

RAYMOND TREVOR NAIDOO
And
RHEYANA ESME MOODLEY
And
GERALD NEVILLE NAIDOO
And
DEANNA MOONEEN MAKAN
And
KATHLEEN FAITH WERRETT
Versus
LAST TAGUMA SAURAMBA

HIGH COURT OF ZIMBABWE
MUZOFA & BACHI MZAWAZI JJ
CHINHOYI

Civil Appeal

Mr. B. T. Mudhara, for the applicants
Mr. M. Mutsvairo, for the respondents

BACHI MZAWAZI J: This is an appeal against the decision of the Magistrate Court Chinhoyi, of the 1st of June 2022, in case MC203/21. The appellants' main grounds of appeal are firstly, an attack on the trial court's decision in which it denied a final order for eviction on the same ground it had dismissed in its interim ruling that the matter was pending before the High court in case HC13/21. Secondly, that the court's failure to grant the relief of eviction which they had sought and cancellation of lease, after it had made a finding that the respondent has breached the terms of lease agreement between the parties was a misdirection. The respondent countered by noting a cross appeal with numerous grounds also attacking the findings of the *court aquo* both in fact and law listed below.

1. The court a quo erred at law by dismissing the point in limine of *lis pendens* and stay of action raised by the respondents at the commencement of the trial, only to make a finding at the conclusion of the trial that the court could not order eviction because of a pending High Court matter under case no HC 13/2021.
2. The court a quo erred in law by completely failing to address the legal issue raised by the respondent on the inadequacy of Rachel Dube's legal authority to represent the plaintiffs in light of the failure to produce Special Powers of Attorney for two of the plaintiffs.

3. The court a quo erred in law by completely failing to address whether the appellants and respondent entered into an agreement of sale whose effect was to override the landlord-tenant relationship.
4. The court a quo erred in law and in fact when it made a finding that the respondent was in breach of the lease agreement in light of the fact that the lease agreement had expired or alternatively on the basis that the right to institute legal proceedings had not accrued to the appellants by virtue of failing to give seven (7) days notice in terms of clause 10, sub clause 10.1 of the lease agreement.
5. The court a quo erred and misdirected itself when it made a finding that respondent was liable to arrear rentals in the sum of ZWL 17 050.00 when appellants claim for arrear rentals was for ZWL 371 800.00 and appellants did not amend their pleadings as required by the law.
6. The court a quo erred in law when it awarded costs against respondent on a higher scale without any legal or factual jurisdiction for such an award.

In addition, at the hearing, the respondent raised a point of law that, the appeal was fatally defective in that the appellant did not comply with Order 31, Rule 4 (a) of the Magistrates Court Rules 2019 which dictates that, a notice of appeal or cross-appeal shall state, whether the whole or part only of the judgment or order is appealed against and, if part only, what part.

To begin with, the common cause facts are that, the appellants as the registered owners of a residential property known as stand number 118 North Drive Chinhoyi, entered into an annual lease agreement with the respondent through a duly appointed agent in 2012. In terms of the rent clause, rentals were reviewable occasionally to reflect the prevailing economic conditions.

It is not in dispute that at one stage rentals were reviewed from RTGS350.00 to RTGS450.00 by mutual consensus. Then, the local rate was at one is to one with the United States dollar. Sometime in 2019, the USD equivalent that the respondent was paying as rent translated to a paltry USD3.00. This prompted the appellant to call for the upward reviewal of rentals in the sum of RTGS1000.00 to cushion the effects of the prevailing economic conditions.

After failed negotiations and agreement on the new figure, the appellant continued to bill their rentals based on the new amount, whilst the respondent disbursed the old agreed to rentals. As a result, from the appellant's perspective there was an accrual of rent arrears leading to written notices of demand for payment accrued rent arrears, breach and a cancellation of the lease. The non-positive reaction of the respondent led to the lawsuit before the Magistrate Court.

It also is a common fact that during the tenure of the respondent's tenancy, an agreement of sale was prepared after a discussion to sell the property to respondent. There is mention, however, that the agreed purchase price in the sum of US\$55 000.00, was never paid nor did the appellants sign the lease agreement. This was further buttressed by the respondent's own admissions that he considered himself a tenant who fulfilled his obligation by the continued payment of rentals even after the drafting of the agreement of sale.

Appellant's claim before the Magistrates court was for the cancellation or confirmation of cancellation of the lease agreement, alongside that of payment of arrear rentals and eviction. The appellants' argument both in the trial court and before this appeal court is that the payment of rentals is the cornerstone of a lease agreement. Failure to pay rentals, from their perspective, amounts to breach of the agreement and entitles the offended party to cancel the same and an order for the ejection of the defaulting party.

The Respondent in the trial court did not deny, being a tenant and that up to the time of that trial, he was paying rentals initially agreed to. He raised other peripheral issues that need no repetition, but the most pertinent ones are those of the existence of an agreement of sale as reason why he could not be evicted, the tacit relocation of the lease agreement and the subsequent Statutory Tenancy requirements. The respondent also stated that the disputed rent increment was a unilateral act which was not in tandem with their previously agreed set pattern of negotiations and mutual consensus on a figure.

Since the parties by mutual consensus had proposed an omnibus approach and a composite judgment if need be, the main issues to interrogate arising from the compute of the main and cross appeal is whether or not the court erred both in fact and in law in arriving at its impugned decision? and whether or not the appellant failed to comply with Order 31(4)(a) of the Magistrates (Civil) Rules 2018?

In addressing the *point in limine*, as correctly pointed out by the respondent, indeed the appellant did not specify in clear terms that they are appealing against a part of or the whole decision of the trial court.

The general rule as set out in the case of ***Chidyausiku v Nyakabambo 1987(2) ZLR 119***, an appeal or a cross appeal must explicitly state whether the judgment appealed against is in part or in whole. This is the whole import of order 31 (4)(a).

An exception to the rule in the above case was alluded to by Garwe JA (as he then was) in *Altem Enterprises (PVT)LTD T/A Ruwa Furnishers vs John Sisk & Son (PVT)LTD SC04/13*, wherein he stated that,

“I am prepared to accept that as a general rule, the above remarks correctly reflect the law of this country. To the extent, however, that the judgment suggests that this is a hard and fast rule I am inclined to differ. There may well be cases, such as the present, where the slavish adherence to the above principle would not only cause prejudice but would result in a certain degree of absurdity. I revert to the facts of this case to justify why I am of this opinion.”

Guided by the *Altem* case supra we have been persuaded by the appellants argument that the omission in itself is not fatal nor prejudicial as their prayer rectifies the purported oversight and bails them out. We agree that though they did not differentiate as dictated by Order 31 rule (4) (a), in their opening statement to their grounds of appeal which part of the decision, their prayer exonerates them.

Apparently, the prayer reads, “the portion of the court’s a quo’s judgment stating that the issue of eviction is pending under case No: HC 13/2021 be set aside and substituted by.....’,

It is our considered view that, the relief sought clearly indicates that the appeal is partial and directed to a portion of the impugned judgment. Accordingly, the *point in limine* fails.

Coming to the grounds of appeal, what both parties have in common in their first grounds of appeal with a slight variation, is that the court was wrong to make an interim ruling that the matter was not *lis pendens* yet in the same breathe denies the relief of eviction on the same principle of *lis pendens*.

On analysis, we are agree with both parties, in respect to the first ground in the main appeal and the cross appeal. It is evident that the court denied the relief of eviction, on the ground

that the matter was pending before the High court in case number, HC13/21, when it had initially dismissed the respondent's special plea on *lis pendenis*?

The record is self –explanatory, needs no elaboration and illuminates the contrasting and conflicting positions taken by the lower court in the same matter with regards to the *lis pendenis* decisions. This was an apparent misdirection as the court in a way reviewed its own interlocutory decision which is *ultra vires* the law as it was *functus officio*. See, *Madyauta v Madziva (Civ) A 96 of 2014*[2015] HHC22/2015, *Bere v JSC and Others SC1/22*, *ZESA Holdings (Private) Limited v Clovegate Elevator Company(Private) Limited & Anor*, SC69/23. In that respect, both grounds of appeal succeed.

As regards ground two of the main appeal on the findings of the court on breach and its failure to grant the attendant relief of eviction, the port of first call is the actual ruling of the trial court. In its findings the trial Magistrate, on page 23 of the record of proceedings, stated as follows;

“...although the court finds that the plaintiff is in breach of contract, it will not make an order for the cancellation of lease or eviction as there is a matter pending before the High Court on whether there was a sale agreement or not between the parties under case HC13/2021.

We agree with the appellants' argument that the court ought to have granted eviction after making a finding on breach. We do not fault the court's findings on breach. It is evident that initially there was a written annual lease agreement which was never renewed in writing. In that regard the continued relationship of the parties in the absence of a written lease, on the same terms of their initiating agreement spoke to a tacit relocation of the lease agreement. That meant the terms of the 2012 lease agreement were operational and each party was bound by them. See, *Altem Enterprises (PVT)LTD T/A Ruwa Furnishers vs John Sisk & Son (PVT)LTD SC04/13*,

Hence, in terms of Clause. 3.1 of the lease agreement, the appellant was entitled to increase rent to accommodate the economic climate of the day. Had it been that there was specific mention that rent has to be negotiated or agreed upon then it would have been justified for the respondents to condemn the alleged unilateral rent increment by the appellants. To the contrary, there is nowhere in the lease that stated that there has to be a round table negotiation or that impugned the unilateral decision to increase rentals. Irrebutable evidence was placed

before the lower court on communication over the proposed upward review of rentals, notice of cancellation amongst other supporting documentary evidence.

W.E. Cooper, 2nd Ed., p 59. In his book, *Landlord & Tenant*, observed 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. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress”.

In casu it is absurd in this day and time that an honest and reasonable person would want to stay on another person’s property for almost nothing. It flies in the face of logic and common sense that a person wants to stay in an upmarket house for an amount less than US\$10.00. The law recognises that even in the absence of an agreed rent, the tenant has an obligation to pay not only a fair rent but that which resonates with the market rates of the same property in the same residential area. Even if the Statutory Tenant argument raised based on the issue of the expiration of lease through the effluxion of time is to stand, the bottom line is either party was supposed to approach the Rent Board for appropriate rental computation.

In this case, it is the defaulting party, the respondent who disagreed with the increment who was supposed to explore this avenue. His failure to do so and challenge the increased amount in that forum meant he was bound by the new rentals and did accrue arrears based on that increase.

Parkside Holdings Private Limited v Londoner Sports Bar HH-66-00, as cited in *Altem Enterprises*, above, is authority that the payment of the last agreed rental is only fair in a less volatile economic environment but in an unstable one adequate rent is the guiding criteria. Of equal guidance is the case of *Altem Enterprises (PVT)LTD T/A Ruwa Furnishers vs John Sisk & Son (PVT)LTD* SC04/13, discusses in detail the concepts of tacit relocation, Statutory tenancy, and the role of the Rent Board.

Having outlined the position of the law, we are of the view that, the appellant’s second ground of appeal succeeds. It is our observation that, in a nutshell, whilst the court was correct in its initial decision that although the parties before it were the same as those in the said High Court matter, it accurately pointed the distinction in the causes of action which is

breach of a lease agreement and attendant relief as opposed to that of the existence of an agreement of sale or not before the High court, respectively. In that regard the trial court was justified in its decision to grant arrear rentals based on the increased amount. It was also correct in making a finding that the failure to pay adequate rent *per se* and rent in general goes to the root of the contract of lease and tantamount to breach. So, in our considered view, the court's finding on breach was rational.

However, it then erred in its evasion to grant the anecdotes of its findings on breach on the basis that eviction was an ingredient in the agreement of sale dispute before an upper court. It was imperative that it ordered cancellation of the lease as the parties were still bound by its provisions due to the tacit relocation although in essence there was no longer any lease to cancel. The court was also duty bound to order eviction which is a natural consequence once a finding of breach for non- payment of rentals. In rendition, it is trite that non-payment of rent is an essential ingredient for a relief of ejection from leased property as well captured in decided cases. Failure to pay rent, as extrapolated in the case of *NRZ Contributory Pension Fund-v-Verisy Ent (Pvt) Ltd & Ors HB 13/2017*, goes to the root of the lease agreement and vitiates it bringing the entire edifice crumbling down. See *Supline Investments (Pvt) Ltd-v-Forestry Commission 2007 (2) ZLR 280*.

This in turn puts to rest grounds 4 and 5 of the respondent's cross appeal which are accordingly dismissed.

Ground two of the cross appeal challenges the authority of and or the scope of the power of attorney the appellant's agent held. This is the very person whom they entered into a lease agreement with. Therefore, it does not make sense to question her status and mandate only at this stage to suite their whims. In that regard nothing turns on this point.

The sticking issue taken by the respondents in their ground three is their condemnation of the court's failure to make a definitive decision on the rights of the parties based on the sale agreement. As already alluded to this does not make sense, since the court had already stated its position in dreading to tread or venture into a subject matter that was not before it but a Superior Court.

Indeed, the court had no mandate to deal with an issue of the agreement of sale which was not before it but another court of competent jurisdiction, but it was supposed to deal with the ancillary relief claimed based on its findings on breach. As a court of Appeal we find that this

ground has no merit. This is so because, all factors and evidence before the lower court pointed to the non-existence of a valid agreement. It is on record that the respondent admitted to being a tenant to date. This is further buttressed by his continued payment of rent. Had he been a person with any rights emanating from a genuine agreement of sale he should have exercised those by not obliging to the payment of rentals. Further, there is irrebuttable evidence on record that though the purchase price had been set and agreed to, the respondent never paid even a single cent towards the purchase of the property. Evidently, this was and remains an inchoate contract of sale which gives, without pre-empting the decision in case HC13/21 the respondents no rights at all to the said property. See, *Mudhanda v Jennifer Nan Booker* HH637/2015 and *Mackeurtan, Sale of Goods in South Africa*.

Lastly, nothing turns on the issue of amendments. It is settled law that these can be allowed at any stage of the court proceedings for as long as they are in the interest of justice and not prejudicial to any party. The justification is found in Rule 41 (10) of the 2021 High Court rules which states that the court or a judge may notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleadings or document, in such a manner and on such terms as be just, and all such amendment shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. See *Agricultural Bank Ltd-v-Nickstate Investments (Pvt) Ltd + Ors* HH 231/10, *UDC Ltd-v-Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210. This was also amply captured in the case of *Lourence-v-Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 151 SC.

Resultantly, the main appeal succeeds and all the cross of appeal fails in its entirety.

Accordingly, it is ordered that.

1. The defendant and all who occupy through him be and are hereby evicted from Stand No. 118, North Drive Chinhoyi.
2. They are ordered to vacate Stand No. 118, North Drive Chinhoyi within the next 14 days failure upon which the Sheriff is ordered to evict them.
3. The respondents to pay cost of suit at an ordinary scale.

MUZOF A J Agrees

Mundia & Mudhara, appellants legal practitioners

Mushonga, Mutsvairo & Associates, respondent's legal practitioners