

ESTHER CHIYADZWA
versus
BETTY MAGUWU

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 24, 26 & 28 January 2011

Ms Chiwara, for the plaintiff
Mr Kufaruwenga, for the defendant

BERE J: On 11 March 2010 the plaintiff issued summons out of this court seeking the eviction of the defendant from stand 3667 Township of Gweru Township Lands.

Whilst accepting that the plaintiff is the registered owner of the property the defendant resisted the prayer sought by the plaintiff on the basis that she had been invited and offered accommodation by the plaintiff as part of her employment by the plaintiff. The defendant also filed a counter claim where she alleged that as a result of her employment by the plaintiff from 1999-2009 she had accumulated the sum of \$6 274-80 in unpaid wages and that her understanding was that until such time she was paid her wages in full the plaintiff was precluded at law to evict her as she held a right of lien over the plaintiff's property.

At the joint pre-trial conference held by the parties on 3 November 2010 the parties narrowed the issues for determination at trial two basically two simple considerations viz:

- (i) whether a not plaintiff is entitled to evict the defendant from the property in question, no. 8 Rosemera Iveme, Gweru.
- (ii) Whether or not the High Court has jurisdiction to determine whether or not the defendant is entitled to the payment of the alleged outstanding payment of \$6 274 in the form of unpaid wages.

On the initial day of the hearing of this matter I invited counsel to address me on the second issued which I deemed to be quite central and decisive in this matter. After hearing what I would term extremely conservative submissions from counsel I held that this court had jurisdiction to determine the issues raised in this matter.

I was motivated by the fact that denying this court jurisdiction would have meant denying both parties a forum to have their dispute resolved. I reasoned that even if I were to refer the parties to the Labour Court that court would not be in position to grant the plaintiff an

order for eviction if it felt the evidence justified or sustained the plaintiff's case. In coming to this conclusion I was largely guided by their Lordships' position in the case of *Chisipite School Trust (Pvt) Ltd v Clarke* 1999(2) ZLR 324 where the court had to deal with an almost similar situation.

Is the plaintiff entitled to evict the defendant?

The critical facts in this case were to a large extent common cause, the only notable area of disagreement being that whether or not the defendant's contract of employment was terminated in 1999 at the time the plaintiff left for South Africa after she had lost employment with her erstwhile employer, Blue Ribbon.

Herbert Kutirai who appeared in this court on behalf of the plaintiff duly authorised by a power of attorney signed on 16 February 2010 was most unhelpful in assisting the court in determining the status of the defendant at the time the plaintiff left this country. This was because he came into the picture much later and was not privileged to witness the parting between the defendant and the plaintiff.

The defendant insisted she was engaged by the plaintiff long before 1999 at an original wage of \$400 which amount was raised to \$800-00 at the time the plaintiff left the country. In this regard she sought to rely on exh 1 the inventory of the property she claimed was left in her custody on 19 April 1999. The document is certainly not conclusive *per se*. The exhibit does not say what the defendant attributes it to mean. It is significant that at the conclusion of the document all the rentals for the plaintiff's houses are specified and when it came to the cottage which was occupied by the defendant it indicates: "Cottage to be advised". There are several interpretations that can be derived from this. It could mean that at the time the plaintiff left the country she had not yet decided what amount of rentals she wanted from that cottage. This would be inconsistent with the defendant's position of her entitlement to occupy this property.

The defendant also sought to strengthen her alleged employment by the defendant by seeking to garner evidence which showed she has been carrying many errands for and on behalf of the plaintiff. Whilst accepting that that on its own tends to raise the bar for the defendant's claim to have been employed, one must not lose sight of the fact that the plaintiff and the defendant appeared to have a very strong relationship given their historical association.

In the court's view the evidence tendered did not on a balance of probabilities demonstrate that the defendant was employed by the plaintiff. The boxing approach type of presentation of evidence adopted by both counsel did not assist the court in this regard.

The defendant attempted to compute what she felt represented her alleged outstanding wages. The presentation was badly done. The closest she could do was to produce exh 8 in the form of photocopy. She had no clue as to where the original document was.

On her own, the defendant could not explain the number of months she was allegedly not paid by the plaintiff. In her poorly presented document wages which were supposed to be computed in Zimbabwe dollars were presented in United States dollars. This was at a time when it was a clear violation of both the Exchange control Act and regulations to deal in foreign currency. The person who compiled the figures was not called to testify or to shed light on what rate was used to arrive at the figure of claim. It was just hotchpotch and that is not the way evidence should be presented to court.

In the final analysis it was not possible for the court to ascertain how the amount of claim was computed. There was simply no real evidence tabled before me. What was placed before me was inconclusive and I order absolution from the instance in so far as the counter claim is concerned.

I must add caution and say that even if the defendant had been able to prove that she was owed money by the plaintiff it would not have been competent for her to resist eviction on the basis of some assumed common law right referred to as a lien. The best course of action open to her would have been to vacate the premises and fight her case in the special court that has been created by Parliament, i.e the Labour Court.

As was clearly stated in the Chisipite case (*supra*) our law does not recognise any claim of right or right of lien in such circumstances. Even if the case had been pending at the Labour Court this would not have prevented the plaintiff from seeking the defendant's eviction in this court because eviction is not sought in the Labour Court which by statute has no power to grant such a remedy. The plaintiff's case for eviction is watertight and the defendant has no valid defence.

I have considered the question of costs. Defendant has been doing numerous work for the plaintiff and it is clear the two have a long history, a fairly sound relationship. This minor dispute which they have had should not destroy what they have achieved over the years. For this reason I am restrained from punishing the defendant with an order for costs.

For the above reasons the plaintiff succeeds and I order as follows:

- (i) The defendant is ordered to vacate property called stand 3667 Gweru Township, Gweru on or before 28 February 2011 failing which the Sheriff or

his lawful deputy be and is hereby authorised to effect such an eviction including all those claiming occupation through her.

- (ii) There shall be no order as to costs but in the event that the defendant resists eviction she shall bear the costs of such an eviction.

Maja & Associates, plaintiff's legal practitioners

Dzimba Jaravaza & Associates, defendant's legal practitioners

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