JOHN SEPE
versus
JONATHAN JINGA

HIGH COURT OF ZIMBABWE
MAKARAU JP and HLATSHWAYO J
HARARE 8 and 21 May 2008.

CIVIL APPEAL

MAKARAU JP: The appellant is one determined litigator. His determination appears to be assisted by the fact that he has not engaged a legal practitioner to assist him and the prudence and reticence that is usually borne out of financial constraints not to pursue small claims to the limit appear absent. Also absent is merit in the appeal that he has noted to this court against a decision of the magistrates' court dismissing his claim.

The appellant and the respondent are neighbours in Dangamvura, Mutare. On 2 June 2006, there was a misunderstanding between the two neighbours that resulted in the respondent damaging the outer door to appellant's residence. The appellant reported the matter to the police and the respondent was arrested and charged with the common law offence of malicious injury to property. He was duly convicted and sentenced. Part of the sentence was an order that he pays to the appellant compensation in the sum of $20 000-00, being the value of the door that he had damaged, failing which he would be imprisoned for three months. The respondent opted to make the payment instead of serving a term of imprisonment.

In October 2006, the appellant issued summons against the respondent out of the magistrates court, claiming the sum of $40 000-00. In his particulars of claim, he admitted that the respondent had paid $20 000-00 for the door but argued that at the time of issuance of summons, the cost of the door had doubled to $40 000-00. He thus claimed the balance of $20 000-00 for the door and a further $20 000-00 that he alleged would be damages for a shirt that the respondent had tore.

The matter was set down for trial but not before a default judgment had been entered against the appellant and an application to set this default judgment aside had been filed and determined between the parties. Before trial, the appellant amended his summons twice. Firstly he increased the amount of his claim to $3 million as being the replacement value of the door. In the second amendment, he prayed for an order compelling the respondent to purchase

another door of the same quality and size as the one he had damaged. In the alternative, he prayed for the current replacement value of the door.

At the trial of the matter, the appellant testified that that during the criminal trial, the respondent was sentenced to pay a fine and to pay compensation for the damaged door. By the time he paid the compensation as ordered by the court, the value of the door had doubled. He further testified that the respondent had replaced the damaged door with a pine door that was fitted on the understanding that it would be replaced at some future date.

After testifying, the appellant called a witness. He was the carpenter who fitted the door. His testimony in a way contradicted that of the appellant in that he denied that when the substitute door was fitted, it was done so as a temporary measure.

The respondent also testified. His testimony was to repeat what is common cause between the parties.

The trial magistrate correctly in my view found that the appellant had been fully compensated for the door by the compensation that was part of the sentence imposed upon the respondent by the criminal court. He further found that the parties had agreed that the respondent replace the damaged door with a pine door and that this had since been done. He thus dismissed the appellant's claim. Against this decision the appellant noted an appeal to this court. In his notice of appeal, the appellant argues that the trial court erred in holding that he had been fully compensated when what he wanted was a hard wood door and not the pine door that was fitted onto his residence.

As has been stated above, the appellant's appeal is in my view completely without merit and is of nuisance value to the court. Firstly, the appellant has accepted two forms of compensation from the respondent in the form of the substitute pine door and the award made by the criminal court.

In my view, it was correctly found by the trial court that he accepted each without reservation and cannot thus file a claim for compensation in the courts. By his conduct, he gave out to the respondent that he was accepting both forms of the compensation and is thus stopped from rejecting either or both at this stage as being either inadequate or improper.

The Criminal Procedure and Evidence Act [Chapter 9.07] provides in section 362 as follows:

> **362 Compensation for loss of or damage to property**
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> (1) Subject to this Part, a court which has convicted a person of an offence may forthwith award compensation to any person whose right or interest in property of any description has been lost or diminished as a direct result of the offence.

It is in terms of this section that the criminal court proceeded to award $20 000-00 to the appellant after convicting the respondent of the offence of malicious injury to property.

In terms of section 372 of the Act, an award of compensation in circumstances similar to the facts of the appeal before us operates as a civil order as against the parties. It is as if the appellant's claim for compensation was determined and finalized in another civil court properly sitting and determining the suit between the parties. Section 372 of the Act provides as follows:

372 Enforcement of awards and orders

Where an award or order has been made in terms of this Part by a court with jurisdiction in civil cases, any interested party may lodge a copy of the award or order with the clerk or registrar of the court, who shall record it, and thereupon the award or order shall have the same effect as a civil judgment of the court given against the person who is named in the order as being liable to pay the compensation or restore the property, as the case may be.

If the amount of the award was inadequate, the appellant may have sought his redress at that stage and against that order. It was and remains incompetent for him to pursue a fresh claim for damages for the same damaged door. The Act specifically provides that where a compensation order has been made, the accused, (respondent) is not liable at the suit of the injured party, (appellant).

374 Person granted award or order debarred from further civil remedy

A convicted person against whom an award or order has been made in terms of this Part shall not be liable at the suit of the injured party in whose favour the award or order was made to any other civil proceedings other than proceedings for the enforcement of the award or order in respect of—

(*a*) the loss or diminution of the right or the personal injury in respect of which the award of compensation was made; or

(*b*) the restitution of the property in respect of which the order was made;

as the case may be.

In my view, the law is very clear and there is no competent suit that the trial magistrate could have adjudicated upon to satisfy the demands of the appellant.

On the basis of the foregoing, the appeal cannot succeed.

In the result, I make the following order:

The appeal is dismissed.

HLATSHWAYO J agrees……..