

NERVEWAY TRADING LIMITED
versus
ALFRED PEDRO KARIZI
and
CLETOS CHAKOMA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 21 July 2015 and 29 July 2015

Opposed Application

S. Furidzo, for the plaintiff
S. Guwuriro, for the defendant

BHUNU J: The plaintiff's claim is for the refund of \$16 000.00 paid as development fee or goodwill to the Defendants in contravention of s 19 of the Commercial Premises (Rent) Regulations S 676/1983. The section seeks to protect lessees from extra demands for payment of extraneous claims other than rentals. It reads:

"No lessor shall, in respect of commercial premises let or to be let by him, require or permit the lessee or prospective lessee of the premises to pay, in consideration of the grant, continuation or renewal of the lease concerned, any bonus, premium or other like sum in addition to the rent, or any amount for the negotiation of the lease."

The background to this case is that on 1 July 2012 the plaintiff entered into a lease agreement in terms of which it leased a shop at 84 Rezende Street Harare owned by John Buckster Trust who leased the property through Guest & Turner Estate Agents.

The first defendant was employed as a manager by the property owner Buckster Trust whereas the second defendant was the Managing Director of the letting Estate Agent Guest & Turner (Pvt) Ltd.

The cause of action arises from a written agreement of occupation of shop signed by both defendants in which the first defendant acknowledged receipt of a total amount of \$16 000.00 being non-refundable payment for development fee or goodwill. The document reads:

"AGREEMENT OF OCCUPATION OF SHOP

- I. Alfred Pedro Karizi
ID Number 63 – 1088478 L 63
Confirm that I received \$10 000.00

(In words) Ten thousand dollars only and balance of \$6 000.00 to be paid on 30/6/12 and keys will only be handed over on payment of such balance from Mr S Munyanyi. ID Number 08 58777 2 F 18

It is the development fee for operating a shop at Rezende Street.

This development or infrastructure fee is non Refundable.

Should the tenant be willing to vacate the premises within the term of a 5 year contract he or she has entitlement to look for another *tenant* from whom to recover the paid goodwill, this can or may be done with the assistance of the *landlord agent*. In the event that the landlord decides to dispose the property there will be no refund. But the tenant will also be allowed to compete with other prospective buyers.

On the date afore written of the undersigned witnesses.

Signature..... Signed O773596042

Signature..... Signed 0772610952

Witness (1)

Name. Charles ...

Signature Signed

ID Number 49 – 048789 – A – 49

63 -761520 726

Balance

It was agreed that the *tenant* has paid the balance of \$6 000.00 and keys have been handed over at 17:40 on 29/6/12

Signed ...”

Both Defendants have now excepted to plaintiff’s claim on the basis that its claim raises no cause of action. They argued that the payment of \$16 000.00 by the plaintiff was not prohibited by law or illegal because there being no lessor tenant relationship between the parties it did not fall within the purview of s 19 of the Commercial Rent Regulations.

The plaintiff’s counsel countered that although not specifically stated the claim was for unjust enrichment. There is some merit in that argument. Considering that the defendants were employed in influential positions of trust by the landlord and its letting agent, a reading of the agreement gives a clear impression that either that the defendants were acting on behalf of their respective employers or they were defrauding the Plaintiff.

Whichever way one looks at it if the Plaintiff proves what it alleges the Defendants were acting unlawfully. If they were acting as agents of their employers then the agreement is hit

by s 19 of the Regulations which renders the agreement unlawful. If they were not acting as their employers' agents then, they had no lawful basis for coercing or misleading the Plaintiff to pay \$16 000. 00 as non-refundable development fee or goodwill.

The second defendant also denied signing as a party to the agreement but admitted signing as a witness. Considering that the second defendant was not an ordinary witness but the managing director of the letting estate agent it is difficult to countenance the idea that he have witnessed a document in which his client was being coerced to pay \$16 000.00 before it could be given keys to the premises. His conduct in this respect tends to be inconsistent with an innocent frame of mind.

The document however shows that there was only one witness who signed as a witness to the document his name is Charles. There are two people who signed above his signature. The other signature could be that of the second defendant since he admits signing the document.

For the foregoing reasons I can only come to the conclusion that both defendants have a case to answer. **It is accordingly ordered that the exception be and is hereby dismissed with costs.**

Kanokanga and Partners, the plaintiff's legal practitioners
Kachere and Guwuriro, defendants' legal practitioners