BELLEVUE BUTCHERY (PVT) LTD

and

SHINGIRAI ZINYEMBA

and

HONDA CENTRE (PVT) LTD

HIGH COURT OF ZIMBABWE

CHITAKUNYE & NDEWERE JJ

HARARE, 26 January 2017 & 7 February 2018

**Civil Appeal**

*G.R J Sithole*, for the 1st & 2nd appellants

*I Ahmed*, for the respondent

 NDEWERE J: The background of the case is that on 7 October 2014 the respondent leased shop premises at Number 121 Harare Street to the first appellant for two years. The rental was renewable annually. The second appellant signed as surety. It was common cause that at the time the summons was issued, the rent was US$2550.00 per month plus operating expenses. It was common cause that the first appellant did not pay rentals in full from November, 2015 to February 2016. As a result, it owed respondent US$5100.06 in rental arrears. Consequently, on 7 March, 2016, the respondent issued summons against both appellants claiming

1. Payment of US$5100.06 together with interest at the prescribed rate from date of summons to date of final payment.
2. Payment of holding over damages of $85.00 per day from 1 March, 2016, to date of ejectment of the first defendant and all those claiming occupation through first defendant.
3. Ejectment of first defendant and all those claiming occupation through first defendant from shop No. 3 at 121 Harare Street, Harare.
4. Cost of suit on an attorney and client scale.

It was common cause that after summons were issued, $3100.00 was paid by the

appellants leaving a balance of $2000.06 as rent arrears. To this, the respondents added holding over damages of $2550.00. The respondents thereafter wrote a letter to the appellants demanding payment but no payment was received so that matter continued.

 The appellants, as defendants in the court *a quo*, entered appearance to defend on 16 March 2016. After noting that the appellants had no *bona fide* defence, the respondent applied for summary judgment. The matter was argued in court and on 31 May 2016, the magistrate granted the application for summary judgment and ordered defendants to pay US$2000.06 together with interest at the prescribed rate from the date of the summons to date of final payment. The defendants were also ordered to pay holding over damages of $85.00 per day from 1 March 2016 to date of ejectment. The first defendant was ordered to vacate Shop No 3 Stand 121 Harare Street, Harare and the defendants were ordered to pay costs of suit on the attorney-client scale.

 The appellants noted an appeal on 27 June, 2016. The following were the grounds of appeal

“1. That the Learned Magistrate erred in granting the application for Summary Judgment when it was quite patent that the Appellants had settled their arrears and respondent had premised its application on the ground that Respondent were arrears on their rentals and consequently had no defence.

 2. The Learned Magistrate erred when he allowed the application for Summary

Judgment when facts before him showed that the Appellants had raised a *bona fide* defence on the merits. In particular, the Appellants challenged the jurisdiction of the Honourable Court on the basis that the lease agreement contained an arbitration clause. Further, the appellants also averred that the sum being claimed by respondent was being disputed and required the dispute required ventilation at a trial.

1. The Learned Magistrate erred in accepting tender by Respondent of an answering affidavit by respondent when no leave of the Court had been sought by the Respondent in accordance with the provisions of Order 15 of the Magistrate Court (Civil) Rules, 1980. Further, the Learned Magistrate did not pay attention to the fact that the filing of an Answering Affidavit was an admission by Respondent that it had failed to establish a basis for Summary Judgment. The Learned Magistrate was in all probability swayed in his decision by the averment made in the Answering Affidavit.
2. The Learned Magistrates also erred in that he did not follow the procedures laid down in Order 15 r 2 (2) of the Magistrates Court (Civil) Rules, 1980. The Learned Magistrate did not conduct an inquiry as provided for under the rules of the court *a quo.*
3. Further, the Learned Magistrate erred in awarding the Respondents costs on a higher scale when evidence before him showed that the Appellant had not acted unreasonably in opposing Respondent’s claim.”

On 22 September, 2016, the appellants filed a Notice of Amendment of their grounds of appeal, saying when they compiled the initial grounds of appeal, they had not been served with the magistrate’s reasons for his decision.

The following were the proposed amendments.

By the deletion of ground 1 and its substitution with the following;

“1. That the learned magistrate erred in granting the application for summary judgment when it was patently clear that respondent had failed to establish a cause of action warranting the award of holding over damages in his favour. The order for holding over damages and the ejectment of first appellant from the premises concerned could not be sustained in the face of *bona fide* defences raised by the first appellant.”

1.2 By the deletion of grounds 3 and 4 in their entirety.

1.3 By the deletion of the prayer and the substitution thereof with the following:

 “Wherefore appellants pray for the following relief:

1. That the instant appeal succeeds with costs;
2. That the order of the court *a quo* is set aside and substituted with the following;

“The application is dismissed with costs on an attorney client scale.”

 The amendments were not challenged and they were allowed. Grounds 2 and 5 remained as they were in the notice of appeal. Amended ground 1 was challenging the Summary Judgment and arguing that Respondent had failed to establish a cause of action warranting the award of holding over damages and the ejectment of first Appellant from the premises.

 Ground 2 said the magistrate erred in granting the order when Appellants had challenged jurisdiction of the court and when appellants had raised a *bona fide* defence and disputed the amount which was being claimed.

 Ground 5 said the magistrate erred in awarding costs on a higher scale.

 Clause 2 of the Lease Agreement laid the conditions about payment of rentals.

 Rent was to be paid “monthly in advance and without deduction by the 1st day of each month.”… The lessee agrees it is a precondition that the rent is always paid two (2) months in advance for the duration of the lease.”

 The moment the appellants failed to pay rentals by the 1st and in advance as stipulated by clause 2 of the Lease Agreement, they were in breach of the Lease Agreement. The appellants never denied the breach. The fact that in the notice of appeal the appellants acknowledge the existence of arrears and say they had settled them is confirmation of the breach of clause 2 of the lease agreement. There was no room for arrears in clause 2 as all rentals were to be paid in advance, by the 1st of the month. Clause 18 of the Lease Agreement is actually entitled “Breach.” It is clear the first appellant breached clause 18.1,

“Clause 18.1: fail to pay the rental or any other monies due by the lessee in terms of this lease on due date, or …”

 It is common cause the lessee failed to pay rent on due date and this confirms that the lessee breached the lease agreement.

 Clause 18.5 provided the lessor with a choice of what to do following a breach. It stated as follows:

“The lessee hereby consents to the jurisdiction of any court in Harare, including but not limited to the magistrates court, in respect of any legal action that may arise as a result of any breach of any of the terms and conditions of this lease should the lessor choose to use such court…”

The lessor chose the magistrate court in terms of the above clause, so clearly the court *a*

*quo* had jurisdiction.

 The above analysis shows that in terms of clause 2, and clause 18 of the Lease Agreement, ground 2 has no merit whatsoever.

Clause 19 provided as follows:

“Should the lessor cancel this lease and the lessee dispute the lessor’s right to do so and remain in occupation of the leased premises pending the determination of such dispute, the lessee shall continue to pay all amounts due to the lessor in terms of this lease on due dates thereof, and the lessor shall be entitled to accept and recover such payment without prejudice to the lessor’s claim for cancellation .”

Clause 19 clearly provided the cause of action for holding over damages and

ejectment being raised in the amended ground number one. The above clause clearly shows that the lessor could receive holding over damages but still cancel the lease agreement. Once the lease agreement has been concluded, the lessee could be ejected. Therefore the amended ground 1 has no merit at all.

 Clause 26 provided as follows:

“In the event of legal or other costs being incurred due to any breach of the terms of this lease by the lessee, such costs shall be payable by the lessee to the lessor and shall include all attorney and client and all party and party costs and any collection charges incurred by the lessor.”

In this instance, the lessor asked for attorney and client costs and that is permissible in

terms of clause 26 above. This means ground of appeal number 5 has no merit.

 As indicated above there is no merit to the amended ground number 1, no merit to ground number 2 and no merit to ground number 5. Consequently, the appeal cannot be allowed.

On the issue of costs, the respondent, in line with clause 26 of the lease agreement, asked for costs on an attorney and client scale. In my view, costs on a higher scale are justified because all the grounds raised by the appellant were covered in very clear and simple terms in the lease agreement. If the appellant and their legal practitioners had read the lease agreement, they would not have appealed as they would have realised that all the issues they were raising were covered by the lease agreement. So in a way, this appeal was an abuse of the court process. Costs on the higher scale are therefore justified.

It is therefore ordered that the appeal be and is hereby dismissed with costs on the attorney and client scale.

Chitakunye J: I concur

*Nyawo Ruzive Legal Practice,* 1st & 2ndappellants’ legal practitioners

*Ahmed & Ziyambi,* respondent’s legal practitioners