

MIRIAM PAMHENE  
versus  
RILPRIDE INVESTMENTS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE  
TSANGA & MAXWELL JJ  
12 OCTOBER 2021 & 19 January 2022

### **Civil Appeal**

*S Kuchena* for the Appellant  
*CT Tinarwo* for the Respondent

TSANGA J: The respondent (as plaintiff) issued summons in the court below claiming the ejectment of the appellant (as defendant) and all those claiming occupation through her from No.1 Winston House 109 Leopold Takawira Street Harare. Holding over damages were also sought at the rate of ZW\$2 500.00 per month from the date of summons to the date of ejectment as well as costs of suit. Having heard the parties in a trial, the court *a quo* granted the order.

### **THE BACKGROUND FACTS**

The parties at one time occupied the described premises along with other sub-tenants, at a time when the main tenancy belonged to *Fortulink Private Limited*, a company which had since been evicted from the premises by the owner. It was not in dispute that on the 10<sup>th</sup> of July 2019, it was the respondent who had subsequently entered into a new lease for the whole shop.

The appellant argued in the court below that she had assisted the respondent in obtaining the lease for the whole shop and hence was also a lessee. She had also contributed money to clear a debt of a former tenant. Furthermore, she submitted that the respondent had signed the lease on behalf of all remaining tenants and that she, the appellant, was paying her

rent through the respondent. The appellant had also stated that she had an audio compact disk of a conversation with the respondent. However, the magistrate in her judgment stated that the transcription had not been admitted as evidence due to the fact that it had been disowned by the office from which it originated.

In its reasons for granting the eviction, the court below highlighted that it was clear from the agreement that the appellant (defendant) was not a lessee to the premises. Clause 10 of the agreement was also said to be clear that the respondent was not to sublet the premises. The court further emphasised the doctrine of privity of contract in that remedies are enforced only by or against parties to a contract and not third parties since contracts create personal rights. As such, the court found that the appellant could not rely on a lease agreement to which she was not a party. Her contribution of money which culminated in the respondent being awarded the lease was said not to be a basis for refusing to leave the premises. The court further emphasised that she could have instituted a counter claim for monies she advanced for the purpose of obtaining the lease.

On holding over damages the court found that the appellant had merely given bare denials to the allegation that she was paying money to the respondent for rent. The court therefore found that she was liable to pay holding over damages. In the final analysis, the court's findings were that the plaintiff (respondent) had the right to evict the defendant (appellant) on the strength of the lease agreement between it and the lessor as well as the fact that the plaintiff was entitled to holding over damages. The court accordingly granted an order of ejectment from No. 1 Winston House 109 Leopold Takawira Street, Harare, and payment of holding over damages at the rate of ZWS 2500.00 per month from the date of summons to the date of vacation. Dissatisfied with the judgment the appellant appealed on the following grounds:

### **GROUND OF APPEAL**

1. The magistrate erred and misdirected herself both at law and in fact in holding that the plaintiff had powers to evict the defendant from these premises
2. The court erred in holding that the audio compact disk was disowned by the office from which it originated contrary the evidence on record of the person who did the transcription who testified to the effect that she had authority to transcribe the contents of the audio compact disk.

3. The court erred and misdirected itself by failing to note that when the plaintiff entered in to a lease agreement in relation to the whole shop with the owner of the premises leaving the defendant in occupation, the defendant became a statutory tenant, and it is only the owner of the premises who was supposed to give the plaintiff vacant possession, who could in turn evict the defendant.
4. The court further erred in failing to note that the lease agreement entered into between the plaintiff and the owner of the plaintiff only gives rise to personal rights which are not enforceable against the whole world at large.
5. The court further erred at both law and in fact in holding that the plaintiff had a duty to pay holding over damages to the defendant arising out of an agreement of lease to which she was not a part.

The second ground of appeal on the compact disk was however abandoned at the hearing leaving four grounds of appeal. The appellant seeks that the appeal succeeds and that the judgment of the court *a quo* be substituted with an order that the plaintiff's claim be dismissed with costs on a party and party scale. Costs of suit for the appeal are sought on an attorney client scale.

### **THE SUBMISSIONS BY THE PARTIES**

The appellant argued that she was/is a lawful tenant by virtue of lessor/lessee relationship with the owner of the premises, which relationship dated back to 2014 whereas the respondent became a co-tenant in 2016. She also argued that at the time of the court's ruling the respondent was no longer even a tenant and did not have any rights to evict the appellant, least of all without the involvement of the owner of the property. Appellant premised this argument on the fact that the respondent's lease presented to the court was from the 1<sup>st</sup> of July 2019 and expired on the 30<sup>th</sup> of June 2020 and was not renewable. The essence of the argument was therefore that the court below should not have dealt with an expired lease as there was no lease to talk about. As such appellant's eviction was said to have been both factually wrong and not sound at law. She also insisted that the owner of the property had no qualms with her stay and that only the owner could evict her.

As regards holding over damages the appellant's argument is that no basis was laid for the demand as the appellant has never had any obligation to pay rent to the respondent who is in fact no longer a tenant. It was on these grounds that the appellant argued that there was a basis for interfering with the judgment of the court *a quo*.

### **Respondent's Submissions**

Respondent pointed to the inconsistencies in the appellant's argument in that in one vein in the trial in the court below she was part of the lease and yet in another vein on appeal she distanced herself from the lease. The court a quo was therefore said not to have misdirected itself in any way warranting the interference of this appeal court against the backdrop of the appellant's own inconsistencies. In any event it was also mainly argued that there was nothing that was outrageous in the court's findings of fact as to warrant interference by a higher court. See *Reserve Bank of Zimbabwe v Granger & Anor* SC34/01; *Hama v National Railway of Zimbabwe* 1996 (1) ZLR 664 at p 670.

The respondent argued that it was the only one paying rentals to the owner of the property and that the appellant had failed to put any evidence of also doing so in the court below. Respondent therefore insisted on its right to evict the appellant on the basis of its lease agreement with the owner of the premises. The appeal was argued to be motivated by the desire to buy time and that it would infringe justice for the appellant to continue occupying property to which she is not part of the lease agreement whilst paying nothing for those premises. To the extent that the appellant was once a subtenant of *Fortulink Private Limited* that had since left the premises, the respondent drew on the case of *Omarshah v Karasa* 1996(1) ZL: R 212 to argue that a sub-tenant's rights are in any event no greater than those of a lessee under the lease and that the appellant does not enjoy protection of a statutory tenancy where a lessee has surrendered right of occupation. The case of *Zuva Petroleum Limited v Chirenje* HH 188/16 was also cited in this regard. It was also argued that the appellant could not be a statutory tenant as she had no lease agreement and was not paying rentals. The principles of statutory tenancy were therefore said not to apply herein.

## **ANALYSIS**

As regards the first ground of appeal that the magistrate erred and misdirected herself both at law and in fact in holding that the plaintiff had powers to evict the defendant from these premises, it is not in dispute that the respondent was the one who had a lease agreement with the owner of the premises. The appellant did not provide an iota of evidence in the court below that she had any landlord tenant relationship with the owner of the premises whatsoever. The appellant was clearly not part of the lease that the respondent subsequently entered into with the owner of the premises and neither had she been the main lessee prior to that having been a

sub tenant of *Fortulink*. Much of the appellant's arguments in the heads of argument indeed sought to introduce new factual issues which are not within the four corners of the judgment appealed against. The magistrate's decision for instance is very clear that the appellant's argument was that she was part of the lease, yet the arguments put forward by the appellant on appeal are entirely different and distance appellant from the lease. Furthermore, appellant's argument as to whether the lease between the respondent and the owner of the premises expired and was never renewed is not for the appellant to say as she was not party to the agreement. It was indeed never an issue in the court below and cannot be made an issue by the appellant on appeal. In so far as the respondent was the one with a lease agreement it was within its power to seek the eviction of the appellant. In any event as respondent's lawyer correctly pointed out, when the summons were issued there was an extant lease agreement with the owner of the premises. The magistrate did not err when she made a finding that the respondent had a right to evict the appellant. The ground of appeal clearly lacks merit and is dismissed.

As stated, the second ground of appeal was abandoned at the hearing. As regards the third ground of appeal that the defendant became a statutory tenant, this ground of appeal cannot stand as there was never a lease agreement between the appellant and the owner of the shop whose lapse would have given rise to statutory tenancy upon expiry. There was no evidence that was produced in the court below showing any relationship with the owner whatsoever. The only lease agreement that was placed before the court was between the respondent and the owner of the premises. There was accordingly no misdirecting on the part of the court in failing to find that the appellant was a statutory tenant.

The fourth ground of appeal is that the court further erred in failing to note that the lease agreement entered into between the plaintiff and the owner only gives rise to personal rights which are not enforceable against the whole world at large. Again this ground makes little sense in that the appellant fails to articulate the basis of her refusal to leave given that indeed the rights to the lease to the shop are between the respondent and the owner of the shop- a lease agreement to which she is not a party. She herself clearly has no lease, oral or otherwise. This is clearly a case where the first, third and fourth grounds of appeal have been brought with no *bona fide* intention of testing the correctness of the decision of the lower court, but are indeed motivated by a desire to buy time and harass the respondent by remaining on the premises.

However, the fifth ground of appeal that the court further erred at both law and in fact in holding that the plaintiff had a duty to pay holding over damages to the defendant arising out of agreement of lease to which she was not a party, has some merit. In ordering the payment of holding over damages the magistrate proceeded on the basis that the appellant had merely issued a bare denial to the assertion that she had been paying rentals to the respondent. Materially, the lease itself forbade any subletting. The lower court could therefore not have found that there was a duty to pay holding over damages on the basis that the appellant had been paying rentals to the respondent as that would have been contrary to the lease upon which the entire judgment drew. In any event, the appellant has a point that the holding over damages were themselves not proven.

As a result the appeal partially succeeds with each party paying their own costs of appeal. The order of the court below is altered to read:

Judgment is hereby granted in favour of the plaintiff as follows:

- a) The 1<sup>st</sup> Defendant and all those claiming occupation through her are ejected from No.1 Winston House, 109 Leopold Takawira Street, Harare
- b) Costs of suit are granted on an ordinary scale.

MAXWELL J.....Agrees.

*Chinyama & Associates, Appellant's Legal Practitioners*  
*Zimudzi & Associates, Respondent's Legal Practitioners.*