

BUBBLE TECH (PVT) LTD
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 27 October 2022 & 10 January 2024

Civil Appeal

T Shadreck, for the appellant
C M Mushayi, for the respondent

WAMAMBO J: This is an appeal against the judgment of the Magistrate sitting at Harare Magistrates Court.

The parties entered into what is termed a BOT agreement, which is a Build, Operate and Transfer agreement. Essentially the agreement is encapsulated in a document at p 46 of the record.

For purposes of clarity, I will reproduce the agreement below:

“29 October 2007
S PARERENYATWA\Bubble Tech Pvt Ltd
107 Mbuya Nehanda
HARARE

Dear Sir

RE: PERMISSION TO CONSTRUCT A TWO ROOMED SHOP WITH TOILET AT JULIUS NYERERE PARKADE ON A BOT (BUILD OPERATE AND TRANSFER) ARRANGEMENT

Reference is made to recent negotiations involving you, the Town Clerk and my department regarding the above matter.

Please be advised that following some internal consultations and your request for permission to immediately move onto site and start construction work in view of the escalating building costs I have been authorized to grant you permission to start construction of the above structure as part of the agreed

BOT arrangement pending the submission of a report to the Commission subject to the following conditions:-

- 1.1 The BOT arrangement is for a five (5) year period commencing 1 November 2007 and ending on 31 October 2012 after which the ownership of the building shall be transferred to the City of Harare at no compensation to Bubble Tech.
- 1.2 The whole construction work is to be totally funded by you.
- 1.3 The construction work is to be undertaken by a Contractor approved by the City of Harare.
- 1.4 The construction work shall be commenced within fourteen (14) days effective from 1 November 2007 and completed within three (3) months failure, which you may apply for an extension.
- 1.5 The City Architech shall at any time he deems convenient have unhindered access to the construction site for the purposes of monitoring the progress and supervising construction work.
- 1.6 No activities on site shall be deemed to be a nuisance or an annoyance to occupiers of adjacent properties and any violations by you shall cause this authority to be terminated before the expiry date.
- 1.7 You must liaise with the Director of Health Services for purposes of the issuance of all relevant licences, permits etc pertinent to your operations.
- 1.8 Ground rent (i.e rent for land exclusive of improvements) and security deposit equivalent to two months rental calculated at open market rates and subject to quarterly reviews shall be payable by you over the five year BOT period effective from 1 February 2008 or the date of completion which ever is the earlier. In addition to the ground rent, you shall be required to pay VAT (Value Added Tax) and other charges such as Municipal rates, water electricity and operating licences.

NB: At the expiry of the Five year BOT period the improvements shall be transferred to the City of Harare and open market rent for both land and improvements shall be payable by you.
Kindly confirm your acceptance of the foregoing by signing together with two witnesses in the spaces provided below.

Yours faithfully

(signed)

Director of Urban Planning Services”

Before the Court, *a quo* the respondent was the plaintiff while appellant was the defendant. A trial ensued wherein both parties called one witness each and produced documents.

The Court *a quo* proceeded to render a judgment contained at p 6 to 8 of the record. The order granted is at p 5 of the record and it reads as follows:-

“IT IS ORDERED THAT

- a) The defendant and all those claiming occupation through him are hereby evicted from Shop No 5 Julius Nyerere Parkade, Corner Jason Moyo and Rezende Harare.
- b) There shall be no order as to costs.”

The appellant, unhappy about the outcome of the matter in the court *a quo* filed a notice of appeal with this court. Five grounds of appeal are raised and they read as follows:-

1. The learned Magistrate grossly erred and misdirected herself by basing her decision on the fact that appellant was not consistent with paying rentals yet this issue was not before her as it had not been pleaded by the respondent.
2. The learned Magistrate grossly erred and misdirected herself in finding that through its evidence respondent had laid down the foundation of the breach of contract, a finding which is contrary to respondent's pleading that appellant was in illegal occupation of respondent's property.
3. The learned Magistrate further erred and misdirected herself in ordering the eviction of the appellant notwithstanding that she admitted that at the time the matter was brought to trial appellant was no longer in arrears.
4. The court *a quo* erred and misdirected itself in not deciding the two *in limine* points which were placed before it *viz*, that the matter was *lis pendens* before the same court under case no 8189/19 and that respondent's cause of action had been overtaken by events in light of the payment rental arrears appellant had made.
5. The Court *a quo* erred in determining respondent's claim it ought not to have entertained from the onset in light of the *in limine* points which appellants raised."

I note that in some instances the same grounds are repeated and that some are interwoven I will however deal with each ground as appears from the notice of appeal and make observations and remarks as I consider necessary.

Ground one

Appellant's heads of argument are particularly long as regards ground one. My understanding of appellants argument is as follows:-

Respondent's case was never mounted on the basis that appellant was not consistent in paying rent. Appellant was thus never called upon to plead to such issue as a basis for the eviction. Respondent was of the view that the issue of rentals was pleaded and referred to p 22 and 24 of the record. Thus, the court *a quo* was correct when it found that appellant was inconsistent in paying rentals, so the argument went.

Page 22 of the record reflects the summons. The summons speaks to arrear rentals and eviction.

Page 24 of the record reflects plaintiff's particulars of claim (the respondent herein). In para 4 it is stated as follows.

4. After the expiry of the BOT the defendant remained in illegal occupation of the plaintiff's property and refused to vacate. The plaintiff was left with no option but to charge the defendant with costs of rentals charged on such business premise as holding over damages. To date the defendant accumulated arrears amounting to ZW\$50 520.10 and the monthly charge is currently ZW\$3680."

In this case the summons reflect on the face of it that it seeks an order for payment of arrear rentals and eviction, it is implicit that the payment of rentals was inconsistent.

Where the declaration goes further to allege in more detail how the arrear rentals came about, I do not understand why respondent claims the issue of arrear rentals was never an issue before the court. That the trial court proceeded and made a finding that appellant was paying rent inconsistently is supported by the evidence and documents produced before her I find in the circumstances that the ground one of appeal is without merit.

Ground two

“The trial court in its judgment at p 8 makes the following findings:-

By the time trial commenced the defendant had cleared his rental arrears. This however does not excuse the defendant from the breach of the existing agreement. Such a breach entitles the plaintiff to cancel the lease agreement and evict the defendant from the premises in question. From the evidence on record, the plaintiff managed to lay down the foundation of the breach of contract.”

Although respondent (as plaintiff) in the particulars of claim refers to illegal occupation, she goes further to refer to arrears rentals that were charged, after defendant therein had remained in illegal occupation of her property at the expiry of the BOT. The particulars of claim speak to arrear rentals and also the fact that the monthly charge was then ZW\$3680.00

That, to me says the rent was agreed between the parties as to how often it would be paid and in what quantum.

When arrear rentals accrued it follows that rentals were not being paid as agreed between the parties. When appellant concedes that there were arrear rentals but however they were paid just before the trial it supports the finding that the rent was being paid inconsistently. That the rent was being paid inconsistently also means that the one paying the rent breached the agreement.

I find that the second ground of appeal is also without merit.

Ground three

As mentioned before some of the grounds flow from others and same are indeed intricately interlocked.

My understanding of this ground is that when summons are issued on the basis that there is outstanding rent to be paid once that rent is paid before trial then an occupant can no longer be evicted.

Why would the rentals be paid by the time of trial? It goes without saying that there were arrear rentals which were hurriedly paid before trial. Should it then follow that a tenant should and can pay rentals inconsistently and then wait for trial and then update the rent payments?

The trial court recognized that there were no longer any arrear rentals and thus declined to make an order for payment of arrear rentals.

This is however not the end of the matter. For rent to become in arrears it means there were breaches of the rental contract agreed to between the parties.

I note here as a matter of importance that appellant agreed there were arrear rentals. The trial court also demonstrated the arrear as follows at p 8 of the record.

“Page 4 of the plaintiff’s bundle shows the defendant’s rentals statement. On the first of January 2021 the defendant owed \$148136 ZWL. Three months later he made a payment to clear part of the arrear rentals. Rentals were not paid for another 8 months and in December 2021 he made a payment of \$ZWL 34000 leaving an outstanding balance of \$ZWL 136 579 which later accrued to \$ZWL 187 933.”

At p 17 of the record appellant’s witness Sam Parerenyatwa gave the following evidence.

“Q. Plaintiff says you were paying holding over damages and not rent?
A. That is false. I am paying rent to plaintiff.
Q. If you are paying rent to what does that mean?
A. I am plaintiff’s tenant.
Q. How much have you been paying?
A. 1700.”

Appellant through its witness conceded to being respondent’s tenant and thus subject to paying rent.

It is also common cause that there were arrear rentals which were paid at the eleventh hour.

At p 10 of the record it is reflected as follows:-

“Defendant

We were not served with the notice of withdrawal for that case. Manner in which summon is couched shows reason for eviction is because defendant is in arrear rental. The plaintiff is claiming \$30 000 but what is being owed is ZWL\$ 25 699.”

Appellant clearly told the court *a quo* just before the commencement of the trial that it was their understanding that the reason that the eviction was being sought was because there were in arrears on rent payments. This clear position is the opposite of what appellant submitted in the course of the appeal hearing before us.

The trial court’s finding that clearing of arear rentals does not excuse appellant from a breach of the existing agreement was correct.

In *Supline Investment P/L v Forestry Company of Zimbabwe* HH 76/07 MAKARAU JP (as she then was) said at p 3.

“A tenant has an undisputed obligation to pay rentals for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlords property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This the tenant must pay to avoid being ejected on the basis of non payment of rentals even if its challenge to what constitutes fair rentals is subsequently validated.”

In the circumstances as expounded above I find that the third ground of appeal is unmeritorious.

Ground four

It raises the issue of the two points *in limine* raised before the court *a quo*. I note here that at p 9 of the record defendant therein placed it before the trial court that case 8189/19 was withdrawn by defendant. The typed record at p 9 has the parties cited erroneously. The appellant herein is cited wrongly as the plaintiff and respondent herein is erroneously cited as the defendant I take it from a wholesome reading of the proceedings that respondent filed case 8189/19 with the same cause of action as this matter.

Appellant avers that the trial court did not decide on the two points *in limine* raised before it while respondent avers to the contrary. At p 10 of the record is a paragraph wherein the trial court made findings that the application by defendant was unfounded and also pronounced a dismissal of the application.

I am alive to the fact that the two points raised relate to arrear rentals having been paid and that the same cause of action as this case was still pending.

The pronouncement by the trial court of the dismissal of the application may not have been as articulate but it was pronounced subsequent to the points *in limine* being raised and just before plaintiff's witness was called to the stand.

I have already found in any case that the payment of arrear rentals does not extinguish an application for eviction. That the trial court proceeded to trial I surmise means that the issue of payment of rentals was no bar to the application before her proceeding.

The respondent placed it before the trial court that case no 8189/19 had been withdrawn. The trial court rendered a ruling that appellant's applicant was unfounded. Although it could have helped matters for the notice of withdrawal to be produced I see no reason why an officer of court

would make such a pronouncement to a court which could easily access the record unless it were true.

Equally, appellant could request for clarity on that issue.

In any case I find that a plea of *lis pendens* does not completely bar a litigant from bringing proceedings before a court.

In *Supline Investments P/L v Forestry Company of Zimbabwe* (supra) at p 4 MAKARAU JP (as she then was) said

“Mr Zviuya attempted (and valiantly so in my view) to prevent the applicant from relying on the clear and admitted breach of the lease agreement by the respondent by raising the issues of *lis alibi pendens* and waiver on the part of the applicant.”

It is trite that the plea of *lis alibi pendens* is not a complete bar to the bringing of proceedings in this court. It is merely a plea to the court for the court to stay proceedings before it to allow the other proceedings to be completed.”

“As is made clear in *Mhungu v Mtindi* 1986(2) ZLR 171 (S) where a plea of *lis alibi pendens* is raised the court has a discretion as to whether or not it should stay proceedings. See too *Williams v Shub* 1976(4) SA 567 (C) per SMITH J in *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000(2) ZLR 84(HC).

For those seeking the jurisprudential basis for holding that a plea of *lis alibi pendens* is in the discretion of the court reference may be made to the remarks of GILLESPIE J in *Zikiti v United Bottlers* 1998(1) ZLR 389(H).”

The trial court in its discretion chose not to stay the proceedings.

I find that the trial court decided what are referred to as points *in limine*. I note that *lis alibi pendens* is actually a special plea.

I note that the manner in which appellant herein introduced the plea of *lis alibi pendens* was rather terse. In any case however I find that the trial court considered the plea as the record reflects.

I find that the fifth ground of appeal flows directly from the fourth ground.

In the light of the findings I have made that the trial court decided on the points *in limine* the fifth ground of appeal has no leg to stand on and is equally unmeritorious.

In light of all the five grounds of appeal raised having no merit, the appeal stands to be dismissed.

To that end it is ordered as follows:-

The appeal be and is hereby dismissed with costs.

MUCHAWA J: AGREES

J Mambara & Partners, appellant's legal practitioners
Gambe Law Group, respondent's legal practitioners