for joinder of Ben Brack would have been good. This is because the amendment to introduce the point was served on the respondent very late, on the day of the trial, without any indication of the nature or the type of the amendment. And there would have been no prejudice to the appellants in the proper plaintiff being added.

On the question of costs, Mr *Andersen* submitted that these should be borne by the appellants on a legal practitioner and client scale. This, in his view, is

because the evidence demonstrated that there was no reasonable basis for the grounds of appeal relied on. And that in effect the appellants grasped at straws in raising defences for which there was no factual basis. He also submitted in this connection that the grounds of appeal, as laid down in the notice of appeal, were not proper in that no particulars are given in the first ground as to why it is alleged that the finding that an agreement of lease had been concluded was incorrect and that the second ground does not reflect the finding made by the learned trial judge. The finding by the learned trial judge was to the effect that the respondent had *locus standi* to institute the proceedings and not as to by whom the damages had been suffered. The appellants' second ground of appeal states that the learned trial judge "erred in finding that it was the plaintiff who had suffered damages".

Whilst I agree that there is merit in Mr *Andersen's* submissions, I do not consider that this is a case where the appellants should be saddled with costs on the above scale. Most of what is being criticised could be put down to the appellants' legal practitioners' lack of diligence and failure to advise their client properly.

In the result, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Coghlan, Welsh & Guest, appellants' legal practitioners

Surgey, Pittman & Kerswell, respondent's legal practitioners