DAMBUDZO MACHINGURA
a.k.a MUZENDA MACHINGURA
t/a PANASHE INVESTMENTS

Versus

NQABA SIBANDA (In his capacity
As Executive Dative of Estate Late
Nhlanhla Sibanda DRB 319/17)

And

REAL GATE PROPERTIES

And

ASSISTANT MASTER OF HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 20 JUNE & 13 JULY 2023

Civil Trial

Ms. *S. Mkwananzi* for the plaintiff
Mr. *W. Ncube* for the 1st & 2nd defendants
No appearance for the 3rd defendant

KABASA J: The plaintiff issued out summons against the defendants claiming the following relief:

"(a) An order declaring the plaintiff a statutory tenant and nullifying the notice of the termination of the lease agreement served by the 1st defendant through the 2nd defendant.
(b) Payment of the sum of US$14 000 or ZWL equivalent as at date of full and final payment being the amount paid to ZESA by the plaintiff clearing electricity bill which 1st defendant should have paid with interest at the prescribed rate of interest from 2014 to date of final settlement.
(c) Costs of suit against the 1st defendant.

Alternatively

(i) Payment of US$1 200 being the deposit plaintiff paid to the 1st defendant upon the beginning of the tenancy tenure as security fee.
(ii) An order interdicting 1st and 2nd defendants from ejecting plaintiff from the rented premises until payment of US$14 000 or ZWL equivalent as at the date

of full and final payment with interest at the prescribed rate of interest from the date of summons to the date of full and final settlement.

(iii) Costs of suit."

The claim, as elaborated in the declaration, is premised on the fact that the plaintiff entered into a lease agreement with one Nhlanhla Sibanda on 30 August 2014. The lease was to run for 12 months. Upon its expiry it was not terminated nor renewed and the plaintiff continued his tenancy on the same conditions. The plaintiff had paid a security deposit of US$1 200 and had also assumed responsibility for payment of a ZESA bill in the amount of US$14 000. The lessor was to pay back this amount. The plaintiff paid off the ZESA bill in 2019.

On 1 March 2016 second defendant came up with a lease agreement which was to run for a year. Upon its termination it was not renewed but in February 2018 the first defendant extended the lease agreement for a further 3 years. The plaintiff duly paid the agreed rentals. The rentals were reviewed in April 2019 and in 2020. On 12 June 2020 plaintiff was served with a notice of termination of the lease and given 3 months' notice to vacate. The US$1 200 and US$14 000 had however not been paid.

The first defendant refuted the claim, contending that the lease entered into on 30 August 2014 was renewed upon its expiration on the same terms and conditions. A new lease was subsequently entered into on 1 March 2016. No security deposit was paid and the plaintiff was not asked to pay a US$14 000 ZESA bill. The ZESA arrears were paid from the rental money. Even if plaintiff paid the bill, such claim has prescribed.

Following the death of Nhlanhla Sibanda the first defendant took over as the Executor of the Estate. The second defendant came into the picture during the late Nhlanhla's lifetime as the appointed estate agent responsible for managing the property. The second defendant entered into a new lease which was to run from 1 March 2016 to 28 February 2017 at a reduced rental of US$1 000. The plaintiff was to be responsible for the payment of all utility bills. In February 2018 the lease was extended for a further 3 years at a reduced rental of US$850. In June 2019 the rental was reviewed to RTGS4 305. The plaintiff accumulated $10 832.73 in unpaid utility bills. The notice of termination of the lease was informed by the need to wind up the estate and transfer the property to the beneficiaries.

The first defendant counter claimed for the eviction of the plaintiff and all those claiming occupation through him, for holding over damages payable at $4 305 from the date

of the order to date of vacation, payment of $10 832.73 and costs of suit at legal practitioner – client scale.

At the close of proceedings the parties held a pre-trial-conference and agreed on the issues to be referred for trial. These were;

1. Whether or not first defendant is entitled to an order for eviction against plaintiff and all those claiming occupation through him.

2. If first defendant is entitled to an order of eviction against plaintiff, whether plaintiff has a right to remain in occupation until he has been refunded the security deposit and paid the amount of US$14 000 representing monies paid by him to ZESA for electricity arrears.

3. Whether or not first defendant is entitled to holding over damages and if so in what amount.

4. Whether plaintiff paid a deposit of US$1 200 and if so in what currency should it be refunded to him.

5. Whether or not first defendant owes plaintiff the amount of US$14 000 or its ZWL equivalent.

6. Whether or not the claim for US$14 000 has prescribed.

7. Whether or not plaintiff owes first defendant the amount of US$10 823.73 and if so in what currency should it be paid out.

The trial was to commence on 19 January 2023. The parties, in acknowledgement of the real issues presented by the pleadings agreed to proceed by way of a stated case.

The issues were further truncated by the attitude taken by the first defendant. The first defendant appreciated that the costs to be incurred in prolonging the matter would be far more than what the claims were for. To that end first defendant abandoned the claim for $10 832.73, accepted liability for the refund of the security deposit of US$1 200 and accepted, without prejudice to pay the ZESA amount of US$14 000.

The plaintiff on his part agreed to vacate the premises upon payment of these two amounts. The outstanding issues were on the currency in which the 2 amounts were payable, the period for which interest on these amounts were payable and costs.

I decided not to dwell on the facts the parties agreed on and those in dispute largely because the issues for determination were narrowed making it odious to go into the lengthy submissions contained in what the parties came up with in the stated case.

I propose to deal with each of the 3 issues in turn:

1. **Whether the US$1 200 security deposit is refundable in US$ currency or ZWL and if it is ZWL currency, the applicable rate.**

The plaintiff's contention as captured in the heads of argument is that the security deposit does not fall into the category of financial or contractual obligation, nor can it be described as an asset or liability in terms of s22 of the Finance Act, No. 7 of 2019. Security deposit is kept in trust and payable to a lessee upon termination of the lease. The status of that security deposit was therefore not affected by the amendment to the Finance Act as the actual status and amount payable was to be determined upon termination of the lease.

The first defendant held a different view. Counsel for the first defendant contended that the ordinary grammatical wording of s22 (1)(d) of the Finance Act (No. 1) Act, 2019 as interpreted in *Zambezi Gas (Pvt) Ltd* v *NR Barber (Pvt) Ltd and Anor* SC-3-20 leaves no doubt that the liabilities of first defendant to plaintiff immediately before 22 February 2019 were valued and expressed in United States dollars. Such amounts are therefore payable in ZWL at the parity rate of 1:1.

I am persuaded by counsel for the defendant's argument. In the *Zambezi Gas case (supra)* MALABA CJ expressly and succinctly put it thus:

> "… the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act): Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollar) (SI 33/19) expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one-to-one rate."

The US$1 200 was paid in 2014 and was to be held in trust. It was, as at the date of payment, an asset to the plaintiff and a liability to the defendant.

Section 4(1)(d) of SI 33/19 incorporated into the Finance Act as s22(1)(d) provides that:

> "for accounting and other purposes (including the discharge of financial or contractual obligations, all assets and liabilities) that were, immediately before the first effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in s44 C (2) of the Principal Act) shall on the first effective date be deemed to be values in RTGS dollars at the rate of one-to-one to the United States dollar …"

The US$1 200 was valued and expressed in United States dollars before the effective date. It was therefore deemed to be valued in RTGS dollars at a rate of one-to-one to the United States dollar.

In essence what the defendant was holding in his account for accounting purposes was RTGS1 200 with effect from the promulgation of the regulations.

The value was assessed and expressed in US$. It was not a situation where such asset or liability was yet to be assessed by the application of some agreed formula. When it was to be paid did not affect the value given to it as before the effective date. The lessor was therefore holding US$1 200 which was deemed to be valued in RTGS dollars at a rate of one-to-one to the United States dollar.

> "What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets or liabilities referred to in s44 C (2) of the Reserve Bank of Zimbabwe Act [Chapter 22:15] ("the principal Act") (*Zambezi Gas Zimbabwe (Pvt) Ltd*).
> The US$1 200 was still so valued and expressed as it was before the effective date.

I found the following exposition by MALABA CJ to fit snugly into the circumstances of this case. The learned Chief Justice had this to say:-

> "Section 4(1)(d) of SI 33/19 provides that all assets and liabilities that were valued and expressed in United States dollars immediately before the effective date shall "on and after" the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar. The word used is "values" and not "valued". "Values" and "valued" are two different concepts. The former presents a notion of a set value which remains even where it is subjected to a certain conversion. The latter, on the other hand, suggests a value which can be changed according to the circumstances under which the value is being applied.

> The values referred to in s4 (1) (d) of SI 33/19 show that after a one-to-one conversion the RTGS dollar takes the value and character of the United States dollar."

It follows therefore that the US$1 200 paid by the plaintiff went through the conversion of one-to-one and the RTGS dollar took the value and character of the United States dollar. The defendant was therefore holding RTGS$1 200 and such did not change.

The first defendant, in the interest of curtailing a prolonged trial decided to accept that US$1 200 was paid as security deposit in 2014. It is that amount that first defendant has tendered to the plaintiff and the plaintiff is legally enjoined to accept the $1 200 whose value was determined at a rate of one-to-one.

I therefore determine the first issue in favour of the first defendant. The payment or tender of ZWL/RTGS$1 200 accords with the law and marks the discharge of the first defendant's liability to the plaintiff in so far as the refund of the security deposit is concerned.

KUDYA JA in *Ingalulu Investments (Pvt) Ltd* v *Mbayiwa and Ors* SC-42-22 made the point that a delict, unlike a financial or contractual obligation, cannot be categorized as an asset or liability until it is voluntarily accepted as such by the wrongdoer or until such acceptance is foisted upon the wrongdoer by a court of competent jurisdiction. … In accounting terms, an asset or a liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account."

In casu US$1200 was so recorded in either party's books of account and that did not change as such amount was already ascertainable and not subject to a court of competent jurisdiction's decision or assessment.

The US$14 000, by parity of reasoning, was in ZESA's books of account as an asset and in the defendant's books as a liability. The relationship between them was one of creditor and debtor. The debt was before the effective date and so it follows the US$14 000 was RTGS$14 000.

In light of the ratio *decidendi* in the *Zambezi Gas case (supra)* the claim seeking to have this amount paid in US$ or the equivalent at the interbank rate is not sustainable.

The liability was before the effective date, it matters not how far before 22nd February 2019 it was.

> "Immediately before the effective date refer to the state in which assets and liabilities, to which the provisions of s4 (1) (d) of SI 33/19 apply, should be in relation to the effective date, irrespective of how far back in time the asset or liability valued and expressed in United States dollars came into existence. The phrase "immediately before" means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars. The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter." (Zambezi Gas *supra*).

The mere fact that the defendant and plaintiff agreed that plaintiff pays such debt and be refunded by defendant did not change the complexion of the liability and the value thereof.

The plaintiff could not have paid that amount in any other currency but the currency that was applicable, introduced by s22 of the Finance Act, more so as the plaintiff averred that he paid the amount in 2019.

I therefore determine that the US$14 000 is to be paid at the rate of one-to-one as already tendered by the defendant.

2. **Interest**

It is important to note that the resolution of this matter to the point where the parties agreed to proceed by way of a stated case was due to the first defendant's decision to curtail a protracted trial and avoid attendant legal costs that would have translated to way more than the amounts the parties were haggling over.

The plaintiff was most unhelpful and appeared to be happy to prolong the matter as long as he continued to utilize the premises for which no rent was being paid. Whatever the reason for such non-payment, the fact is the plaintiff was operating from the business premises rent free.

The US$14 000 was therefore not an amount that was proved as due but was accepted by the first defendant on a without prejudice basis. A case for interest payable from 2014 was therefore not made. To allow such a claim would be tantamount to rewarding a party whose conduct was motivated by *mala fides*.

It is for this reason that I am persuaded to order interest payable from the date of this judgment.

3. Costs

Costs are in the discretion of the court. The general rule is that costs follow the cause.

Had plaintiff accepted the tender of costs the matter would probably not have found its way to the stage where it was set down for trial. The plaintiff's success, if it can be called that, was not as a result of adjudication but largely the first defendant's efforts to ensure the matter was finalized.

The plaintiff can therefore not be described as successful by any stretch of the imagination.

With the payment of what he had been offered but declined to accept, he has no leg to stand on in resisting eviction from the premises.

Counsel for the defendants drew the court's attention to the decision in *Ferreira* v *Levin NO and Others* 1996 (2) SA 984 (CC) where the court, *inter alia*, discussed the circumstances that may lead to the deprivation of costs to a successful party. The plaintiff's conduct, the conduct of the legal practitioner who appeared to have just assumed agency at the last minute to merely stand by papers filed by plaintiff's erstwhile legal practitioners whose renunciation of agency was largely due to a failure to get the plaintiff to appreciate the legal issues involved and the technical success achieved by the plaintiff, persuaded me not to award costs to the plaintiff.

Whilst the plaintiff's conduct left a lot to be desired I am loathe to mulct him with punitive costs. This is so because I got the impression that he genuinely believed that he ought to receive more than RTGS$1 200 and RTGS$14 000. I am therefore unable to say his conduct is deserving of censure. (*Mutunhu* v *Crest Poultry Group (Pvt) Ltd* HH-399-17, *Mahembe* v *Matambo* HB-322-02), *Dongo* v *Naik & 5 Ors* SC-52-20)

That said however this is a case which justifies an award of costs against the plaintiff, *albeit*, at the ordinary scale.

In the result I make the following order:

1. The first defendant shall pay US$1 200 and US$14 000 to the plaintiff at the parity rate of one-to-one with the ZWL$.

2. Interest on the amount of RTGS14 000 is payable at the prescribed rate from the date of judgment.

3. The plaintiff shall vacate stand number 30314 Entumbane Township, Bulawayo within 7 days of payment of the amounts stated in paragraph 1, failing which the Deputy Sheriff is authorised to eject the plaintiff and all those claiming occupation through him.

4. Plaintiff shall pay first defendant's costs at the ordinary scale.

Sansole & Senda, applicants' legal practitioners
Mathonsi Ncube Law Chambers, 1st and 2nd respondents' legal practitioners