

CLEMENCE HURUVA
HEBERT HURUVA
EMMANUEL CHIKOVA
S.D MUSHONHIWA
BEAULAR MBINDO
BENARD FOVERA
INNOCENT MWACHIYANA

and

SMM HOLDINGS (PRIVATE) LTD
(Under Reconstruction t/a SMM PROPERTIES)

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J
MASVINGO 4 November, 2020 & 19 May 2021

Civil Appeal

C. Ndlovu for the appellants
J. Chipangura for the respondents

WAMAMBO J: This matter is a civil appeal against a judgement entered by a Magistrate sitting at Masvingo.

The respondent issued summons for the eviction of the appellants. An amendment to the summons was later made to include the issue of arrear rentals. The issues agreed to be determined at the trial were as follows:

- a) Whether the Plaintiff required the houses to house its employees
- b) Whether the Plaintiff had been recapitalised to commence operations

In a judgement spanning three and half pages, the Learned Trial Magistrate dealt with the matter in some detail. The Trial Magistrate entered judgement for the respondent as prayed for.

In the notice of appeal the grounds of appeal are as follows:

1. *"The learned Magistrate erred in not deciding the first issue that is whether the plaintiff required the houses to house its employees*
2. *The learned Magistrate erred in finding that the appellants did not have valid leases notwithstanding that the respondent allowed appellants to remain in occupation of the houses and continued to charge monthly rent and accept payments from the appellants after the expiry of the written leases. The leases continued by tacit relocation and the case is distinguishable from the Frank Nyaku Badza case.*
3. *The learned Magistrate erred in finding that the 1st and 2nd appellants accumulated arrear rentals notwithstanding that their witness Mr Travos Humba tendered documentary evidence to prove that he made advance rent payments in both local and United States dollar currencies.*
4. *The court erred in finding that Mr Travos Humba admitted that he had only paid \$180 towards arrear rentals.*
5. *The learned Magistrate erred in ordering the eviction of the 1st, 2nd, 3rd, 4th and 5th appellants when the evidence showed that the respondent had agreed to let them stay in the houses on condition that each paid \$90,00 per month (\$60.00 would cover the current whilst the balance in the sum of \$30.00 would reduce the arrears).*
6. *The learned Magistrate erred in ignoring the foreign currency payments which were made to Mr Museba by 6th appellant.*
7. *The learned Magistrate erred in finding that the respondent had proved her case on a balance of probabilities against all appellants."*

Appellants pray for an order as follows:

- a) *The appeal be and is hereby upheld*
- b) *The judgement of the court be and is hereby set aside*
- c) *The claim for eviction and payment of arrear rentals be and is hereby dismissed with costs*
- d) *The respondent is ordered to pay costs."*

The facts and issues in this matter strongly mirror those in the matter of *Frank Nyaku Badza versus SMM Holdings (Pvt) Ltd (Under Reconstruction) t/a SMM Properties HMA 20/17* (hereinafter referred to as the *Frank Nyaku Badza* case).

Such is the strength of resemblance between the two cases that it is cited by both parties throughout their submissions in the Trial Court and again on appeal.

The *Frank Nyaku* case (supra) is not only housing similar facts and issues as this case but was actually separated from this case.

The grounds of appeal are not quite as precise as required by the Rules of Court. One notes however that the main issues were raised and decided in the *Frank Nyaku Badza* case (supra) besides the issue of tacit relocation.

The brief background is that the appellants were residing in respondents houses under lease agreements. The various appellants were not all employed by Gaths Mine the owner of the houses, with some being civil servants and one a councillor

The issues raised in the grounds of appeal were all answered in favour of the respondents in the *Frank Nyaku Badza* case (supra).

We agree with the finds of the Court in the *Frank Nyaku Badza* case (supra).

The findings are detailed and refer to case law and the factual justification thereof:

At pages 5-6 MAFUSIRE J in the *Frank Nyaku Badza* case (supra) said: -

"Furthermore for him to challenge the respondents claim that it required the houses for its own employees, to say that the respondent was not a local authority, albeit correct and to assert that the only reason why it required its houses back was so that it could re-let them at higher rentals, only betrayed the predominant confusion permeating this whole matter, namely whether or not the rent regulations applied. In other words, if the rent regulations did not apply then the respondent did not need to explain why it required its houses back or what it might do with them afterwards. As indicated already under the common law an owner only needs to show the expiry or lapse of the lease as the contract that suspended the owner's entitlement to its exclusive right of possession."

It becomes clear that in the instant case the Rent Regulations S.I 1 676/ 1983 have no application. The issue of whether or not respondent wanted its houses for its own employees is not a relevant consideration under common law. Effectively the Rent Regulations do not apply to this case.

It appears that the Learned Trial Court was alive to this. At page 11 of the record the Trial Court said: -

"That evidence forms part of the record but the court has opted for this route because the position of such matters was aptly put by JUSTICE MAFUSIRE in the Frank Nyaku Badza case and the court wonders why counsel would continue to bring such matters to court when the road map has been set by the High Court. It is common cause that in all the defendants none of them a valid lease (sic). All the leases have since expired. Their right to be in the said houses had been terminated."

The trial Magistrate was indeed correct. All the appellant's leases indeed had expired. They no longer had a right to be in the said houses.

The other complaints raised in the notice of appeal revolve mainly on the issue of arrear rentals and tacit relocation.

I find that indeed the issue of tacit relocation was not raised so it was not dealt with in the *Frank Nyaku Badza* case.

I will presently deal with this issue.

R.H. Christie, Business Law in Zimbabwe at page 273 says of tacit relocation;

"In all such cases the lease terminates at the end of the fixed period or on the happening of events, without the necessity of notice by either party.

Tiopaizi v Bulawayo Municipality 1923 AD B 17-325 a case on a contract of employment decided according to principles equally applicable to contracts of lease.

The same passage in DE VILLIES JA's judgement in Tiopaizi's case points out that if at the end of the fixed period, the landlord permits the tenant to remain in occupation the leases will continue (but not in respect of an option to review Chibanda v Hewlett 1991 (1) ZLR 211) by what is known as tacit relocation until terminated by reasonable notice. H & J Investments (Pvt) Ltd v Space Age Products (Pvt) Ltd 1987 (1) ZLR 242."

SANDURA JP (as he then was) in *Chibanda v Hewlett 1991 (2) ZLR 211(HC)* at page 216 B-C said: -

"The learned author Cooper defines a tacit relocation at page 319 op, cit as follows: A tacit relocation is an implied agreement to re-let and is concluded by the lessor permitting the lessee to remain in occupation after termination of the lease and accepting rent from the lessee for the use and enjoyment of the property."

It appears common cause that the appellants continued to reside in respondent's houses after the expiry of their lease agreements and that respondent continued to accept rentals from them. From the tenor of Master Lionde's evidence letters of demand were issued and served on the appellants for the outstanding rent. Summons for eviction were also issued against all appellants. The appellants were clearly given reasonable notice to vacate the respondent's houses.

The Learned Trial Magistrate dealt adequately with the issue of the arrear rentals for each appellant.

It is also borne by the record that the appellants for the most part confirmed being in arrears. The arrear amounts were never seriously placed in issue. The evidence presented by Master Lionde remains largely uncontroverted. The payment of rentals through one Museba through his FNB account was never proven nor does it accord to the terms of the lease agreement as referred to.

To that end we also find that the arrear rentals were proven and the Trial Magistrate's findings are also correct in that regard.

At the end of the day we find that the appeal has no merit and make the following order:

The appeal is dismissed with costs.

WAMAMBO J.....

ZISENGWE J agrees.....

Ndlovu & Hwacha; Appellants Legal Practitioners
Chuma Gurajena & Partners; Respondent's Legal Practitioners