

SAMUEL CHIWOMBA
versus
JULITTA HELEN MHUNDWA

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 1 June 2017 & 27 September 2017

Civil appeal

R. Zimudzi & Mr N. Mukanda, for the appellant
S. Musapatika, for the respondent

CHITAKUNYE J: On 1 June 2017, after hearing counsel for both parties we dismissed the appeal with costs. Herein are the reasons for our decision.

It is common cause that the appellant and the respondent entered into a written agreement of sale on 5 June 2012 at Marondera whereby the appellant was purchasing stand No. 108/4 Chimanimani Street Dombotombo Township Marondera from the respondent for a sum of \$15 000.00. On the date of signing the Agreement of Sale, the appellant paid a deposit of \$13 000 and was to pay the balance of \$2 000 later. The balance was due as from 30 June 2012. They also agreed that if he did not pay that \$2 000 as a once off lump sum, he will then have to pay it as \$2 500 with the addition of \$500 being interest.

It is not in dispute that the appellant did not pay that balance by 30 June 2012. Instead, in July 2012 he took occupation of the premises in question in circumstances where the respondent alleged that the appellant evicted her tenants and took occupation without her authority. The appellant on the other hand contended that he was given occupation by the respondent because the property was no longer occupied.

It is, however, also common cause that the respondent, through her then legal representatives, Legal Resources Foundation, wrote a letter to the Appellant on the 16th of October 2012 demanding payment of the outstanding balance of \$2 000.00. In that same letter the respondent indicated that the appellant had evicted the respondents' tenants and taken occupation thus prejudicing the respondent and so could he pay the rentals for the months that he had been in occupation from July to the October 2012 in question. The rentals were apparently not forthcoming. It was indicated in that same letter that by taking occupation in the manner he did the appellant was in breach of clause 8 of the Agreement of Sale as he had not paid the purchase price in full. Clause 8 of the agreement of sale provided that the seller shall give vacant possession of the property from the date of payment in full of the purchase price.

The appellant did not pay the balance from the date of demand, which is 16 October 2012 to about 2 May 2013, which was a period close to 7 months. It was then that the respondent issued summons claiming the balance of \$2 000 and the rentals at that time in the sum of \$3 050.00 for the period July to April 2013.

The appellant contested the claim alleging that the respondent rejected the payment and the respondent gave her tenants 3 months eviction notices. In the same plea the appellant alleged that the respondent's tenants left without the respondent's knowledge.

In his plea, the appellant, however, admitted owing the Respondent \$2 500.00. So the issue of him owing that balance was admitted. He, however, as he indicated above, was not willing to pay the rentals being demanded. He admitted the same during a pre-trial conference. The issue of the outstanding balance was never contested.

As the case progressed, the respondent realized that the appellant had no genuine or bona fide intention of purging his breach. Thus on 2 October 2015, the respondent filed a notice of amendment of her pleadings to now include an alternative relief for the cancellation of the agreement of sale and payment of rentals to the date of eviction.

A trial was held which was contested wherein the respondent testified and called witnesses in support of her claim. The appellant also testified and called his witnesses. Judgment was thereafter granted in the respondent's favour on 27 November 2015. It is in respect of that judgment that the appellant appealed to this court.

The grounds of appeal are as per the notice of appeal filed of record. There are basically five grounds of appeal.

The first one was to the effect that the court *a quo* erred in law and in fact by failing to consider the fact that the appellant was not in breach of the agreement but rather the Respondent prevented the payment of the balance of US\$2 500.00 when it was tendered by refusing to sign for the same in a bid to defraud the appellant..

The second ground pertained to the amount of the rentals. The appellant alleged that the trial magistrate erred by ordering damages at a rate of US\$ 350.00 per month when in terms of the pleadings it was \$305.00 per month and not \$350.00.

The third ground pertained to the manner in which the appellant took occupation. The appellant alleged that the court erred by failing to consider that his occupation was lawful as he took occupation after he had paid almost the full purchase price, the tenants had vacated as they were given three months' notice to vacate by the respondent and the appellant was given a specific instruction to take occupation by respondent's agent as the respondent feared that the property might be vandalized if it remained unoccupied after the tenants had vacated.

In the fourth ground the appellant alleged that the court *a quo* erred by failing to consider that the respondent cannot claim rentals in respect of the property she received almost the full purchase price without tendering the amount paid, a situation that would result in unjust enrichment.

The fifth ground pertained to the award of costs whereby the court *a quo* awarded costs on an attorney and client scale. The appellant alleged that there was no legal basis for such an award of costs against him

Upon hearing arguments before this court and also listening to the parties on those grounds of appeal, it was apparent that this was a matter that could have been resolved if the parties involved were serious about what they intended to do.

In our view, the appellant's grounds of appeal had no merit at all. For instance, in the first ground, the appellant alleged that there was no breach of agreement, therefore the court erred in finding that there was breach. Unfortunately, the record of proceedings as it is, showed that the appellant himself admitted to have been in breach in a number of paragraphs in his own evidence. He admitted to that breach in terms of not having paid the \$2 000 within the period stipulated in

the agreement of sale and also not having paid the \$2 500 in the installments that had been agreed to as an option. It was common cause that despite a letter of demand of 16 October 2012 the appellant did not pay the balance. It was clear that he was in breach. The question of him having tendered, and the respondent having refused that tender, was an aspect that the record of proceedings was not in support of. If anything at one point the appellant seemed to suggest that it was the respondent who was supposed to come after him for the balance, which is not in tandem with their agreement. The appellant adduced no evidence of the respondent's refusal of any tender. The evidence showed that there was no such tender at all.

Having admitted that he was in breach as noted at p 49 of the record, in particular paragraph 5 in his plea, the appellant effectively confirmed the breach. Such admissions were also made at pages 21 and 22 of the record wherein the appellant admitted that he still owed the respondent US\$2 500.00 and begged court to give him an opportunity to pay up. He in fact went on to say that he appreciated that he still owed the respondent the balance. It is clear that the first ground has no merit whatsoever.

On the second ground, we have a situation where the appellant alleged that the court erred by ordering the appellant to pay damages for loss of monthly rentals for 40 months at the rate of US\$350 in circumstances where the respondent was claiming damages at the rate of \$305 per month where there was no any evidence that there were tenants at the time the appellant took occupation and there was no any evidence substantiating how the Respondent arrived at the amount.

This ground, to say the least, is a figment of the appellant's creation. A creation in the sense that, the assertion that there was no evidence substantiating how the respondent arrived at the amount claimed is not true at all. Firstly, the respondent and her witnesses testified that rentals were charged at \$50.00 per room per month at this property which translated to \$350.00 per month for the seven rooms. This evidence was not challenged. Secondly, when the appellant himself took to the witness stand and testified, he did not counter that, instead he confirmed that the tenant he found still on the premises was indeed paying \$50.00 per room per month. He also confirmed that he continued receiving that sum for about a year and half from that tenant as that tenant had remained on the premises for about one and half years. Clearly therefore, for that time the appellant

was also receiving \$50.00 per room per month from that tenant which he did not pass onto the respondent but benefitted from it.

So really, it was a matter of all the witnesses including the appellant agreeing that the 7 roomed house at the end of the day would raise a sum of \$350.00 per month. That in our view was what the evidence showed. It is true that in her pleadings the respondent had initially asked for \$305.00 per month. It was our considered view that this was an error which was corrected by the evidence which showed that the manner in which the rentals were paid was per room and everyone was agreed that rentals were \$50.00 per room per month.

In our view this ground of appeal had no merit as well. It is our view that indeed the evidence can be used to correct any anomaly that may have been contained in the pleadings if that evidence as in this case is common cause and serves to resolve the real issue between the parties. In as far as the evidence confirmed what the appellant knew what the rentals were, there cannot be any prejudice to be suffered. See *Musakadza v Minister of Home Affairs & Another* 2000(1) ZLR 405 (H)

In the third ground of appeal, the appellant alleged that the court *a quo* erred by failing to consider that the appellant's occupation was lawful in that when the appellant took occupation he had paid almost the full purchase price. The tenants had vacated as they were given a notice to vacate by the respondent and the appellant was given a specific instruction to take occupation of the property by the Respondent's employee or agent, that is, the Respondent's caretaker as the Respondent feared that the property might be vandalized if it remained unoccupied after the tenants had vacated.

This ground again in our view was without merit. It may be pertinent to point out that the appellant himself admitted that when he took occupation, one of the tenants was still on the premises. So the question of the respondent's fears that if the property remained vacant it might be vandalized did not arise. The tenants themselves who left this property indicated that they left in the month of June 2012 and this was at the behest of the appellant who, apparently, after getting into the sale agreement with the respondent, started visiting the premises and informing the tenants that he had bought the property and so could they vacate. It was in those circumstances that the first tenant to depart gave the keys to the tenants who were remaining on the premises because he could not withstand the appellant's continued visitations and harassment urging them to vacate.

The second tenant testified to the same effect. He left as a result of the defendant's visitations asking or demanding that they vacate as he had purchased the property. Indeed, the person who was acting as caretaker, that is, the respondent's sister testified also on this aspect. She confirmed that indeed the tenants left because of the appellant's visitations and demands that they vacate as he had bought the property.

The evidence was clear and uncontroverted that all the tenants who vacated before the appellant took occupation did so at the behest of the appellant and not that the respondent had given them notice to vacate; they just could not withstand the appellant's continued harassment.

It is clear from the record of proceedings that the magistrate cannot be held to have erred in believing these witnesses as clearly the house was occupied as of June 2012 by tenants and by the end of June two of the tenants had vacated and they both said it was at the behest of the appellant. The appellant himself could not show any evidence that the respondent had indeed given notices to the tenants apart from his mere say so.

As regards the circumstances under which he took occupation and the time he took occupation, the appellant confirmed that one of the tenants was still there in the cottage. For about one and half years he was collecting rentals from this tenant despite the fact that he was not his tenant without passing the rentals to the respondent. Clearly in our view the appellant took occupation without the authority of the Respondent. He simply bulldozed his way into the premises.

The finding that the appellant took occupation without the authority of the Respondent was also supported by the letter from the Legal Resources Foundation of 16 October 2012, that has already been referred to, wherein upon being instructed by the respondent, Legal Resources Foundation wrote a letter to the appellant advising him that he had taken occupation without the respondent's consent and that he should pay the outstanding balance of the purchase price and also pay the rentals for the months he had been in occupation since he had evicted the respondent's tenants. He was to pay rentals in their stead. The appellant did not deny receiving that letter. He at the same time did not testify what he did in response to that letter implying that he probably ignored the letter as of no consequence since he was in occupation and whoever wanted to evict him had to take a further step other than this letter of demand. That letter in our view was clear as regards the circumstances the Respondent was alleging the Appellant had taken occupation and that there

was need for him to then pay rentals that were being paid by the tenants he had evicted. There was therefore no question of the respondent requesting the appellant to take occupation because the property might be vandalized. If the Appellant agreed that in terms of clause 8 of the agreement of sale he was to take occupation upon payment of the full purchase price, it meant that by taking occupation before payment of the full purchase price in the manner alleged, he was in breach of a term of the contract.

As regards the fourth ground of appeal, the appellant alleged that the court *a quo* erred by failing to consider that the respondent cannot claim rentals in respect of property she received almost the full purchase price without tendering the amount paid. That is a situation he alleged will result in unjust enrichment.

The legal basis for this ground of appeal was not easy to understand. It is trite law that the fact that a party has paid almost the entire purchase price would not entitle such a party to take occupation of a property contrary to the terms of the agreement. The agreement in question clearly stipulated when occupation would be taken. That was after payment of the full purchase price. The appellant took occupation before that payment.

Further, the appellant took occupation without the consent of the owner of the property and the owner thereafter asked him to pay rentals that were being paid by the tenants he had evicted. Therefore, there was no question of unjust enrichment. Indeed, upon quizzing counsel on this ground, counsel virtually conceded that there was no legal basis for this ground. He alluded to arguing on the basis purely of humanitarian ground. That is, in our view, not a basis to say that the court *a quo* erred in fact and in law because it did not consider the humanitarian basis. Clearly the respondent was entitled to receive rentals from that property and the Respondent had the right to demand rentals from anyone occupying her premises. In the circumstances, that ground also has no merit.

As regards the last ground which in on the scale of costs, the appellant's position was basically that there was no legal basis to award costs on an attorney and client scale against the appellant. After listening to the submissions, we were of the view that the court *a quo* did not err at all. Counsel for the parties did refer to appropriate legal principles on the exercise of the court's discretion in awarding costs. See *Mahembe v Matambo* 2003(1) ZLR 148(H).

It is true that costs on a higher scale are mostly given in deserving cases and usually sparingly so as not to discourage a party with genuine cause from pursuing their cause. Costs on a higher scale may be given in deserving cases where court deems that a party or a litigant was either abusing the court process or falls foul of a number of factors. These factors include that a party or litigant may have been acting in a dishonest manner or malicious conduct in that he pursued proceedings that were vexatious or frivolous. There is also the question as to whether in defending a matter, a defendant is bona fide in such a defense or one is merely seeking to buy time and abuse the court process.

In the circumstances of this case, from what we have alluded to pertaining to the grounds of appeal and the record of proceedings, it was clear that the appellant had no defense to the action brought against him in that he admitted not having paid the purchase price hence being in breach. The evidence was clear that he took occupation in circumstances where he had not been authorized by the owner of the premises. In spite of all that upon being asked to pay rentals, he virtually refused and instead remained in occupation. It was more of 'what can you do? I will remain in your property for free.' Before the court again he could not proffer any defense to his continued occupation in the circumstances in question and his failure to even pay the balance or any rentals. Indeed, as already alluded to above, his failure to pay the balance or rentals has persisted even to this date.

In short before the court *a quo*, he was still presenting a situation of intransigence that led to the court deciding on awarding costs on a higher scale. Indeed, court has discretion to award costs on a higher scale. Authorities are bound that the award of cost on a higher scale is within a court's discretion as long as there are grounds to do so.

In the circumstances in this case we have a litigant who had no defense whatsoever but exhibited intransigence and lack of desire to pay what was being asked not because he had any *bona fide* defense, but as a way of buying time whilst he continued enjoying free occupation of the respondent's property. It is our view that, in those circumstances it cannot be said that the court *a quo* erred in exercising its discretion in awarding costs on an attorney and client scale.

Based on these and also the legal arguments that have been submitted before us by both counsel, we are of the view that this appeal cannot succeed. The appeal be and is hereby dismissed with costs.

NDEWERE J: I concur.....

Zimbudzi & Associates, appellant's legal practitioners
Danziger & Partners, respondent's legal practitioners