TSITSI MANOMANO
versus
MICRO-TEACHING COMPUTER SYSTEMS (PVT) LTD
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 28 September 2021 & 19 January 2022

Civil Appeal

E Donzvombeva, for the appellant
S Kampira, for the 1st respondent

TSANGA J: This is an appeal against eviction whereby the Magistrates' Court ordered that the appellant (as the defendant in the court below) and all those claiming occupation through her be evicted from stand 40260 Belvedere, Harare. Costs were also granted against the appellant on an ordinary scale.

THE BACKGROUND

The first respondent, as the plaintiff in the court below issued summons against the appellant for eviction from stand 40260 Belvedere, Harare. The first respondent had a valid lease with the City of Harare, the second respondent herein, and sought eviction in order to effect certain improvements to the leased premises as required by the City of Harare. The appellant refused to vacate on the basis that she had been allocated that same house she was occupying by the same City of Harare. She said she had been in occupation for the last 10 years. She said deductions were being made from her salary and she had not received any communication from the City of Harare

to vacate. Moreover, the gist of her argument was that the first respondent's lease was one of those that had been duly terminated by a council resolution and that the resolution remained extant.

The City of Harare was successfully joined to the matter and their position was that the premises which were initially leased to the appellant had been converted to commercial premises. They said the appellant was aware that the premises had been commercialized but has persisted in staying in the property despite this.

The court below found common cause facts as being that the appellant had been allocated the premises in 2009 and had been paying rentals. The court found it undisputed that the first respondent has a lease agreement in respect of same property and that a clause in the lease indeed said the first respondent should have commenced building within twelve months of obtaining lease. Also agreed was that the City Council passed a resolution for termination of leases which included first respondent's lease for noncompliance with this clause of lease. The Finance Director tasked with terminating lease then wrote to the first respondent extending the compliance time.

For the court below the issues that fell for determination were therefore whether the first respondent had a valid lease with the Council and secondly whether or not the appellant (as the first defendant then) should be evicted from the premises. The court below reasoned that since the lease was not terminated by the Finance Director as per resolution and had in fact been extended one could not say that the first respondent was not in possession. The court further ruled that the appellant's relief lay with the Administrative Court in terms of the Administrative Justice Act since the second respondent is an administrative authority. Furthermore, the court's finding was that the City of Harare, having since declared the property as commercialized, it was no longer suitable for occupation by the appellant herein. As the holder of a valid lease agreement the court found that the plaintiff i.e. the first respondent herein had a right to evict the appellant as her allocation letter was no longer valid. The judgment was thereof granted in favour of the first respondent as plaintiff in the court below.

THE GROUNDS OF APPEAL

The grounds of appeal are as follows:

1. That the court *a quo* misdirected itself by coming to the conclusion that there was a valid lease agreement between the first and the second respondents in circumstances where such lease agreement had been terminated through a council resolution. The fact that the Acting Finance Director had single handedly extended the lease agreement (which had hitherto been terminated) in the absence of a council resolution authorizing him to do so did not validate the agreement.
2. The court misdirected itself by ordering the eviction of the appellant from stand number 40260 Harare when there was no legal or factual basis upon which the first respondent could evict her.
3. The court misdirected itself by making a finding that the appellant's "allocation letter" was no longer valid when there was an extant lease agreement between the appellant and the second respondent as the employee and employer respectively.

   The order sought is that the appeal succeeds with costs and that the order of the court *a quo* be set aside and substituted by the following:

(a) The plaintiff's claim being without merit be and is hereby dismissed with costs

THE SUBMISSIONS BY THE PARTIES

Regarding the first ground of appeal the appellant submitted that the resolution did not lose effect just because it was not acted on. It was said to have remained extant unless lawfully reversed or rescinded. The cases of *MWI Zimbabwe (PVT) Ltd* v *Ruwa Town Council* HH 237-11 and *James Mushore* v *Council Christopher Mbanga N.O & Ors* HH 381-16 were cited in support of this point. Moreover, it was argued that s 84-90 of Urban Council's Act provides for procedure for coming into force of resolution and how it may be altered, suspended, reversed or rescinded. The failure to follow procedure was said to have rendered the agreement illegal in terms of the extension granted by the Finance Director as the latter had no power to act contrary to the Council resolution. The case cited in this regard was that *City of Gweru* v *Kombayi* 1991(01) ZLR 333 (S).

The second ground was said to be intimately linked to the first. As regards the third ground of appeal, the appellant argued that there was no evidence that the allocation letter to the appellant was cancelled. Moreover, the witness called by the City Council in the court below was said not to have been even aware that deductions on appellant's salary were still being made. Also, it was argued on behalf of the appellant that there could be no basis for finding that the lease was no longer valid when no evidence was presented before the court that the lease was indeed terminated. In other words, the argument with respect to the third ground was that there was nothing at all to suggest that the appellant's lease was terminated.

THE RESPONDENT'S SUBMISSIONS

The respondent argued that the agreement between it and the City of Harare was reduced to writing and that in terms of that agreement set procedures for termination had to be followed otherwise there would be no effective termination. *Minister of Public Housing & National Housing* v *ZESCO P/L* 1989 (2) ZLR 311 at 316. Since the procedures for terminating were not followed the respondent therefore argued that the magistrate was correct in concluding that there had been no termination. Furthermore, in terms of their agreement, the contract was for a period of five years only terminating in July 2021. As such the respondent also argued that it was the period for construction that was extended but not the lease as the lease was still valid until 2021. Moreover, the first respondent argued that the land use had long since changed and that when the appellant was allocated the land in 2009 this was an employee whereas the City Council had entered into a different contract in 2016.

ANALYSIS

As regards the first ground of appeal that the court *a quo* misdirected itself by coming to the conclusion that there was a valid lease agreement between the first and second respondents in circumstances where such lease agreement had been terminated through a council resolution, what

is critical is that there was a written lease agreement between the first and second respondents. The resolution adopted by the Council provided the framework of how the City Council had resolved to act and a paper trail of what was agreed upon. However as stated in *First Mutual Investment (Private) Limited* v *Roussaland Enterprises (Private) Limited* t/a *Third World Bazzar* HH 301-17:

> "The lessor-lessee agreement is either written or verbal. Where it is written, its clauses spell out the rights and obligations of the parties and all matters which are ancillary to the contract."

Where there is a written lease agreement as in this case, the law governing eviction and all due process would therefore still have had to be followed in order to give proper effect to the Council resolution. There was therefore no error on the lower court's part in holding that the resolution alone did not terminate the lease. In other words, the fact that the Finance Director communicated something contrary to the resolution is itself not the point. The point is that the processes and procedures for terminating the lease as per the written contract would need to have been followed to give effect to the resolution as the resolution itself did not terminate the agreement but simply provided the framework of what was agreed upon in terms of action. It did not do away with the need to follow due process and could not trump whatever procedures for termination that were stipulated in the written lease agreement. There was therefore no error on the part of the magistrate in finding the lease agreement remained valid. The first ground of appeal therefore fails.

The appellant's major point is that the second ground is intricately linked to the first in the sense that with the first respondent's lease having been terminated by a resolution, there was no basis upon which it could evict the appellant. The effect of the resolution on the termination of the lease has already been addressed. The important point is that there was a valid lease between the respondents which was not terminated by the resolution as nothing was done to follow the written agreement between the parties. Furthermore, it is important to emphasise that at no point does the appellant suggest that there was never a lease between the respondents. This is important as the same property could not have been leased to two different parties at the same time. It is not disputed that first respondent entered into a written lease agreement from 2016. Page 146 of the record bears evidence that as way back as 20 April 2019 appellant had been given the statutory 3 months' notice to vacate precisely because the first respondent was the new occupant of those premises and was

behind schedule in commencing construction. The appellant argues that the letter was invalid because the first respondent was not the lessor and that it would have been different if it had come from the lessor and not the third party. She has not disputed that the premises were as a matter of fact commercialised. To the extent that the first respondent had the right to enjoy the benefit of the property it was leasing under a lease which was valid, the eviction of the appellant was proper. The lower court therefore did not err when it pointed the appellant to an administrative court recourse for any grievances regarding the continued deductions to her salary.

The third ground of appeal is that the court misdirected itself by making a finding that the appellant's allocation letter was no longer valid when there was an extant lease agreement between the appellant and the second respondent as the employee and employer respectively. The appellant has simply pointed to the fact that deductions are still being made for rentals but there was no evidence of an ongoing lease agreement with the City of Harare. The fact that the appellant has insisted on staying and that deductions are still being made from her salary is not the point. If indeed the premises had been wrongly let to the first respondent, there is no evidence in the record that the appellant raised any anomaly at the time.

The appeal lacks merit and is hereby dismissed with costs.

MAXWELL J…….Agrees

Makwanya Legal Practice, appellant's legal practitioners
Sibonile Kampira Legal Practitioners, respondent's legal practitioners