

THE PREMIER SOCCER LEAGUE  
versus  
FREDDY MANGOMA  
and  
CUTHBERT MUTANDWA

HIGH COURT OF ZIMBABWE  
CHITAKUNYE AND NDEWERE JJ  
HARARE, 9 June 2016 and 18 May 2017

### **Civil Appeal**

*K Gama*, for the appellant  
*E Jera*, for the 1<sup>st</sup> respondent

CHITAKUNYE J: On 23 June 2014 the first respondent issued summons out of the magistrates' court against the appellant, as the first defendant, and the second respondent, as the second defendant, jointly and severally, one paying the other to be absolved. The first respondent sought an order against the appellant and the second respondent in the following terms:-

1. Cancellation of the lease agreement entered into between the parties as signed in January 2013.
2. Eviction of the first and the second defendants and all those claiming occupation through them from the premises at No. 13 12<sup>th</sup> Avenue, Haig Park Mabelreign, Harare.
3. Payment of the sum of US\$ 3 000-00 being arrear rentals for the months of March to June 2014.
4. Holding over damages at US\$ 750-00 per month from 1 July 2014 to date of vacation.
5. Payment of US\$ 446-07 being the amount outstanding in respect of rates.
6. Interest on all the amounts due at the prescribed rate from the date of issue of summons to date of full payment.
7. Costs of suit on a legal practitioner and client scale.

Upon being served with the summons the appellant entered appearance to defend. The second respondent did not defend the action. As a consequence on 17 July 2014, a default judgment was entered against the second respondent. After obtaining the default judgement the first respondent proceeded with his claim against the appellant.

A pre-trial conference was held in terms of the rules and the issues for trial were determined. The issues for trial were identified as follows:

1. Whether or not the plaintiff can proceed with the action against the first defendant in view of the fact that it obtained an order against the second defendant.
2. Whether or not the termination of the lease agreement on 28 February 2014, without notice and without giving back vacant possession to the plaintiff, was valid.
3. Whether or not the first defendant should be ordered to pay rentals and utility bills accruing at the leased premises between March and July 2014.

When the parties appeared for trial their respective legal practitioners submitted that the matter should proceed as a stated case as, in their view, the facts of the case were common cause. The issues to be determined were questions of law. The legal practitioners duly submitted their written submissions on the issues to be determined.

On 21 June 2015 the learned trial magistrate duly delivered his judgement in favour of the first respondent. The order granted was as follows:

1. The lease agreement entered into between parties in January 2013 be cancelled.
2. Eviction of the 1<sup>st</sup> defendant and all those claiming occupation through them from the premises at Number 13 12<sup>th</sup> Avenue, Haig Park, Mabelreign Harare.
3. Payment of \$ 3 000-00 being arrear rentals for the months March to June 2014.
4. Payment of holding over damages at US\$750-00 per month from 1<sup>st</sup> July 2014.
5. Payment of US\$509-93 being outstanding rates as at 30 June 2014.
6. Payment of US\$5 344-70 being outstanding electricity charges as at 26 June 2014.
7. Interest on all the amounts due at the prescribed rate from the date of summons to date of full payment.
8. Costs of suit.

The appellant was aggrieved by the judgment hence this appeal.  
The grounds of appeal were couched as follows:

- (a) With respect, the court *a quo* erred by purporting to determine and grant a claim that was determined and granted by the same court on 30 July 2014.
- (b) The court *a quo* erred by granting unproven claims.
- (c) The court *a quo* erred by not considering concessions made by the plaintiff in his submissions.
- (d) The court erred by not finding that by obtaining judgement against 2<sup>nd</sup> defendant (2<sup>nd</sup> Respondent), plaintiff (1<sup>st</sup> Respondent) acknowledged the existence of a *vinculum juris* between him and the 2<sup>nd</sup> defendant.
- (e) The court erred by determining an academic matter.
- (f) The court *a quo* grossly misdirected itself by granting unavailable relief to 1<sup>st</sup> Respondent simply because 1<sup>st</sup> Respondent was alleged to have failed to locate 2<sup>nd</sup> Respondent.
- (g) The court *a quo* erred by awarding 1<sup>st</sup> respondent costs on an attorney and client scale.

The first respondent opposed the appeal. The above grounds of appeal will be dealt with in seriatim

- (1) **With respect, the court *a quo* erred by purporting to determine and grant a claim that was determined and granted by the same court on 30 July 2014.**

The appellant's argument was to the effect that having granted a default judgement against the second defendant on 30 July 2014, the court *a quo* was *functus officio*.

In determining this issue it is pertinent to note that it is commons cause that in granting the default judgement against the second respondent, the court *a quo* cancelled the lease agreement between the first respondent and the appellant despite the fact that the appellant was defending the action. The appellant's counsel in his submissions in the court *a quo* acknowledged the error as much in paras 10 - 12 wherein he stated that:

“10. Exception is taken to paragraph 1 of the default judgement, a copy of which is annexed hereto and marked “Annexure 1”.

11. The paragraph states the following:

‘The lease Agreement between plaintiff and the 1<sup>st</sup> Defendant be and is hereby cancelled.’

12. Plaintiff obtained a default judgement against 1<sup>st</sup> Defendant when 1<sup>st</sup> Defendant was not in default. The default judgement is null and void to the extent that it relates to the 1<sup>st</sup> defendant which was not in default when the purported default judgement was entered.”

The first respondent's legal practitioner acknowledged as much when he, in para 2.10 of his written submissions in the court *a quo*, stated that:

"2.10 It is also pertinent at this stage to deal with the objection by the 1<sup>st</sup> Defendant to Paragraph 1 of the order granted by the Honourable Manhanzva (as she then was) on the 30<sup>th</sup> July 2014. Clearly, as far as it related to the 1<sup>st</sup> Defendant, that judgement was made in error. However, the issue of the cancellation of the lease agreement is no longer before this honourable court as it is now agreed that the lease was terminated. There is therefore no need to delve into that issue when it is not before the court."

From the submissions by counsel it is apparent that the only clause in the default judgement that made reference to the appellant was clause 1. The other clauses made clear references to the second respondent. The appellant's counsel made a meal out of this clause. In his reasons for judgement the trial magistrate did not specifically address this clause but alluded to the default judgment as a whole. It is in this light that she concluded that court was not *functus officio*. At p 8 of the record the learned trial magistrate stated thus:

"The first issue raised and for determination is whether by obtaining a default judgement against 2<sup>nd</sup> defendant, plaintiff lost the right to sue 1<sup>st</sup> defendant. This query is most absurd be it by applying common sense or resorting to legal rule. The question is: why should plaintiff lose the right to sue 1<sup>st</sup> defendant by virtue of a judgment granted in default against 2<sup>nd</sup> defendant. Order 11 (4) (9) (*sic*) is clear that where Plaintiff has obtained default judgement against 2<sup>nd</sup> defendant for failing to file an appearance to defend, Plaintiff may proceed on such default judgement without prejudice to his right to continue the action against 1<sup>st</sup> defendant. It cannot even be argued that plaintiff has recovered the full claim owing as per summons because 1<sup>st</sup> defendant admitted in his plea already that plaintiff was suing 1<sup>st</sup> defendant because he was failing to execute its default judgment against 2<sup>nd</sup> defendant. This puts that issue to rest as the debt is still due."

A reading of the judgement on this issue shows clearly that the learned trial magistrate was concerned with the outstanding real issues between the parties. The question of the cancellation of the lease agreement was no longer pivotal in as far as counsel for both parties had accepted that such had been cancelled, albeit in error, and in any case, the lease had been terminated when the appellant surrendered the keys to the premises, through its legal practitioners, to the first respondent on 18 July 2014 thus giving vacant possession to the first respondent on that date. It thus became a technical confirmation of the *status quo*. It must be born in mind that court's role in a dispute between parties is to endeavour to do justice between the parties on the real issues. In *casu*, the real issue that remained to be determined pertained to the outstanding debt. I did not hear appellant's counsel to deny that the debt remained outstanding and that the rest of the clauses in the default order made no reference to the appellant.

The trial magistrate in his reasons for judgement relied on the provisions of Order 11 Rule 4 (9) of the Magistrates Court Rules, 1980. That rule states that:

“(9) When one or more of several defendants in an action consent to judgement or fail to enter appearance to defend or to deliver a plea—

- (a) Judgement may be entered against the defendant or defendants who have consented to judgment or are in default; and
- (b) The plaintiff may proceed on such judgment without prejudice to his right to continue the action against another defendant or other defendants.”

The wording of the above rule is very clear. It gives the plaintiff a right to continue with the action against the non defaulting defendants. The effect of this rule is that the fact that the plaintiff has obtained a default judgment against one or more of the defendants did not invalidate the cause of action against the defendants who are not in default.

The appellant’s argument on this point that by virtue of having obtained a default judgment against the second respondent, the cause of action against the appellant was extinguished is thus incorrect. Counsel put up a spirited effort in that regard to no avail. Clearly he may have misunderstood the circumstances when a court is *functus officio*.

The appellant’s counsel further argued that Order 11 rule 4 (9) was not meant to decimate fundamental common law principles such as the *functus officio* principle. Unfortunately as noted above counsel was subsumed with the issue of cancellation of the lease agreement and not with the real issues that had remained outstanding between the parties. Had he applied his mind to that he would have realised that the rule is also meant to ensure that the plaintiff is not denied his fundamental right to recover his debt from all the defendants just because a pauper or the defendant with the least ability to pay the debt defaults and has a judgment granted against them. If that were the case debtors with the ability to pay or with resources from which the debt could be recovered would simply put forth co-debtors with no resource and encourage them to default knowing full well that that would extinguish the cause of action or just hide behind the principle of *functus officio*.

Generally a court becomes *functus officio* after it would have given a final and definitive judgement on a matter. A default judgement is not such a judgment as it is not a judgement on the merits.

In *Ronald Itai Chawhanda v Sizalobuhle Angel Dube and Another* HB 6/07, NDOU J had this to say on the status of a default judgment:

“The judgement was not given on the merits, so it cannot be final. It is a general principle of our law that once a court has duly pronounced a final judgment, it has itself no authority to

correct, alter or supplement. The court becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised its authority over the subject matter ceases.

*West Rand Estates Ltd v New Zealand Insurance Co. Ltd* 1926 AD 173 at 176; *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298(A) and *Sayprint Textiles (Pvt) Ltd & Another v Girdlestone* 1984 (2) SA 572 (ZH).

There are, however, a few exceptions to this general rule e.g the rule does not apply to interlocutory orders or corrections made pursuant to the provisions of the Rules of this court.”

As the default judgement was not a final judgement on the merits, it follows that the court *a quo* was not *functus officio*. The trial magistrate was thus correct to proceed as she did.

**(2) The court *a quo* erred by granting unproven claims.**

The appellant’s counsel argued that the onus was on the first respondent to prove that he was owed arrear rentals in the sum of US\$3000-00; rates in the sum of US\$509-93; electricity charges in the sum of US\$5 344-70 as well as holding over damages. He further alluded to the fact that in terms of the lease agreement the lessee was required to pay \$50-00 per month for electricity and so the first respondent had to prove how the electricity charges reached a figure of US\$5 344-70 for the duration of the lease agreement, which was January 2013 to July 2014. In the circumstances counsel argued that the learned trial magistrate erred and misdirected herself by awarding sums of money in excess of the amounts claimed before amendments of the pleadings upon which the claims were founded. This ground of appeal is hard to comprehend as the matter was proceeded with as a stated case as the parties had agreed on the facts. As aptly noted by the first respondent’s counsel, it was the appellant’s counsel who suggested and insisted that the matter should proceed as a stated case in terms of Order 19 of the Magistrates Court(Civil) Rules.

Order 19 rule 5 (3) states that:

“If the question in dispute is a question of law and the parties are agreed upon the facts, the facts maybe admitted in court, either viva voce or by written statement, by the parties and recorded by the court, and judgement may be given thereon without further proof.”

It was in appreciation of this rule that the appellant’s counsel insisted before the trial court that there were no disputes of fact but only a question of law. Once that question of law is answered the rest will fall into place.

At p16 of the record of appeal, the appellant's counsel, in response to the first respondent's counsel's suggestion that the matter should proceed to trial as had been expected' stated that:

"I would like to sincerely apologise to Plaintiff's counsel if he feels that I frustrated him. I do not want to waste the court's time that is all. We may proceed to trial but it is not necessary as the documents being relied on are not disputed. The facts themselves are not disputed. I am not asking for a postponement. I am ready to argue the matter. The court has suggested we make written arguments but I am prepared to make oral submissions. The lease and letters and utility bills were submitted to court already. The issues are very simple. Why have a full trial yet this is a busy court. I will go ahead if the court so pleases."

In response to this the respondent's counsel stated that:

"If the court determines that the lease exists then I suppose the rentals and utility bills would not be in dispute."

The electricity bill was then admitted into evidence with the consent of the appellant's counsel and the City of Harare Bill was to be submitted to court again with the consent of the appellant's counsel.

It was upon agreeing on all these pieces of evidence by consent that the parties proceeded to submit their arguments on points of law.

In his judgment the trial magistrate restated what the parties agreed as follows:

"I must hasten to clarify that the parties agreed in court during oral submissions that should the court find that the lease was not terminated on 28 February 2014, then plaintiff was entitled to an order as per summons.

That is 1<sup>st</sup> defendant would automatically owe rentals for the period March to June 2014 when 2<sup>nd</sup> defendant remained in occupation. First defendant would also owe holding over damages at \$750-00 per month from 1<sup>st</sup> July 2014 to date of vacation. First defendant would further owe all outstanding amounts in rates totalling \$509.93 as well as outstanding electricity charges totalling \$5 344.70 as per electricity bill statement admitted by consent of both parties into evidence as a reflection of the true account."

The above captures the position as agreed to by the legal practitioners when they asked for the matter to proceed in terms of Order 19 (as a stated case).

It is clear from this statement that the appellant was not challenging the amounts of the claim. Indeed I did not hear the appellant's counsel to deny that the above summation by the trial magistrate is an accurate reflection of the position of the parties at the time. What this confirms is that there was no dispute between the parties as regards the amounts that would be due to the first respondent from the appellant once the legal arguments were resolved. There was nothing further that the first respondent needed to prove as the amounts had been agreed to by the parties.

In the circumstances it was thus not candid of the appellant to now argue that the first respondent needed to prove the quantum of the claims.

As regards the electricity bill, whilst this may not have been in the summons, the parties agreed to its inclusion by consent.

It is trite that a party is not obliged to prove a fact that has been admitted. The failure by the first respondent to amend the pleadings to include the claim for electricity bill cannot be fatal in as far as that bill was accepted by the appellant and was tendered as proof of the amount owing by consent of the parties. In any case the failure to state certain aspects in pleadings may not always be fatal to a party's case especially as in this case, that aspect was consented to by the appellant.

The appellant also argued that the trial magistrate erred by not considering concessions made by the plaintiff in his submissions.

In his submissions the appellant's counsel referred mainly to two aspects namely that the first respondent conceded that no cause of action was established and that there was no claim in the summons for electricity charges. By raising these issues the appellants' counsel seemed oblivious of the fact that he had consented to the admission of the electricity bill and the issue of cause of action was not conceded to at all. If anything the first respondent's counsel contended that the granting of the default judgement did not extinguish the first respondent's right to pursue his claim against the appellant.

The clause 1 of the default judgement which the appellant sought to rely on as extinguishing the cause of action state that:-

"The lease agreement between Plaintiff and the 1<sup>st</sup> Defendant be and is hereby cancelled."

This is the clause both the appellant's and the first respondent's legal practitioners acknowledged as having been made in error as the appellant was not in default. The clause, nevertheless, referred to the appellant and not the second defendant as the lessee. Having cancelled that lease agreement between the appellant and the first respondent, the other issues arising from the alleged breach of the lease remained to be determined. As already noted earlier on, the fact of granting a default judgement did not extinguish the first respondent's right to proceed on against the appellant. The default judgement did not have the effect of absolving the appellant from his liabilities that had accrued in terms of the cancelled lease agreement.



It may also be noted that the issues for determination were clearly spelt out at the pre-trial conference stage and reconfirmed at trial. As aptly captured in the magistrate's reasons for judgment quoted above, the parties agreed on including the electricity bill.

It is also trite that the courts adopt an indulgent and more liberal approach towards pleadings in the magistrates' court. See *Luxury Stores v Shamva Service Station* (1983) (Pvt) Ltd S-122/88. In *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 318F-G GUBBAY JA (as he then was) had this to say on pleadings in the magistrates' court:

“In the first place, pleadings in the magistrates' court are not to be examined under a magnifying glass. Magistrates' courts adopt an indulgent and more liberal attitude towards them as compared with pleadings in the High Court. The tendency is rather to uphold their validity if at all possible and try to determine what the real issues are between the parties.”

CHATIKOBO J in *Musadzikwa v Minister of Home Affairs & Another* 2000 (1) ZLR 405 at p 412G-413A referred to the magistrates court as—

“a forum in which pleadings are not analysed with a magnifying glass, but one where greater latitude is given to the litigants to traverse issues beyond the immediate confines set by the pleadings. The strictures enunciated in the above dictum are to be observed more strictly in the High Court than is the case in the inferior courts. This notwithstanding, this court, while it strives to ensure that the parties are restricted to the issues as reflected on the pleadings, will not enslave itself to the pleadings in complete disregard of its duty to decide the real dispute between the parties.”

Upon a summation of the approach in the High Court as noted in a number of cases, the honourable judge at 413F-H, opined that:-

“I perceive the common approach in these dicta to stress the need to strike a balance between underpinning the importance of keeping litigants to strictly within the four covers of their pleadings, on the one hand, and on the other hand, the court's duty to attain justice by permitting a fuller investigation of the wider issues which do not arise from the pleadings, where that can be done without occasioning prejudice to one or other of the litigants. Such a balance is easy to strike in a case such as the present, where both parties approach the case on the assumption that the wider issues, though not pleaded, are relevant to the determination of the real issues between the parties.”

The importance of doing justice as between the parties was also underscored by MAKARAU J (as she then was) in *Zimbabwe Posts (Private) Limited v Zimbabwe Posts and Telecommunications Union* HH15/03 at p 4 of the cyclostyled judgment wherein the honourable judge stated that:

“I am inclined to deal with the issue notwithstanding that it was not the issue before me when the application commenced. In my view, justice is practical and the court should not shy away from dealing with the real dispute between the parties where in doing so, the court is not occasioning any injustice to any of the parties.”

The learned judge went on to state that:

“In the matter before me, no party will suffer prejudice, as both parties have not only identified this as the real issue before them, but, have extensively addressed me on the issue verbatim and in writing. It will be idle of me not to deal with the real issue between the parties and to insist that the applicant prepare fresh papers to air the real dispute between the parties. I have further asked myself whose interest I will be serving by dismissing the application as not properly bringing the dispute before me. Clearly not of both parties who have since adopted the real dispute as the only dispute between them. While it is trite that the court cannot plead a case on behalf of the parties, and the applicant ought to have sought to amend its draft order and application, I am convinced that in the case before me, no party will suffer any prejudice if I were to deal with the real issue between them. The parties have by consent sought to enlarge the issues between them and the court can hardly be seen seeking to confine what the parties have enlarged.”

If the above obtains in the High Court were a stricter adherence to pleadings is usually emphasised, it should even be more liberal in the magistrates court were indulgence is expected in the spirit of doing justice between the parties by determining the real dispute between them.

In *casu*, the issue of the cancelled lease agreement, albeit in error, was accepted by both parties and the appellant did not seek to correct that as it could easily have done under Order 30 of the Magistrate Court (Civil) Rules, 1980 pertaining to the rescission and correction of orders made in error. Clearly the issue of the lease was no longer the real dispute as the lease had been terminated when the appellant gave back vacant possession. The real issue pertained to the outstanding amounts on the rentals, rates and utility bills. Both parties acknowledged this and agreed that the amounts of these items were not in dispute including that of the electricity bill.

I thus hold that once parties have agreed that an issue should be determined, notwithstanding that it was not raised in the pleadings, they are estopped from raising an objection that the issue was not on the pleadings merely because judgment was not in their favour.

**2. The court *a quo* erred by not finding that by obtaining judgement against the second defendant (2<sup>nd</sup> respondent), the plaintiff (1<sup>st</sup> respondent) acknowledged the existence of a *vinculum juris* between him and the second defendant.**

Under this ground of appeal, the appellant argued that by suing the second respondent and even obtaining a default judgment against him requiring that the second respondent vacate the rented premises, pay rent arrears in the sum of US\$3 000-00, pay holding over damages, and pay rates and costs , the first respondent acknowledged that there was a legal

obligation between the first respondent and the second respondent to the extent that the appellant no longer had any obligation to the first respondent as the two parties were now dealing with each other.

In furtherance of this argument the appellant's counsel also alluded to the fact that the lease agreement in question was in fact for the benefit of a 3<sup>rd</sup> party as acknowledged by the first respondent. He thus argued that the contract was a *stipulatio alteri*. He further argued that since the contract was for the benefit of the second respondent, who was the appellant's employee, by citing him as a party the first respondent virtually elevated him to a party to the contract.

This argument was bereft of sound legal reasoning. The lease agreement itself is very clear as to who the parties were. These were the appellant, represented by the second respondent, and the first respondent. Though the rented premises were to be occupied by the second respondent as employee of the appellant, the responsibility for the rentals and rates was on the shoulders of the appellant as the tenant. If there had been a change of responsibilities for paying rent and other charges it was for the appellant to prove such. In *Chirenje v Vendifin Investments & Others* SC 13-09 court reiterated this when it stated that:

“It is now settled law that in a contract for the benefit of the third party, the beneficiary third party's right to sue and the obligation to be sued under such contract accrue upon the offer being communicated to and accepted by the third party in terms of the contract. It is the communication of the offer and the acceptance of the offer that creates the *vinculum juris*, which in turn creates the entitlement to sue and the obligation to be sued. See *McCullogh v Fernwood Estate Ltd* 1920 AD 24 at 206.”

In *casu*, there was no evidence tendered to show that the requisite offer and acceptance had been made. The appellant sought to infer the existence of such a contract on the basis of the first respondent having sued the appellant and the second respondent jointly and severally.

In his rejection of the argument of a *stipulatio alteri*, the magistrate correctly pointed to the lease agreement and the letters by the appellant's legal practitioners all pointing to the appellant as the tenant. In the letter of 28 February 2014 from the appellant's legal practitioners to the first respondent's letting agents, the following is stated:

“We have been instructed by the Premier Soccer League (PSL), our client, to advise you, as we hereby do, that Mr. Cuthbert Mutandwa, the employee for whom it hired the above mentioned property, will leave the organisation on 28 February 2014 and is required to vacate the premises on that same day.

The lessor and Mr. Mutandwa are free to enter into their own lease agreement in which case the Premier Soccer League will cease to be your tenant. In the event that no such agreement is

entered into, Mr. Mutandwa is required to vacate the premises immediately as he was given three months' notice to do so."

By virtue of this letter the appellant was unequivocally acknowledging that as at that date it was the Tenant with all the obligations and responsibilities of a tenant in terms of the lease agreement. The appellant in that letter proceeded to indicate that should Mr. Mutandwa not vacate, it will proceed to give the one months notice to terminate its agreement with the first respondent in terms of the lease agreement.

On 18 July 2014, the appellant's legal practitioners wrote another letter to the first respondent's legal practitioners in which the appellant once more acknowledged having been the tenant. The appellant was, however, ill - advised as it gave the impression that it had cancelled the lease agreement on 28 February 2014 and, from that date, it was no longer responsible as a tenant on the premises in question. A reading of 28 February 2014 letter does not disclose a termination of the lease but a threat to terminate the leases upon giving a month's notice if the second respondent did not vacate the premises. To confirm the appellant's continued tenancy, when its former employee vacated the premises he surrendered keys to the premises to the appellant and the appellant in turn surrendered them to its legal practitioners. If the appellant had ceased being the tenant on 28 February 2014, why did the appellant accept the keys when, according to its legal practitioner's argument, the first respondent and the second respondent were now in a new agreement, as lessor and lessee. Clearly as of 18 July 2014 the appellant still appreciated its obligation to give vacant possession of the leased premises as it was still the tenant. The appellant's effort to saddle the first respondent with its problems with its former employee did not absolve it of its contractual obligations.

In the circumstances the trial magistrate did not err in holding that the appellant and the first respondent remained as the parties to the lease agreement.

### **3. The remaining grounds of appeal comprised:**

- (i) That the court erred by determining an academic matter;**
- (ii) The court *a quo* grossly misdirected itself by granting unavailable relief to the first respondent simply because the first respondent was alleged to have failed to locate the respondent; and**
- (iii) That the court *a quo* erred by awarding the first respondent costs on an attorney and client scale without justification.**

These grounds appear not to have been persisted with any seriousness hence the appellant's counsel referred this court to the submissions in the court *a quo*. What was required was for counsel to point at any misdirection on the part of the trial magistrate in arriving at the findings on these issues.

For instance, the question of the lease agreement was sufficiently dealt with and it was common cause that the lease was terminated and vacant possession handed back on 18 July 2014 when the appellant returned the keys for the property to the first respondent. Any pronouncement on the cancelling of the leases was of no consequence. What may have been of importance to note is that the appellant as the tenant only gave vacant possession on 18 July 2014 and so was liable for the rentals, rates and utility bills up to the time of giving vacant possession.

The other ground pertained to whether an unavailable relief was granted. I did earlier on allude to the fact that the real issue that remained as between the parties pertained to the debt. In that regard the first respondent was granted the relief. Such relief cannot be said not to have been available.

The last ground of appeal seemed to have been included just as routine. This is so because no costs on the attorney and client scale were awarded. The clause on costs simply reads 'costs of suit.'

Upon a careful analysis of the submissions by counsel for both parties I have come to the conclusion that the trial magistrate did not err in coming to the decision as she did. If anything her decision is amply supported by the evidence adduced including facts admitted as common cause. The appeal can thus not succeed.

Accordingly, it is hereby ordered that the appeal be and is hereby dismissed with costs.

NDEWERE J: I concur .....

*Gama and Partners*, appellant's legal practitioners.  
*Moyo & Jera*, 1<sup>st</sup> respondent's legal practitioners.