

MANATSA NCUBE  
(In His Capacity as the Founder and Trustee of  
NATSA FAMILY TRUST)  
versus  
NICOLA KRIENKE

HIGH COURT OF ZIMBABWE  
WAMAMBO & MUCHAWA JJ  
HARARE, 9 June and 7 July 2022

### **Civil Appeal**

Mr *A Masango*. for the appellant  
Mr *J Dondo*, for the respondent

**MUCHAWA J:** This is an appeal against a decision rendered by the Magistrates' Court (the court *a quo*) in which an action instituted by the appellant was dismissed. The appellant had sought the following relief;

1. Payment of US\$1 500.00 payable at the prevailing foreign exchange auction rate on the date of payment being arrear rentals.
2. Holding over damages in the sum of US\$250.00 per month, payable at the prevailing foreign exchange auction rate on the date of payment from April 2021 to date of vacation.
3. Interest at 5% per annum from October 2020 until date of payment.
4. Ejectment of defendant and all those claiming occupation through her.
5. Costs of suit on a legal practitioner client scale.

The background to this matter is that the appellant acting on behalf of the Natsa Family Trust bought a property known as an undivided 4.81 per cent share being stand number 13 in a certain piece of land situate in the District of Salisbury Township measuring 1478 square metres commonly known as Flat No. 13 Gainsbrough, Corner Leopold Takawira and Chinamano, Harare, from one Edward Mashiringwana. This was on 6 June 2020. The property was then transferred into the Natsa Family Trust under Deed of Transfer 4140/2020 on 22 October 2020. The

respondent was given notice to vacate by 30 October 2020 but she refused and remained in occupation and did not pay rentals.

The joint pre-trial conference minute reflects the issues referred to trial as follows;

1. Whether or not plaintiff is entitled to claim arrear rentals.
2. Whether or not plaintiff is at law entitled to claim arrear rentals from defendant in the sum of US\$1 500.00 and holding over damages in the amount claimed
3. Whether or not defendant and all those claiming occupation through her should be ejected from the premises known as flat No. 13 Gainsbrough Corner Leopold Takawira and Chinamano, Harare held under Deed of Transfer 4140/20 before the determination of the High Court proceedings instituted by the Plaintiff under case number HC 7263/20 wherein plaintiff is seeking rei vindication of the same property.
4. Whether or not the plaintiff 's entitled to claim arrear rentals and holding over damages before the finalization of proceedings pending in the High Court under cases number HC 7466/20

The action was defended. The court *a quo* dismissed the claim with costs on an ordinary scale.

Disgruntled, the appellant has lodged the instant appeal on the following grounds;

1. The court *a quo* grossly erred in finding that appellant was to pursue the claim for ejectment in HC 7263/20 yet the claim therein was based on a different cause of action and had already been completed and could not stay the ejectment claim filed by appellant.
2. The court *a quo* grossly erred in holding that appellant was not entitled to holding over damages and arrear rentals yet respondent was wrongfully and in unlawful occupation of the premises and was liable to pay rentals and holding over damages.
3. The court *a quo* erred in making a finding of fact which is so outrageous that appellant had failed to prove his claim for holding over damages and arrear rentals yet respondent did not dispute the quantum both in her pleadings and during trial.
4. The court *a quo* failed to exercising (sic) its discretion judicially by awarding costs against appellant when it was common cause that appellant's action in seeking ejectment of respondent did not warrant an award f (sic) costs.

It is prayed that the appeal succeeds with costs on a legal practitioner scale and that the order of the court *a quo* be set aside and substituted with what had been originally prayed for in the summons as set out above.

We heard the matter and reserved our judgment. This is it and we deal with each ground of appeal seriatim.

**Ground 1 of appeal: Whether the claim for ejectment in HC 7263/20 was based on a different cause of action and had already been completed and could not stay the ejectment claim filed by the appellant**

Mr *Masango* submitted that there was a different cause of action in the High Court under HC 7263/20 which was an application based on the *rei vindicatio* principle due to the failure by one Edward Mashiringwani to give vacant possession of the property to the appellant Trust whilst the proceedings in the Magistrates' Court were based on the appellant's delictual claim for patrimonial loss caused by the unlawful occupation of the property.

Secondly, it was submitted that, in fact, case HC 7263/20 was already concluded in favour of the appellant. The court was referred to p 63 of the record in para 32, being the plaintiff's (now appellant's) closing submissions where this point was made.

The last point made under this ground, is that if indeed the objection of *lis pendens* had been properly made, it should have resulted in simply staying the proceedings in the court *a quo* and not a dismissal of same.

An inconsistency in the reasoning of the court *a quo* was pointed to in that on the one hand it observed that the proceedings before the High Court had not been finalized whilst on the other hand noting that the order granted in favour of the appellant was then the subject of an appeal under case SC 351/21. See p 7 of record.

Mr *Dondo* submitted that ground 1 of appeal is misleading as there was no evidence before the court *a quo* that case HC 7466/20 had been completed. In any event, as there is an appeal pending under SC 351/21 against the order in HC 7263/20 which is still to be determined, it was argued that the matter is still pending. The appellant is said to have only raised the issue of the conclusion of the matter HC 7263/20 in its closing submissions and not before that.

It was further argued that the *actio rei vindicatio* sought before the High Court was similar to the eviction of the person in occupation. By issuing out summons on 29 March 2021 in the court

*a quo* whilst the appellant had already filed an application for *rei vindication* before the High Court, the appellant is alleged to have been abusing court process and the dismissal is said to have been warranted.

What emerges from the respondent's plea before the court *a quo* is that she raised that two matters were pending before the High Court. One was HC 7466/20 in which the appellant's title to the property was alleged to be defective as it had contracted with an alleged mentally incapacitated seller who was incapable of entering into a valid contract. The second was in relation to the matter under HC 7263/20. In the closing submissions the appellant pointed only to HC 7263/20 having been concluded.

A perusal of the judgment by the court *a quo* shows that it mixed up the import of the two matters before the High Court. On p 7 of the record, the court *a quo* noted that the plaintiff (appellant) had instituted legal proceedings under HC 7466/20 seeking *rei vindicatio* of the same property. It was in fact in HC 7263/20 that the appellant sought *rei vindicatio*. The cancellation of the deed of transfer was pursued in favour of the seller in case HC 7466/20. The appeal under SC 351/21 was lodged against the order in HC 7263/20 and not against HC 7466/20. Further the court *a quo* wrongly observed that the defendant was not a party to case HC 7263/20. She appears therein as the second respondent. It is in case HC 7466/20 that she is not a party.

The mix up aside, was it competent for the court *a quo* to have dismissed the matter solely on the basis of the pending cases before the High Court? It cannot be true that the respondent did not raise the plea of *lis pendens* when in the plea on p 38 of record, para 2, the respondent pleaded as follows;

"The defendant accordingly pleads that plaintiff's title to the property is defective and nothing can flow from a contract which is void *ab ignition* (sic) an issue which the plaintiff is aware has to be determined by the High Court under proceedings in case number HC 7466/20 which proceedings are still pending before the High Court."

On p 39 para 4, the respondent's plea further pointed out that proceedings under HC 7263 were still to be determined.

The court *a quo* correctly noted that the claim for arrear rentals and holding over damages was not before the High Court but that the claim for ejectment was similar to that in the *rei vindicatio* application before the High Court. The court concluded on this as follows;

“It has generally been stated that there should be finality to litigation. Once a suit has commenced before a competent court, it should be brought to conclusion and not be replicated. The court does wonder why the plaintiff brought the claim before this court. It is best that the plaintiff pursues its claim at the High Court relating to the eviction of the defendant from the premises.”

It is misleading to say that the matter was then dismissed on the basis of the pending matters. The court *a quo* proceeded to then consider the two claims of arrear rentals and holding over damages and it concluded that the appellant had failed to reach the required standard of proof hence the dismissal of the claim.

Is there a difference between a claim for ejectment and an application for *rei vindicatio*? In *Lafarge Cement Zimbabwe Limited v Chatizembwa* HH 413/18, the subject of *rei vindicatio* was aptly covered as follows;

“The principles of the *actio rei vindicatio* are settled in our law. The owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold.”

MANZUNZU J in *Gatsi v D. Med Healthcare Pvt Ltd* HH 259/22 extensively covered the subject of *lis pendens* below;

“The renowned authors Herbststein and Van Winsen in the *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5<sup>th</sup> ed* deal with the defence of *lis pendens* as stated at p 605:-

“*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court... It matters not, in my view that the matters have been brought by way of application and the other by way of action. It is not so much the vehicle by which the matters have been brought to court but the nature of the issues and relief sought, that is the substance and not the form.”

In the action before the court *a quo*, the appellant sought to prove that he was the owner of the property in issue and that the respondent was in occupation without his consent. That was the basis upon which ejectment of respondent and all those claiming occupation through her was sought. Before the High Court, the appellant sought in the *rei vindicatio* application that the respondent and Edward Mashiringwani and all those claiming occupation through them should surrender vacant possession of the property to him. This was indeed a replication of the same cause of action, between the same parties, concerning the same thing in which the same relief was sought.

It is my finding that the court *a quo* did not err in finding that at the date of instituting the action in the Magistrates' Court, there had been a similar matter pending before the High Court. It is however incorrect to allege that the matter was dismissed on account of that fact. As observed above, it was dismissed on a consideration of the claims of arrear rentals and holding over damages which the court held, the appellant had not discharged the onus of proof on. This ground of appeal does not advance the appellant's case at all.

**Ground 2 of Appeal: Whether the appellant was entitled to holding over damages and arrear rentals**

The court *a quo* held as follows;

“-----the court is of the view that the plaintiff as the registered owner is not entitled to claim rentals save for holding over damages in the circumstances of the case. The reason being there is no lessee and lessor relationship between the plaintiff and defendant. The question of fair rentals referred to by the plaintiff is neither in terms of the agreement between the parties or the determination by the rent board. In other words the plaintiff wants the court to make a determination on what could have constituted fair rentals which is improper.”

It was argued for the appellant that rentals were claimed on the basis of respondent's occupation of the premises which occupation was causing patrimonial loss to the appellant Trust. Such claim, it was contended, was made on the basis of unjust enrichment and that there need not have been a lease agreement for the claim to be sustained.

No submissions were made for the respondent on the propriety of the claim for rental arrears.

G. Bradfield & K Lehmann, *Principles of the Law of Sale & Lease, Juta, and 3rd Edition* at p 137 notes that rent is a component of an agreement of lease. I quote;

“Contracts for the lease of property are reciprocal agreements between lessors and lessees, in terms of which the lessors bind themselves to give the lessees the temporary use and enjoyment of property, wholly or in part, and the lessees bind themselves in turn to pay a sum of money as compensation for that use and enjoyment.” That is to pay rent.

A claim for rent is therefore based on a contract of lease, or as determined by the rent board. The appellant could not claim rent arrears without these being based on a lease agreement. The magistrate was correct in dismissing the claim for arrear rentals.

The court was correct in distinguishing arrear rentals and holding over damages. MUZENDA J in *Baxter v Chirochangu & Anor* HMT 34/20 held as follows;

“-----an owner of immovable property who has never been in physical occupation or possession of his property is entitled to claim damages from a person who wrongfully and unlawfully occupied that property.”<sup>1</sup>

An owner of property has a delictual claim for his patrimonial loss caused by the unlawful occupation of his land.

It is therefore my finding that the appellant was not entitled to claim arrear rentals but was within his right to claim holding over damages.

**Ground of appeal 3: Whether the appellant failed to prove its claim of holding over damages**

The court *a quo* held that the appellant had the onus to prove, on a balance of probabilities how it had arrived at the amount claimed. It was found that the appellant had failed to reach the required standard of proof.

Mr *Masango* submitted that the respondent had never disputed the quantum of US\$250.00 per month for the holding over damages but that she had simply said she wanted a lease. It was argued that since this was not denied, it should be taken as accepted. Further reference was made to the case of *Dube v Sengwayo* HC110/91 wherein it was held that a claim for holding over damages in respect of ejectment proceedings was a claim for a liquidated demand because the damages were easily ascertainable.

Mr *Dondo* submitted that the appellant failed to adduce proper and acceptable evidence on how the sum of USD250.00 was arrived at. His mere word of mouth that the rentals for similar premises was US\$250 per month was said to be insufficient. It was argued that reasonable rentals are normally proved by a comparative analysis of rentals charged for other similarly placed buildings. It was contended that proper evidence should have come from an estate agent in the absence of an agreement between the parties and particularly as there was no lease agreement. Because these were damages, Mr *Dondo* argued that they needed to be specifically proven as the matter was contested. The case of *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd & Anor* 1985 (1) SA 248 was referred to argue that market rentals at the time of breach are the yardstick for determining holding over damages.

It cannot be factually correct to say that the pre-trial conference minute did not put in issue the quantum of holding over damages. The second issue referred to trial was captured as follows;

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<sup>1</sup> See also *Hever v Van Greuning* 1979 (4) SA 952 @ 954 e-f

“Whether or not plaintiff is at law entitled to claim arrear rentals from defendant in the sum of US\$1 500.00 and **holding over damages in the amount claimed.**” (My emphasis)

Two issues arise for determination regarding the holding over damages. The first is whether the plaintiff is entitled at law to claim holding over damages and the second is whether they would be payable at the amount claimed.

All the plaintiff did was to state that rentals for such premises were approximately US\$250.00 to US\$300.00 per month from his investigations. He made the allegation and had an obligation to prove same as these were patrimonial damages. In the case of *Southview Holdings (Pvt) Ltd v Bruce Nhamo Taruvinga & Anor* HH 2/16, the plaintiff called an estate agent to give evidence on comparative rentals which evidence was accepted by the court and it held as follows;

“The onus to establish market rentals for purposes of proving holding over damages is on the plaintiff and the standard of proof is on the usual preponderance of probabilities. The evidence adduced by plaintiff in *casu* to prove market rentals was that of Mr Mandaza which was largely unchallenged and it was that there was no difficulty in securing tenancy on the same terms and conditions as to rent and operational costs in respect of 3 bedroomed units in the area.”

*In casu* this was not done and the amount was contested. On p 21 of the record under cross examination is recorded the following exchange;

Q: My client claims a reasonable rentals (sic) would be \$250 USD per month

A: I do not agree with that

There being no agreement on the market rentals, the appellant as the one alleging, had an onus to prove same. The position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation. See *Astra Industries Ltd v Peter Chamburuka* SC 27/12.

The court *a quo* did not find that the burden of proof had not been discharged for the arrear rental claim as it had already found that the appellant was not entitled, at law, to such a claim.

The court *a quo* cannot be successfully impugned for finding that the appellant failed to prove its claim of what the market rentals were as the basis for the holding over damages claim. There is no merit in this ground of appeal.

#### **Ground of Appeal 4: Whether the court erred in awarding costs against the appellant**

Whilst conceding that the award of costs is a matter wholly within the discretion of the court, Mr *Masango* argued that it was the respondent’s unlawful conduct of refusing to vacate the

premises and not paying rentals which galvanized the appellant to file the court proceedings, hence there should have been no order of costs.

Mr *Dondo* submitted that costs follow the cause and are purely discretionary and there is no basis to upset an exercise in discretion.

In the case of *Gasela v Constituency Elections Officer, Gweru Rural Constituency & Ors* 2005 (2) ZLR 240 (S) it was observed that the award of costs is discretionary and that such an order of costs can only be interfered with on appeal in the event of a misdirection by the court *a quo* or if the order is such that no reasonable court could have made it.

Following from my findings in this appeal, it cannot be said that there was any misdirection by the court *a quo*. Costs follow the cause and that is what the court *a quo* did. There is no merit in this ground of appeal.

In the circumstances the appeal is dismissed with costs for lack of merit.

MUCHAWA J:.....

WAMAMBO J agrees-----

*Muronda Makinga Legal Practice*, appellant's legal practitioners  
*Dondo & Partners*, defendant's legal practitioners.