

HC 160-15  
HCA 74/14  
X REF MAGISTRATE COURT 1135-13

**STAGEBOX INVESTMENTS (PVT) LTD**

**And**

**LOVEMORE SITHOLE**

**And**

**HUSTLERS LEISURE CENTRE (PVT) LTD**

**And**

**CLARKSON KWANGWARI**

**Versus**

**M. MUTSHINA N.O.**

**And**

**MONTE CARLO (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE  
MUTEMA & MAKONESE JJ  
BULAWAYO, 15 JUNE AND 30 JULY, 2015

**Civil Appeal**

*L. Sithole* for the 1<sup>st</sup> appellant

*C. Kwangwari* for the 3<sup>rd</sup> appellant

No appearance for the 1<sup>st</sup> respondent

*M. Ncube* for the 2<sup>nd</sup> respondent

**MUTEMA J:** On 15 June, 2015 we dismissed this appeal with costs on the scale of legal practitioner and client on the basis that it had no merit. Hereinafter are the reasons for that order as requested by the second appellant.

The long and short of the dispute between the parties is as follows:

The second respondent (Monte Carlo) is the landlord and owns Monte Carlo Centre situate along Fife Street, Bulawayo. The second appellant (Sithole) owns first appellant (Stagebox) which leases shops number 7B and 8 Monte Carlo Centre while the fourth appellant (Kwangwari) owns the third appellant (Hustlers) which leased Hustlers Nite Club at Monte Carlo Centre. The lease agreements in respect of the above named tenants were concluded by the parties in 2009. Stagebox's net rentals were US\$300,00 per month in respect of shop 7B and US\$350,00 per month for shop 8 while net rentals for Hustlers were US\$1 200,00 per month.

As at 29 January, 2013 Stagebox had incurred rental and operational arrears of US\$4 550,00 while Hustlers had incurred US\$8 400,00 for similar expenses. As a result Monte Carlo issued summons against each of the appellants claiming the following:

- (a) Cancellation of the lease agreement;
- (b) Eviction of each appellant and all those claiming occupation through each appellant, from the leased premises;
- (c) Payment of the respective arrears alluded to *supra*; and
- (d) Costs of suit.

The appellants contested the suit before the first respondent but lost the contest and judgment was entered for the second respondent as prayed for in the summons as indicated above. The sole issue which had been referred to trial was simply whether the appellants were in breach of the lease agreement. Dissatisfied with that outcome the appellants appealed to this court with the appeal being premised on some twelve grounds most of which do not qualify as grounds of appeal. We could have dismissed the appeal on that technicality alone in respect of all the appellants and or against the first and third appellants on the premise that they being incorporated entities, the second and fourth appellants had no right of audience representing the two companies in the High Court since they are not qualified, let alone registered and practising legal practitioners – see *Pumpkin Construction (Pvt) Ltd v Chikaka* 1997 (2) ZLR 430.

The concepts alluded to above are legal concepts not readily understood or subscribed to by the ordinary lay person. This constrained us to hear the appeal on the merits in the interests of justice.

The only grounds which qualify as grounds of appeal by the laymen appellants and which go a long way in resolving the appeal are three, viz (b), (d) and (i) in the notice of appeal. These grounds will be dealt with seriatim below.

“(b) The Authority and Power of the Agent who was meant to represent the 2<sup>nd</sup> respondent was illegal, given the fact that it was not backed by the Company Resolution, authorizing and empowering Dr Eric Bloch in his personal capacity to act on behalf of the 2<sup>nd</sup> respondent in appointing the agent.”

The agent whose authority was being challenged is Ilan Wiesenbacher. His evidence was that he was duly appointed the property manager of the second respondent and in support of that averment he produced a general power of attorney (exhibit 1 – page 116 of the record). That general power of attorney is dated 15 November, 2012, was executed by Eric Walter Bloch at Bulawayo. It reads in pertinent part:

“Know all Men whom it may concern

That I, Eric Walter Bloch (I.D. No. 08-177963 P 10), Being Duly Authorised Thereto in my capacity as a Director of Monte Carlo Investments (Private) Limited Do hereby nominate and appoint ILAN WIESNBACHER (I.D. NO. 84-0104365 – 00) to be my General Attorney and Agent for managing and transacting all affairs in respect of Monte Carlo Investments (Private) Limited with power to ask, demand, sue for recover and receive all debts or sums of money ... And to let and hire out houses, and grant leases ... and to collect and receive the rents ... AND if necessary, for me and on my behalf to commence, prosecute or to defend any action, suit or other proceedings in or before any court ... AND further to give and grant receipts, releases or other effectual discharges for any sum of money or things recovered or received on my behalf ...”

Despite this piece of documentary proof as evidence of his status coupled with a meeting held with all the tenants at Monte Carlo Centre the appellants, from the outset, refused to acknowledge him as the lawful agent. They also refused and neglected to pay rent and have

frustrated any attempts by him to negotiate new lease agreements with them. He said the appellants demanded that he produce a handwritten letter confirming his appointment which he produced having been authorized by the owner of the building a Mr A. Menashe confirming his appointment but still the appellants would not budge.

All the foregoing evidence is common cause and all other tenants at these premises recognized Ilan Wiesenbacher's appointment and status and paid their respective rentals to him except the appellants who continued digging in and refusing to pay their rentals in the amounts stated above. Wiesenbacher's testimony was corroborated by another witness Mr Shirto, also a tenant at the premises.

The learned trial magistrate cannot be faulted for arriving at her finding that enough proof was adduced by Wiesenbacher that he was granted authority to act on behalf of the second respondent. In the event, the appellants' contention that the agent in question's appointment was illegal for want of a company resolution authorizing Erich Bloch to appoint the agent is a mere attempt at layman sophistry used as a red herring to avoid the payment of rentals. If the appellants doubted the legitimacy of Wiesenbacher's agency they were at liberty to contact the owners of the property and ascertain the fact. They did not bother doing so instead they were content to sit back with intransigence and occupy the shops for free. Their reasoning was not only flawed but grossly unreasonable and should accordingly be rejected with the contempt it deserves.

“(d) Failure by the 1<sup>st</sup> respondent to consider payments made direct to ZESA in the 2<sup>nd</sup> respondent's account to offset whatever amount being claimed by the 2<sup>nd</sup> respondent even after producing the receipts in court.”

The legal fallacy of this argument is not difficult to unmask. A lease is one of several species of contract. Contractual performance of a term, such as payment of rent *in casu*, must strictly conform to what is stipulated in that term as agreed upon by the parties. Generally, performance must be made to the creditor or to someone entitled to receive it on his behalf (such as an agent) or to someone indicated by the creditor as recipient of the performance (such as his

own creditor). In the instant case it is common cause that rentals by Monte Carlo tenants were paid to Michael Mpande who was the agent/manager prior to Wiesenbacher coming onto the scene. The manager would then effect payment of the utility bills to ZESA for electricity and to City Council for water. So the lease between the parties never had a clause/term authorizing the appellants to pay rent to any of the utility providers. Payment of rent to ZESA by the appellants did not therefore discharge their obligation towards Monte Carlo.

Over and above the foregoing the appellants do not state what the rental amount per month was and the ZESA payments alluded to were only two as appear on pages 120 and 121 respectively of the record as follows:

“DATE: 2013 01 02 ...  
ACCOUNT NAME: MONTE CARLO  
AMOUNT PAID [USD] 1 100 ] Hustlers Leisure Centre - \$700  
Stagebox Investments - \$300  
Zhax Suppliers (Pvt) Ltd - \$100  
Total \$1 100

“DATE: 2013 03 14 ...  
ACCOUNT NAME: CARLO MORTE  
AMOUNT PAID [USD] 600 ] Hustlers Leisure Centre - \$300  
Stagebox Investments - \$200  
Zhax - \$100  
Total \$600”

NB: Zhax Suppliers (Pvt) Ltd is also an appellant but in a separate matter.

*In casu* Hustlers and Stagebox paid two different amounts each on 2 January, 2013 and on 14 March, 2013. Those amounts do not show that they were for rentals and for what month (s) and for how much. They were only paid at the beginning of 2013 yet Wiesenbacher’s unchallenged testimony was that from November, 2012 when he was appointed agent the appellants disowned him and never paid anything by way of rentals as evinced by the rent arrears schedule on pages 117 – 119 of the record. What the appellants alleged to have paid ZESA as rent was not only not the correct monthly rental amount but a drop in the ocean when the total period of default is taken

into account. By employing the phrase "... to offset whatever amount being claimed by the 2<sup>nd</sup> respondent ..." the appellants are clearly admitting that they were in arrears. Their ground of appeal on this aspect is accordingly untenable and must fail.

“(i) The 1<sup>st</sup> respondent regarded the appellants as non statutory tenants whereas the 2<sup>nd</sup> respondent in his evidence regards the appellants to be statutory tenants there being contradictions between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and thus making the 1<sup>st</sup> respondent biased towards the 2<sup>nd</sup> respondent in her judgment.”

This ground should not detain the court. Even if the trial magistrate had found that the appellants were statutory tenants – which they were when account is had of the fact that the initial lease agreement of 2009 had expired and not been renewed – still the appellants would not, given the common cause extant facts, have been saved by that finding.

Section 22 (2) of Statutory Instrument 676 of the Commercial Premises (Rent) Regulations 1983 protects a statutory tenant provided he/she continues to pay the rent due within seven days of due date and complies with the other conditions of the expired lease agreement.

In the instant case appellants do not deny their continued occupation of Monte Carlo premises neither do they deny that they were obligated to pay rent for those premises. Their argument, which the court has already found to be legally lame as postulated above, is simply that they did not recognize Ilan Wiesenbacher as Monte Carlo's agent tasked with the management of the premises and collection of rentals. In *Altem Enterprises v John Sisk & Son (Pvt) Ltd* SC-4-13 the court held that “The position is settled that a tenant has no right to occupy property save in return for payment of rent and that where there is no agreement on the amount of rental payable, the lessee is liable to pay the lessor a reasonable amount for the use and occupation of the property, the rental value of the property in the open market being the criterion for the assessment of this amount.”

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The appellants have not been paying rent for the premises they continue to occupy since November, 2012 when the previous lease agreement expired. By this failure to pay rent by the seventh of each month either in the amount the landlord demanded or in the amount of a fair market value for the premises or in the amount the appellants deemed reasonable, they lost their protection normally provided by statutory tenancy. Failure to pay rent constitutes a material breach of a contract of lease which warrants the defaulting tenant's eviction from the premises.

In the result, the trial magistrate was accordingly correct and justified in entering judgment for Monte Carlo as claimed in the summons against the appellants. The foregoing reasons are the basis upon which the court found the appeal meritless and dismissed it with costs on the attorney – client scale.

Makonese J ..... I agree

*Messrs Ndove, Museta & Partners*, 2<sup>nd</sup> respondent's legal practitioners