REPORTABLE (42)

(1) GOODLIVING REAL ESTATE PRIVATE LIMITED (2) JEROME NDUBISI OKEKE
v
LIN ZHONGMIN

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & PATEL JA
HARARE, OCTOBER 14, 2013

***L Uriri* with *T E Toto*, for the appellants**
Mr *C W Gumiro*, for the respondent

GARWE JA: After hearing counsel, this Court was of the unanimous decision that the appeal had no merit and consequently dismissed it with costs. It was indicated at the time that the full reasons for the decision would be made available in due course. These are they.

The background to the dispute giving rise to the appeal is as follows. In March 2010, the respondent entered into an agreement with the appellants for payment of what the parties termed "a commitment fee" in respect of premises undergoing renovations at

stand Number 151 Mbuya Nehanda Street, Harare. It appears from the papers that a tendency has arisen in the housing market where prospective tenants seeking rental space in buildings where there is a high demand for such space are requested by the lessor to pay what is variably termed "a commitment fee", "goodwill of the rental space" or "lease preference fees". The purpose of such a fee is to enable the prospective tenant to be given first priority in concluding a lease agreement in respect of the premises once they are available for occupation. Without payment of such a fee, a prospective tenant would stand little, if any, chance of even being considered for possible occupation of the premises.

In terms of the agreement entered into between the parties, the respondent agreed to pay the total sum of $35,000 as "goodwill" in respect of the premises in question. It is common cause the premises in question were undergoing renovations. The respondent paid the sum of US$10,000 as a deposit to the second appellant on 11 March 2010, leaving a balance of $25,000 which was to be paid once the renovations were complete. Once the balance of the $25,000 was paid, the parties were then to agree on the amount of rental payable per month.

Having formed the opinion that he had been misled, the respondent decided to demand a refund of the sum of $10,000. The appellant refused to refund the money, claiming that the respondent had been in breach of the terms of the agreement. The respondent then instituted proceedings for the recovery of the amount in question. A joint pre-trial conference minute drafted by the parties identified five issues for trial. At the conclusion of the trial that followed, the court *a quo* found that no agreement had been reached that the sum of $10,000 would be non-refundable. The court further found that the appellants had been unjustly enriched at the expense of the respondent and consequently ordered the appellants to refund

the sum of $10,000 together with interest and costs of suit. The appellants then noted an appeal against that order.

At the hearing of the appeal before us, the attention of counsel for the appellants was drawn to the provisions of s 19 of the Commercial Premises (Rent) Regulations S.I. 676/83 ("the Regulations"). Neither counsel for the appellants nor the respondent had, it would appear, been aware of the provision. That section provides:

> "***19 – Payment of bonus, premium et cetera***
> 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 negotiating the lease."

Faced with the clear language in s 19 of the above regulations, Mr *Uriri* for the appellant was forced to concede that most of the issues raised before the court *a quo* and in heads of argument before this Court were irrelevant and that the payment of the sum of $10,000 to the appellants was illegal. That concession was, in the circumstances, most proper.

The provisions of s 21 of the Regulations also re-inforce the legislative intention that any one who receives payment in circumstances similar to those of this case cannot retain that payment. Section 21 provides, in relevant part:-

> "***21 – Recovery of payments in excess of fair rent or in contravention of section 19***
> (1) ...
> (2)Where any payment has been made in contravention of the provisions of section 19, the lessee who made the payment may recover from the lessor who received the payment the amount thereof."

In addition, s 32 of the Regulations makes it a criminal offence for any one to contravene s 19 of the Regulations and provides for a fine or imprisonment or both. Section 34 allows a court to order a refund following a conviction for a contravention of s 19.

The clear intention of the Legislature was to prohibit the tendency on the part of some landlords to take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. Put differently, it is impermissible and a breach of the law, for a landlord to demand payment of "a commitment fee", or "goodwill", or "a lease consideration fee" or any other fee, by whatever name, which amounts to a bonus or premium or a consideration for negotiating the lease. That this provision has been part of our law for a long time is clear – see the decision of BEADLE CJ in *S v Fraser Partners (Pvt) Ltd & Anor* 1972(1) S.A. 408, 409 (RAD) in which a similar provision came up for consideration before the Court.

For the avoidance of doubt, it must be noted that a security or good tenancy deposit does not constitute a prohibited payment in terms of s 19. This is clearly recognised in s 20 of the Regulations which provides that only such deposit must be refunded to the lessor within fourteen (14) days of the termination of the lease in question.

One further matter falls for determination and that is whether the second appellant is liable to pay the amount jointly and severally with the 1st appellant.

Whilst it is correct that in the pleadings the appellants put in issue the liability of the second appellant, it having been the appellants' position that the second appellant had

been a mere representative of the first appellant, it is clear that the issue was never really pursued nor was the court *a quo* asked to make a determination on it. The respondent's declaration made it clear that payment of the sum of US$10,000 was sought against both appellants, jointly and severally, the one paying the other to be absolved. Despite the position seemingly adopted by the appellants in the plea that the first appellant merely acted as an agent for the second appellant, the joint pre-trial conference minute signed by both parties identified a total of five issues for determination at the trial. Whether both appellants were jointly and severally liable was not one of the issues identified for trial. As it so happened, during the trial proceedings, the court *a quo* confined its attention to the five issues that had been identified. At no stage was the court asked to make a determination on whether or not the second appellant was also liable.

To now suggest, as has been done in the grounds of appeal, that the court *a quo* misdirected itself in holding that the liability of the two appellants was joint and several is not only unfair to the court *a quo* but also impermissible. A court cannot and should not be criticised for not making a decision on an issue that was never placed before it for determination. There is therefore no basis upon which the finding by the court *a quo* that both appellants were liable can be impugned.

In any event, the acknowledgment of receipt issued to the respondent on payment of the sum of $10,000 clearly indicates the receiver as "Jerry Okeke" and that it was him who was to allocate the shop in question to the respondent. There is no suggestion on the receipt that the money was being paid to the first appellant and that the second was a mere agent of the first. For this additional reason this court was of the view that no proper basis

had been established for setting aside the finding by the court *a quo* that the liability of the appellants was joint and several.

In all the circumstances, therefore, the court was satisfied that there was no merit to the appeal and accordingly dismissed the appeal with costs.

ZIYAMBI JA: I agree

PATEL JA: I agree

Mwonzora & Associates, appellants' legal practitioners

Messrs Musariri Law Chambers, respondent's legal practitioners