MARILYN JEAN BAXTER
versus
FUNGISAI CHIROCHANGU
And
RONALD SUNUNGURAI CHIROCHANGU

HIGH COURT OF ZIMBABWE
MWAYERA AND MUZENDA J J
MUTARE, 25 March 2020 and 2 July 2020

Civil appeal

HBR Tanaya, for the applicant
Mrs *Y Chapata*, for the respondent

MUZENDA J: This is an appeal brought by the appellant against the whole of the judgement issued by the Provincial Magistrate sitting at Mutare on the 3rd of January 2020.

Appellants spelt out the ground s of appeal as follows:-

1. The Honourable court below erred and grossly misdirected itself in law in ordering appellants eviction from her home without considering all the relevant circumstances as contemplated in s.74 of the Constitution of Zimbabwe Amendment (No. 20 Act, 2013)
2. The court below erred and grossly misdirected itself in granting summary judgement over an illiquid claim for holding over damages.
3. The court a quo grossly erred and misdirected itself in law in ordering appellant to pay holding over damage in a non landlord tenant dispute.
4. The Honourable inferior court grossly erred and misdirected itself in fact and law in ordering appellants to pay holding over damages with effect from 1 July 2019 in the sum of zw$10 000.00 per month when appellant had alleged fats which if pleaded and accepted at the trial, were sufficient to establish a defence.

The appellant sought a relief to have the application for summary judgement to be dismissed with costs. And that the appeal be upheld with costs on attorney client scale.

The two respondents who are husband and wife purchased curtain piece of land situated in the District of Umtali called stand 86 Murambi Gardens of Umtali Township lands measuring 3450 square metres for RTGS $450 000 .00 through a deputy Sheriff's public auction. The property was previously owned by the now appellant. The two were confirmed purchasers of the property on 5 March 2019, they are now title holders under Deed of Transfer No.3520/19. The respondents then issued summons against the appellant in the magistrate court seeking her eviction from the property at the same time claiming holding over damages in the sum of $10 000.00 per month from 1July 2019 until her vacation and costs of suit. Appellant entered appearance to defend. The respondents filed an application for summary judgement and on 3 January 2020 the court *a quo* granted the application. On 6 January 2020 the appellant filed the present. The respondents proceeded to file a further application before the trial court a quo for leave to vacate pending appeal and they obtained that order on 17 February 2020. On 19 February 2020appellant voluntarily vacated the property and the respondents are now in possession of the property.

On the date of hearing of this appeal the legal practitioners of the parties indicated that there was need for oral arguments the matter had to be decided on the basis of the papers filed of record. However what was not clear to this court was whether the appellant was still pursuing the appeal given the fact that she had voluntarily moved out of the property and outcome of the matter would become purely academic. This is now our ruling on the appeal

WHETHER THE COURT AQUO ERRED AND GROSSLY MISDIRECTED ITSELF IN LAW IN ORDERING APPELLANTS'S EVICTION

The appellant submitted that the court *a quo* misdirected itself in law when it ordered her eviction from the property without considering all relevant circumstances as espoused in s.74 of the Constitution of Zimbabwe which speaks against the eviction of a person from her home, or have the home demolished without an order of the court made. Appellant added that the duty of the court is to consider all relevant factors and then arrive at a just and equitable conclusion as to whether a person should be evicted, the terms of such ejectment and other related factors. According to the appellant ownership and legal right should not be the determining factors, the paramount factor for the judicial officer would be to protect the right of the people to shelter. Appellant went on to compare legislation in Sauth Africa[1]. And urged this court to rely on such legislation to protect the appellant. Appellant went on to cite

[1]Prevention of illegal eviction and unlawful occupation of land Act 19 of 1998

the cases of *Michel and others v Malula and others*[2] and *Port Elizabeth Municipality v various occupiers* [3] to advance her argument that courts should go beyond the aspects of ownership and legal right and ensure that a person is granted a constitutional guarantee of shelter and accommodation as a fundamental right. By evicting appellant the court *a quo* exposed appellant and her family to harsh weather, and her property to destruction and theft.

On the other hand the respondents contends that the appellant's referral to s.74 of the constitution is misplaced. In s.74 of the constitution the lawmakers sought to prevent arbitrary evictions. As a contrary to the appellant's argument, the eviction of the appellant was sought through the courts hence in this case and circumstance there is no basis to talk about arbitrary eviction. The respondents submitted that on all farness the appellant has no defence to the application for a *rei vindicatio*. Appellant can not try to hide behind the veil of mercy and try to use the court for an extension of stay in someone's property. Once it is accepted that the respondents are owners then appellant can not remain in property without the blessing of the owners. The duty of the court in this case is to protect the owner rather than the occupier or possessor[4]. In any case, respondents concluded this court has no basis to interfere with the judgement of the court *a quo* based purely on finding of facts unless it is satisfied that having regard to the evidence placed before the trial court, the findings complained of are so outrageous in their defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at such a conclusion[5]

I am unable to agree with the appellant submissions relating to s. 74 of the Zimbabwean Constitution. Appellant used to own the subject house, the court is not privy to the events that led to the sale of the house through public auction. What is however uncontroverted is that the responded were the highest bidder sat an auction and acquired that property legally. They therefore did not arbitrary remove the appellant but opted to go through a legal process by issuing summons putting appellant on alert. They did not have touts to forcefully eject the appellant. Appellant by citing s.74 of the constitution of Zimbabwe try to argue that s. 74 is applicable. A close legal analysis of the case law cited by appellant from South African jurisprudence unmistakably shows that these matters involved illegal settlements by the respondents on municipal land which is patently distinct for the

[2] 2010 (2) SA 257 (CC)
[3] 2005 (1) SA 217 (CC)
[4] Shorai Mavis Nzara and 3 othes v Cecilia Kashumba and 3 others SC 18/18.
Al spite Investments (PVT) Limited v Westerhoff 2009 (2) zlr 236
Vigilter Moyo v Edwin Sibanda and 2 others AB 81/17
[5] Nyahondo v Hokonya and others 1997 (2) zlr 457 (sc) AT P.460

facts of this matter conclude therefore that ns 74 of the Constitution is totally inapplicable to the facts of this matter. What is apparent on the facts before us here is that the respondents as owners of the newly acquired immovable property can evict anyone who occupies their property without their consent and they used the court to exercise their rights legally. The application for ejectment is premised on the *rei vindication* doctrine and the court *a quo* property interpreted the legal principles settled by these courts to order appellant's eviction. There is no legal basis for this court to interfere with that decision reached by the court *a quo*. In any case the appellant of her own volition saw the light and swallowed the pride and moved out of the property. Accordingly this ground of appeal has no merit and it ought to be dismissed.

WHETHER OR NOT THE COURT *A QUO* ERRED AND MISDIRECTED ITSELF IN GRANTING SUMMARY JUDGMENT OVER AN ILLIQUID CLAIM OF HOLD OVER DAMGES?

The appellant contended that the amount of holding over damages constitute an illiquid claim if it is an illiquid claim then an application for summary judgment would not be applicable. Appellant went on further to submit that the holding over damages were not based on a liquid document as there was no acknowledgement of debt, nor a lease agreement nor any document to show that the amounts were liquidated. According to appellant holding damages could only have been determined after leading of oral evidence in a trial. Appellant further added that the court *a quo* erroneously concluded that the appellant had not challenged the holding over damages.

To the contrary the respondents submitted that holding over damages cannot be confined to a landlord – tenant relationship but to situations where the occupier holds on to the owner's property. The respondent's claim was based on the value of the rental the property would earn had it been on lease and such a value is easily ascertainable. In any case respondents explained how they had come up with the amount of holding over damages. Respondents went on to cite *Hever v Van Greuning*[6] which is of the authority that an owner of immovable property who has never been in physical occupation or possession of his property is entitled to claim damages from a person who wrongfully and unlawfully occupied that property. Respondents further cited the matter of *Dube v Sengwayo*[7] which held that a

[6] 1979 (4) SA 952 at pages 954 e-f and cases cited therein
[7] HC 110/91

claim for holding over damages in respect of ejectment proceedings was a claim for a liquidated demand because the damages were easily ascertainable.

The argument by the respondents finds favour with this court. The analysis of the facts by the court *a quo* is sound in as far as whether holding over damages were a liquid claim. There is no legal basis to critique it nor to impugn it. The decision in *Dube v Sengwayo* (*supra*) has not been set aside and given the reasoning I that judgment I agree too that a rental per month put up by an owner of property can easily be determined or ascertained without difficulties and in this case the respondents explicitly explained in their affidavits how the damages were computed. I conclude that the holding over damages constitute a liquid claim and dismiss that ground of appeal by the appellant. Having reached that decision relating to the second ground of appeal, the same conclusion is applicable to the third ground of appeal which pertains to the court ordering appellant to pay holding over damages in a non-landlord-tenant dispute. As already concluded herein, a property owner who had not taken occupation of the property can legally claim holding over damages as long as the respondents had done in this case. Appellant's ground 3 of her appeal has no merit.

WHETHER THE COURT *A QUO* GROSSLY ERRED AND MISDIRECTED ITSELF IN FACT AND LAW IN ORDERING APPELLANT TO PAY HOLDING OVER DAMAGES WITH EFFECT FROM 1 JULY 2019?

The appellant submitted that the court *a quo* erred and misdirected itself in ordering appellant to pay holding over damages with effect from 1 July 2019 in the sum of $10 000-00 per month when the appellant had presented facts in her opposing affidavit sufficient to establish a possible defence to the respondent's claim. It was argued further on behalf of the appellant that appellant had pleaded facts to defeat respondents' claim. It was not clear to the appellant whether she was properly served with a notice to vacate the premise by 1 July 2019 and hence respondent's claim for holding over damages could not have been unassailable, appellant argued. Appellant added that the trial court ignored such a triable issue and ordered payment without any justification to that effect. Appellant concluded that damages cannot be sustained by a summary judgment, the court *a quo* had a duty to afford the appellant to prove that she cannot be ordered to pay holding over damages of $10 000-00 per month from 1 July 2019.

In response the respondents argued that the respondents established on a balance of probabilities why appellant was obliged to pay $10 000-00 per month from 1 July 219.

Respondents admitted that in an application for summary judgment appellant was required to raise a plausible and *bon fide* defence to the respondent's claim. However, the appellant raised a bare denial to the effect that the appellant did not have tenants to the property. She did not raise the issue of notice in her papers. She did not challenge the amount of $10 000-00. The fundamental point was that appellant was enjoying the property of the respondents without paying rentals.

The court has already concluded and determined that the court *a quo* did not err in granting the application for summary judgment pertaining to holding over damages. That aspect is now water under the bridge. Having granted the judgment on holding over damages and the quantum of $10 000-00 per month, the next issue for determination was the commencement date for payment. The court *a quo* settled on 1 July 2019 as pleaded by the respondents in their papers. The respondents contended that from 1 July 2019 she had to pat rentals. The trial court accepted the respondents' evidence on that aspect of dates, we saw no misdirection on the part of the court *a quo*. The court analysed all facts placed before it relating to the aspect of dates and concluded that 1 July 2019 was the appropriate date. We have no legal basis whatsoever to interfere with that finding. Once a summary judgment was granted in respect of holding over damages, the quantum and date of payment ought to be determined and the court *a quo* did decide. We conclude that the judgment of the court *a quo* in its entirety should not be interfered with and the whole set of grounds of appeal has no merit and ought to be dismissed.

Accordingly, it is ordered as follows:

The appeal is dismissed with costs.

MWAYERA J agrees _____

Tanaya Law Firm, appellant's legal practitioners
Henning Lock, respondents' legal practitioners