WELLCROFT INVESTMENTS (PRIVATE) LIMITED
t/a HOUSE OF SANDALS
versus
MODERN CARPETS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HLATSHWAYO and KUDYA JJ
HARARE, 27 January and 16 February 2011

Civil Appeal

I Ahmed, for the appellant
R Fitches, for the respondent

KUDYA J: This is an appeal from the judgment of a magistrate sitting at Harare on 5 August 2010 in which she granted an order of eviction to the respondent against the appellant.

On 1 July 2010 the respondent filed a court application for the eviction of the appellant. The appellant opposed the application. The matter was determined on the basis of the averments made in the affidavits filed of record by the parties. On 23 March 2010 the respondent wrote to Mr Ameet Hargovan at the leased premises giving the appellant three calendar months notice from 1 April to 30 June 2010 purportedly in terms of the Rent Regulations SI 32/2007 to vacate the premises. In that letter it was indicated that the parties executed the lease in 2007. The sole reason advanced therein was that the respondent wanted to take full occupation of the premises. The letter was responded to by Hargovan on the appellant's letter head on 10 May 2010. The appellant refused to vacate the property alleging that it was being victimized for declining to accede to a rental increase. It did not disclose the date on which the rental increase had been proposed but in its reply of 14 May the respondent disclosed that the letter declining the increase had been written by the respondent on 12 October 2009. It denied that the notice was actuated by the refusal to pay higher rentals but by the desire to fully utilize and occupy the property in line with the respondent's board resolution of 4 January 2010. It averred that the appellant was aware at the time the lease was executed that the respondent could not fully use the property. On 17 May the appellant responded and remained adamant that it would not be vacating the premises come 30 June.

The founding and opposing affidavits captured the essence of the above mentioned correspondence. In the answering affidavit, in response to an averment that the respondent sought to evict the appellant in order to lease out the property to another tenant at a higher rental, the respondent denied the existence of a rent dispute. It also disputed that it intended to sublet the property to a third party. It maintained that the premises were required for its own use. It emphasised that it initially used the premises before its business sufferred a down turn during the hyperinflationary era which caused it to lease them to the defendant but with the new economic dispensation its business had improved prompting it to seek repossession of the premises. In oral argument in the court a *quo*, the respondent's counsel made the following submission:

> "The reason for the application is that the applicant now wants the premises for its own use. Applicant had leased the premises to the tenant when it was not viable for it to use the premises in issue. Things have changed for the better; it wants to use the premises for its expanding business. Applicant's current business is being carried out from the back office of the premises and now applicant wants her front office."

The appellant maintained its stance that the respondent did not require the premises for its own use but wanted it evicted in order to lease the premises at a higher rental to a new tenant.

The court a *quo* was satisfied on the papers that the respondent genuinely sought the eviction so that it would utilize the premises. In its notice of appeal, the appellant attacked the judgment on two broad grounds, firstly that the notice to terminate the lease was invalid and secondly that the respondent failed to establish good and sufficient grounds for the repossession of the premises. The respondent, however, raised two preliminary issues against the validity of the appeal.

The first was that the notice of appeal was invalid for want of compliance with r 29 (1) of the Supreme Court rules which was incorporated for appeals from the magistrates to the High Court by the Magistrates Court Amendment Act no. 9/1997. It sets out six mandatory requirements which must be stated in a notice of appeal. In the instant case the notice of appeal fell short of the requirements of r 29 (1) (a) in that it did not set out in its preamble the date on which the judgment appealed was granted nor the court from which such judgment emanated. All it did was state the name of the magistrate who delivered the judgment and the date of 6 August 2010 that the appellant became aware of the judgment. It will be recalled that the

judgment was granted on 5 August 2010 by the magistrate sitting at Harare Magistrates court. Mr *Fitches*, for the respondent submitted on the authority of *Matanhire* v *BP & Shell Marketing Services* (*Pvt*) *Ltd* 2004 (2) ZLR 147 (S) that the notice of appeal was a nullity. It is correct that the failure to adhere to the strict requirements of r 29 fatally affected the validity of the notice of appeal in that case. The rationale for requiring the date of judgment was spelt out by MALABA JA, as he then was, in the *Matanhire* case at 150A in these terms:

> "The purpose of requiring the date when the decision appealed against to be stated in a notice of appeal is to enable the respondent and the court to determine *ex facie* the notice of appeal whether the provisions of r 5 of the [Supreme Court (Miscellaneous Appeals and Offences)] Rules prescribing the time limit in which the appeal should be instituted and the notice of appeal filed delivered and filed, were complied with."

In the present matter, I decided to condone the failure to rigidly follow the said rule for two reasons. The first was that while on the record cover the trial magistrate endorsed that she granted the order of eviction on 5 August and the handwritten reasons for judgment and the typed judgment was dated 5 August, the typed order has the date stamp of 6 August. Order 31 r 1 (a) provides that a notice of appeal should be filed within 21 days of the date of judgment. In *casu* the notice of appeal was filed on 11 August. I did not believe it would have been in the interests of justice to strike off the appeal for the appellant to apply for extension of time to comply with the rule and condonation for non-compliance. As regards the failure to indicate the name of the court I believe that the presence of the trial magistrate's name is in substantial compliance. The second was that such a failure did not prejudice either party, the court or the due process.

The second preliminary point raised by the respondent was that the appeal lapsed for failure to furnish security in terms of Order 32 r 2 of the Magistrates Court Civil Rules. Mr *Fitches* abandoned this submission when the letter filed with the clerk of court on 11 August 2010, which was always part of the appeal record was brought to his attention. In that letter the appellant undertook to pay the costs of the preparation of the appeal record. The rule in question reads:

(2) An appeal shall be noted by—
- (a) the delivery of notice; and
- (b) unless the court of appeal otherwise directs, giving security for—
  - (i) the respondent's costs of appeal to the amount of one hundred dollars;
  - (ii) the costs of the preparation of a copy of the record to the amount estimated by the clerk of the court:

> Provided that a clerk of the court may, in his discretion, accept a written undertaking from the appellant to pay for the costs of the preparation of the record.

It seems to me that the in the absence of a dispensation from the appeal court against the provision of security of the respondent's costs of appeal and the cost of the record it is mandatory that the appellant makes provision for the security of costs under both heads. The wording and positioning of the proviso indicates that it applies to the costs of the preparation of the record only and not to the provision of the security of the respondent's costs of appeal. The undertaking given by the appellant was for the costs of the security of the preparation of the appeal record. The appellant did not provide for the security of the respondent's costs of appeal. Thus had Mr *Fitches* not abandoned his second preliminary issue, I would have dismissed the appeal for failing to comply with Order 31 r 2 (b) (i) of the Magistrates Court Civil Rules.

I proceed to deal with the merits of the appeal. The first ground raised by the appellant was that the notice to terminate the lease was invalid for two reasons. Firstly, it was addressed to an individual and not to the appellant, a corporate body. Secondly, it was based on the wrong subsidiary legislation. The appellant did not provide authority for the first aspect but relied on *Johannesburg City Council* v *Feinstein & Anor* 1953 (3) SA 576 (T) for the second. In regards to the first aspect, it is clear that the notice to vacate was addressed to "Mr Hargovan, House of Sandals, Newlands Shopping Centre" and was entitled "Vacation from property sublet to you: House of Sandals." The response of Hargovan of 10 May in which he refused to vacate the property after the expiration of three months was on the appellant's letter head bearing the name " Wellcroft Investments t/a House of Sandals" as was the response he subsequently made to another letter on the proposed eviction on 17 June. In his oral submissions Mr *Ahmed*, for the appellant, conceded that Hargovan was not only a director but the human face of the appellant corporation. In my view, by virtue of his position as an executive officer of the appellant and by his conduct, Hargovan demonstrated that the notice was properly served on the appellant through him.

The case of *Johannesburg City Council* v *Feinstein & Anor* involved an application by the city council for the eviction of the respondent from its premises under s 22 (1) of the Rent Act of 1950 for use of the premises in the public interest. It gave the respondents 12 months notice to vacate but after 12 months the respondents declined to do so. The respondents'

occupation was protected under s 22 as long as they continued to pay rent and perform the other conditions of their tenancy unless the landlord ("applicant") established additional grounds set out in sub-paras. (a) to (e) of s 22 (1). The applicant desired the premises used as a restaurant by the respondents for itself to cater for its expanding electrical showroom business. It relied on sub-paras (c) and (e). The latter allowed repossession if the premises were reasonably required by the local authority in connection with any scheme for town improvement or for any other public work which the local authority was by law entitled to undertake and gave twelve months notice. It was held that the purpose of expanding its show room business was not in connection with any scheme of town improvement or any other public work which involved the physical scheme of constructing buildings, roads or other amenities to improve a town and not an electricity display warehouse or anything ancillary thereto. Subparagraph (c) permitted repossession if the lessor reasonably required the premises for personal use and gave six months notice as long as the notice was not given prior to 1 July 1951. The municipality had given 12 months notice on 28 September 1950 which was to expire on 27 September 1951. The notice was held to have been a bad notice as it fell foul of the provisions of sub-para (e).

The notice given in the *Johannesburg City Council* was invalidated because it fell foul of the statutory provisions of the Rent Act No. 43 of 1950. In the present case the respondent premised its notice in terms of s 30 (2) (c) of the Rent Regulations SI 32/2007. The premises were commercial premise and not a dwelling. The requisite notice to vacate was instead governed by s 23 of the Commercial Premises (Rent) Regulations SI 676/1983. Mr *Ahmed* submitted that the citation in the notice of the wrong statute invalidated the notice. In the *Johannesburg City Council* case, BLACKWELL J at 579B-C stated that:

> "I have been referred to authorities both in the English Courts and in our own, the effect of which is as follows: If a notice can be given by a lessor to a lessee or by a lessee to a lessor under the terms of a lease, or, as in this particular case, under the terms of a statute, that notice is unilateral in character-it has a binding effect. Irrespective of the will of the recipient, it creates legal rights and imposes legal obligations. That being so, a notice of this sought must be in the terms of the power to give it which is created by the instrument or by the Act. The law to this effect was laid down in England in the case of *Hankey* v *Clavering* 1942 (2) A.E.R. 311 and followed in our courts in the case of *Boerne* v *Harris* 1949 (1) SA 793 (AD). In both of those cases notices were sent between landlord and tenant which on the face of them were wrong, which on the face of them did not conform to the instrument under the force of

> which they were given, and therefore were held to be not appropriate, and the recipient of them might treat them as worthless, as casting upon him no legal obligation."

I have read the case of *Boerne* v *Harris, supra*. In *Bourne's* case the lessee purported to exercise the option to renew the lease for another five years. The lease which would expire on 15 April 1947 provided in clause 10 for the option to be exercised at least six months before that date. Bourne's attorneys wrote a letter to the lessor, Harris, which stated that:

> "We refer to the lease in respect of the Savoy Hotel, Somerset West between our client Mr A.L.M. Boerne and yourself, and advise that our client intends to renew the lease for a further period of five years from 15 October, 1946, in terms thereof".

BLACKWELL J correctly captured the majority decision of GREENBERG JA to which WATERMEYER CJ, VAN DEN HEEVER JA AND HOEXTER AJA concurred. The essence of the majority decision was that a notice from a landlord to a tenant to vacate leased premises that did not conform to the instrument under which it was issued was invalid. I was, however, persuaded by the force of reasoning in the dissenting judgment of SCHREINER JA who at p 814 held that the notice had to be construed objectively, that is, "as it would be understood by a lessor having the lease before him or her". He summarised his reasoning thus:

> "The 'main apparent purpose' of the renewal letter was obviously and beyond doubt to exercise the lessee's right to renew the lease; the specific mention of the date was in the nature of a false description of the right of renewal which he was manifestly seeking to exercise. No reasonable reader in the position of the lessor could, in my view, imagine that the lessee was making a mistake as to his legal rights, for under clause 10 it is perfectly clear that the renewal period can only run from the middle of April. The reasonable lessor could not fail to appreciate that somehow or other the date by which notice of renewal had had to be given had been substituted for the date from which the renewal had to run, and that since there was no need for the letter to have mentioned any date at all the reference to an obviously wrong date could not invalidate the notice. Such a lessor would not only suspect, he would know, that the mistake did not consist in an intention to renew from the 15th October 1946, the lessee having misunderstood his legal rights, but that it consisted of an erroneous setting out of an intention to renew as from the 15th April 1946."

In the present matter I hold the view that it was not necessary for the lessor to state in the notice the statute under which he was giving the lessee notice to vacate. The main apparent purpose of the notice was to advise the lessee of the termination of the lease at the expiration of three months. An objective assessment of the lessee's behaviour reveals that it perfectly understood that it was being requested to leave the premises at the end of the notice period.

It is for these reasons that I hold that the notice to vacate that was given by the lessor was valid. The trial magistrate's decision upholding its efficacy cannot be faulted.

The second broad ground of appeal was that the respondent failed to establish good and sufficient grounds to justify the eviction of the appellant. The provisions of s 22 of the Commercial Premises (Rent) Regulations have been set out and interpreted in many cases in this country both in the High and Supreme Courts.

In *Moffat Outfitters* (*Pvt*) *Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154C-D GUBBAY JA, as he then was, found it undesirable to define the phrase "good and sufficient grounds." He held that the burden lay on the lessor to establish those grounds. The duty of the trial court was to exercise a value judgment without caprice or bias or the application of wrong principle by considering the particular circumstances of the case as presented by the lessor and lessee and weighing them against the purpose behind the promulgation of regulations. He emphasised that the purpose served by the regulations was to "prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their tenant's rents unjustifiably."

In the present case, the respondent, as the lessor, sought to repossess the leased premises for its own use. It found itself treading in the footsteps of other landlords who had to come to court to reclaim possession from recalcitrant tenants in such cases as *Checkers Motors (Pvt*) *Ltd* v *Karoi Farmtech* (*Pvt*) *Ltd* 1986 (2) ZLR 246 (S); *Boka Enterprises* (*Pvt*) *Ltd* v *Joowalay & Anor,* 1988 (1) ZLR 107 (S) and *Bestafoam* (*Pvt*) *Ltd* v *Tynedale* (*Pvt*) *Ltd* SC 54/88.

In *Boka Enterprises* (*Pvt*) *Ltd* v *Joowalay, supra,* at 115H-116A, it was held that s 22 (2) is worded in such a way that the court is enjoined to predominantly look at the needs and circumstances advanced by the lessor to the exclusion of the needs and circumstances of the lessee. In *Film & Video Trust* v *Mahovo Enterprises* (*Pvt*) *Ltd* 1993 (2) ZLR 191 (HC) at 209E-F ROBINSON J cited with approval the remarks of PITMAN JP in *Newman* v *Biggs* 1945 EDL 51 at 54 and 55 which were approved in *Boka's* case, *supra,* that:

> "So far as proof of *bona fides* was requisite, it is difficult to see what more can ordinarily be required of a claimant, than that he should assert his good faith, and bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness of his claim."

Both Mr *Ahmed* and Mr *Fitches* agreed that all that the respondent was required to do in the court *a quo* was to bring "some small measure of evidence to demonstrate the genuiness of (its) assertion". Mr *Ahmed* reluctantly conceded that that small measure of evidence had to be establish at the date of hearing and not, as he had initially submitted, in the notice to vacate. See *Film & Video Trust* case, *supra* at 205A-B and 210B.

In his oral submissions Mr *Ahmed* conceded that para 4 of the respondent's answering affidavit to the effect that it had leased the premises which it initially fully utilized to the appellant when its business took a battering from hyperinflation but required them for its booming business sufficed to establish the small measure of evidence required to establish good and sufficient grounds for the termination of the lease. He, however, argued that the respondent did not genuinely desire the use the premises but wanted to evict the appellant firstly because it had declined to pay a higher rental and secondly in order to lease the premises to a tenant who was willing to pay a higher rental. The two grounds advanced by Mr *Ahmed* are a restatement of the grounds set out in s 22 (2) of the regulations which would deny a lessor the right to evict the lessee. The defendant did not substantiate these averments. It did not produce any evidence to show on a balance of probabilities that the respondent requested it to pay a higher rental and it declined to do so. In fact the documentation it used to establish its refusal was the letter it wrote to the respondent on 27 October 2008 in which it agreed to pay US$550-00 per month. It was paying that amount in March 2010 when it was given three months notice to vacate and it continued to pay that amount after the cancellation of the lease. Other than its mere say so there was no evidence led to show that the respondent wished to lease the premises to a third party.

The finding by the trial magistrate that the respondent genuinely desired to utilize the premises for its expanding business operations cannot be faulted.

Accordingly, the appeal is dismissed with costs.

HLATSHWAYO J: agrees.

Ahmed & Ziyambi, appellant's legal practitioners
Jarvis Palframan, respondent's legal practitioners