

EMMANUEL MANDIPA CHIGUBA
versus
DAVID KADZERE
and
DORREN KADZERE
and
RODWELL CHITIYO N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 26 & 27 May 2021 and 20 July 2022

Civil Trial

B. T. Mudhara, for the plaintiff
W. Mabhaudi, for the defendants

MUSITHU J:

The plaintiff instituted an *actio rei vindicatio* action and consequential relief in the form of holding over damages initially against the first and second defendants. The original summons and declaration were issued on 28 October 2016. By way of an amendment to the summons and declaration issued on 31 October 2018, the third defendant was added as a party to the proceedings in his capacity as the Executor Dative to the estate of the Late Edmore Tererai Chitiyo (the late Chitiyo). The relief sought as set out in the amended summons and declaration reads as follows:

“Plaintiff claims:

1. Against First, Second and Third Defendants jointly and severally, the one paying, the other to be absolved:
 - 1.1. Payment of holding over damages in the sum of US\$ 800 per month for each month that the First, Second Defendants and Third Defendants, or any persons claiming right of occupation through them, remain in occupation of Plaintiff’s premises being 182 Bradley Road, Waterfalls, Harare, calculated with effect from 1 October 2016, to date of eviction.
 - 1.2. Interest on amounts in para 1.1 at the prescribed rate of interest calculated from due dates to date of payment in full.
 - 1.3. Costs of suit.
2. Eviction of the First, Second and Third Defendants and all persons claiming right of occupation through them, from Plaintiff’s premises being 182 Bradley Road, Waterfalls, Harare.”

The defendants duly entered appearance following the service of the summons and declaration.

BACKGROUND TO THE PLAINTIFF'S CLAIMS

The background to the claim as set out in the plaintiff's declaration is as follows. The plaintiff purchased an immovable described as a CERTAIN piece of land situate in the District of SALISBURY, CALLED STAND 182 MIDLANDS TOWNSHIP 2 of UPPER WATERFALL ESTATE, MEASURING 4144, also known as 182 Bradley Road, Waterfalls, Harare (hereinafter referred to as the property), from a public auction conducted at the instance of the Sheriff of the High Court. The property was transferred to the plaintiff on 30 September 2016 under Deed of Transfer 4810/16.

The plaintiff averred that the first, second and third defendants were in occupation of the property without his consent as the owner. As a result of the first, second and third defendants' unlawful occupation, the plaintiff claimed that he was suffering holding over damages of US\$800.00 per month for as long as the defendants remained in occupation. That amount represented a fair and reasonable rental that the plaintiff would have earned had that property been leased out.

It was in view of the forgoing that the plaintiff approached this court for the relief sought herein.

THE DEFENDANTS' DEFENCE

The plea was prepared on behalf of the third defendant in his capacity as the Executor Dative to the estate of the late Chitiyo, who allegedly purchased the property from the first and second defendants in 2004. In terms of the agreement of sale, the late Edmore Tererai Chitiyo took occupation of the property and paid the purchase price in full. The late Chitiyo allegedly fell ill and subsequently passed on before title in the property was registered in his name.

The third defendant denied that the plaintiff legitimately purchased the property, since it had always belonged to the late Chitiyo who never put it up for sale. Further, the late Chitiyo never had any judgment debt in favour of the plaintiff.

The third defendant averred that the first and second defendants always recognized the late Chitiyo's ownership of the property. They had no real and material interest in the property from 2004 to date. The third defendant further averred that at the time of the late Chitiyo's demise, the plaintiff was aware of the deceased's occupation, interest in and claim to the property. For that reason, the plaintiff allegedly had no right at law to seek the eviction of the third defendant in his

capacity as the representative of the estate, together with the other beneficiaries of the said estate. The third defendant also contended that the plaintiff had no right at law to seek holding over damages against the third representative and the other beneficiaries of the estate.

THE REPLICATION

In his replication, the plaintiff denied that the late Chitiyo was the owner of the property. The property was registered in the names of the first and second defendants at the time that the plaintiff acquired it. He purchased it at a public auction pursuant to a judgment in execution in case number HC 9225/14. The plaintiff averred that when the Sheriff proceeded with the execution of the property, the late Chitiyo claimed rights to the property by way of interpleader proceedings in HC 11577/15. That claim was dismissed on 3 February 2016.

The late Chitiyo also filed an urgent chamber application under HC 9225/16. That application was also dismissed. The plaintiff contended that the dispute over the ownership of the property was settled on 3 February 2016. For that reason, the third respondent's rights, if he had any, were exercisable as against the first and second defendants and not the plaintiff.

The matter was referred to trial on two issues, which:

- Whether or not the first, second and third defendants have any legal defence to the plaintiff's claim for eviction and holding over damages.
- The quantum of the plaintiff's holding over damages.

THE PLAINTIFF'S CASE

The plaintiff was the sole witness in his case. His evidence was as follows. He purchased the property at a public auction for US\$48,000.00. The property was in the names of the first and second defendants at the time he purchased it. He did not know the previous owners. All processes were completed leading to the transfer of the property into his name. He was denied access to the property by the occupants as the new owner. Even after identifying himself as the new owner, the occupants still refused to vacate the property. That left him with no choice but to approach the court for the relief he now seeks.

The witness told the court that following the defendants' refusal to vacate the property, and in preparation of launching a claim for their eviction and ancillary relief, he caused a valuation of the property to be carried out by property valuation experts. The property consultants, Neville Property Consultants (**the Property Consultants**), opined that the property would fetch rental income of US\$750.00 per month. The valuation report was tendered in court as an exhibit by

consent. The plaintiff stated that he was currently staying in a rented property, and he needed to move into his own property without delay. It was for that reason that he was seeking holding over damages, plus interest against the defendants. He was prepared to forgo the interest claim for as long he was paid his rentals.

Under cross examination, the witness insisted that he did not know of the late Chitiyo's agreement with the first and second defendants because he purchased the property from an auction. The witness was further prodded to concede that the third respondent and other beneficiaries had a right to occupy the property by virtue of the transaction between the late Chitiyo and the first and second defendants. In response, the witness insisted that what gave one rights to claim occupation was legal title which the defendants did not have.

The plaintiff's case was closed following his testimony.

THE DEFENDANT'S CASE

Rodwell Chitiyo was the estate's first witness. He was the Executor of the late Chitiyo's estate having been issued with letters of administration on 4 April 2017. The late Chitiyo was his uncle. He told the court that the late Chitiyo took occupation of the property following what he called a swap deal between the late Chitiyo and the first and second defendants. The late Chitiyo owned a piece of land in Lochinvar, which he purchased from his former employer, the National Railways of Zimbabwe (NRZ). The area where the land was located was later zoned as an industrial area by the City of Harare. The late Chitiyo desired to relocate to an area zoned for residential purposes. Coincidentally, the first and second defendants were operating a transport business from their Waterfalls property (the property herein), which was zoned as a residential area. They needed to relocate to an area zoned for industrial purposes.

The late Chitiyo and the first and second respondents met and agreed to swap their properties. The late Chitiyo took over the Waterfalls property while the first and second defendants received the Lochinvar property. At the time the swap deal was agreed to, the late Chitiyo had not yet been issued with title deeds in respect of the Lochinvar property by NRZ. For that reason, and as some form of security, the first and second defendants held on to their title deed. The title deed was only going to be released to the late Chitiyo once he obtained his own title deed in respect of the Lochinvar property.

The late Chitiyo obtained his title deed in 2009. It was at that stage that the parties commenced the processes to formalize their transaction. They applied for a Capital Gains Tax

Clearance Certificate (the CGT Certificate) from the Zimbabwe Revenue Authority (ZIMRA) around February 2019. The CGT Certificate showed that the first and second defendants were transferring the Waterfalls property to the late Chitiyo. The reason for disposal was stated in the CGT Certificate as a sale. The purchase price was reflected as one hundred and sixty million dollars only (ZW\$160 000 000-00).

According to the witness, the deceased fell seriously ill in 2009. It was around the same time that first and second defendants took occupation of the Lochinvar property. The late Chitiyo could not attend to the transfer of the property as he became completely incapacitated because of ill-health. He had already lost his wife, and his children were too young to pursue the transaction. The witness told the court that the late Chitiyo challenged the sale of the property in execution through the interpleader process because he had nothing to do with the debt owed to a judgment creditor, one Efious Mugwagwa (Mugwagwa), by the first and second defendants. The judgment creditor had visited the Deeds Registry and discovered that there was property registered in the names of the first and second defendants who happened to be his debtors. This was despite the fact that the first and second defendants had advised Mugwagwa's legal practitioners that they no longer had an immovable properties in Zimbabwe, and had since relocated to South Africa.

The witness stated that the late Chitiyo's interpleader claim in HC 11577/15 was dismissed by the court after their chosen legal practitioner, Mr Manyurureni defaulted court. They ended up reporting him to the Law Society of Zimbabwe.

The witness averred that he and the beneficiaries were legally entitled to remain in occupation of the property since the late Chitiyo had parted ways with his Lochinvar property in a swap deal involving the Waterfalls property. He passed on while processing the transfer of title into his name. The late Chitiyo was the first purchaser. The Lochinvar property that he used in the swap deal was in excess of 8 000m². Its value was much higher than what the plaintiff paid for the Waterfalls property which the late Chitiyo had received as part of the swap deal.

The witness also stated that at one point he actually held a meeting with Mugwagwa's legal practitioners, who also happen to be the plaintiff's legal practitioners. The legal practitioners apparently demanded that he pays the debt owed by the first and second defendants to Mugwagwa, failing which he was going to lose the property. The witness further alleged that the same legal practitioners also approached another third party who had purchased another property owned by the first and second defendants demanding payment for the debt owed to Mugwagwa. That third

party allegedly paid US\$16,000.00 towards that debt. That meant that from the US\$26,000.00 outstanding in respect of the capital (US\$20,000.00) and legal fees (US\$6,000.00) owed to Mugwagwa, only US\$10,000.00 remained outstanding. But Mugwagwa's legal practitioners still insisted on being paid the full US\$26,000.00.

The witness stated that the plaintiff's legal practitioners were aware that the late Chitiyo was in occupation of the property at all material times, in light of the past engagements the parties had.

Under cross examination, the witnesses insisted that although the agreement of sale for the Lochinvar property cited the seller as the late Chitiyo and the purchaser as D.K. Transport (Private) Limited (D.K. Transport), the actual purchasers were the first and second defendants since they were the owners of that company. The witness also insisted that the late Chitiyo was the legal owner of the property by virtue of his agreement of sale with the first and second defendants. That was the reason why the third respondent and those claiming through him remained in occupation and were not going to vacate the property. He believed that the plaintiff had acquired ownership unprocedurally because of the failure by the late Chitiyo's then lawyer to attend court.

The third defendant's other witness was Dorren Kadzere, the second defendant herein. Her testimony was essentially similar to that of the third defendant. She and the first defendant sold the property to the late Chitiyo in 2004. On his part the late Chitiyo sold his Lochinvar property to them. They were delays in the transfer of title of their property to Chitiyo, The late Chitiyo had since retired and had no money to process transfer. He had also fallen very sick. The Lochinvar property was eventually transferred into their names around 2007-8.

The witness told the court that at the time the plaintiff purchased the property at an auction in 2016, the property was no longer theirs as they had since sold it to the late Chitiyo. This was confirmed by the CGT Certificate issued by ZIMRA after the parties attended ZIMRA interviews as part of the process to facilitate the transfer of the property to the late Chitiyo. The witness insisted that although the agreement of sale of the Lochinvar property was between the late Chitiyo and D.K. Transport, the actual purchasers were the witness and the first defendant, and not the company.

The witness confirmed that at some stage, she and the first defendant owed Mugwagwa some money. She however had no idea about the court case in HC9225/14 in which Mugwagwa obtained judgment against the two. She was also aware that the property was attached in execution

of that judgment debt. At the time of the attachment, she and the first defendant had long vacated the property after the sale to the late Chitiyo.

When asked by the court to explain the nature of the transaction involving the two properties and the late Chitiyo, the witness stated that it was swap deal. Although she could not remember the exact dates when she and the first defendant gave the late Chitiyo vacant possession, her recollection was that it was soon after the transaction was concluded as they needed to relocate to Lochinvar without delay. She also confirmed that the Lochinvar property was transferred into their company's name, D.K. Transport.

THE ANALYSIS

I now turn to determine the issues before the court in the context of the evidence adduced by the parties.

Whether the first, second and third defendants have any legal defence to the plaintiff's claim for eviction and holding over damages.

It is clear from the evidence that it is the third defendant and those claiming through him who remain in occupation of the property. It is not in dispute that the first and second defendants relinquished possession of the property soon after concluding the swap deal with the late Chitiyo. The late Chitiyo was in possession of the property at the time of his demise. It is also on the basis that the late Chitiyo was in possession of the property having acquired it from the first and second defendants that the third defendant, and those claiming through him insist they have a legal right to remain in occupation.

It also emerged in evidence that the first and second defendants had since relocated to South Africa by the time the late Chitiyo became entangled in litigation with the Sheriff and Mugwagwa. No plea was filed on behalf the first and second defendants. In his evidence, the third defendant was clear that it was him in occupation of the property together with the other beneficiaries of the estate. Even in his closing submissions, Mr *Mudhara* for the plaintiff directed his attention towards the third defendant as the party in occupation of the property. For the going reasons, the court will proceed on the basis that it is the third defendant in occupation of the property. The first and second defendant should not to have cited at all.

In his closing submissions, Mr *Mudhara* submitted that the following common cause facts were clearly supportive of the plaintiff's claim herein. These are that: it was not in dispute that the plaintiff purchased the property at a sale in execution conducted at the instance of the Sheriff; the

plaintiff is the registered owner of the property under Deed of Transfer 4810/16; the third defendant is in occupation of the property and does not dispute that the property is registered in the plaintiff's name; the late Chitiyo's claim to the property was dismissed by this court in HC 11577/15 on 3 February 2016. Lastly, counsel also submitted that it was not in dispute that the average rental expected from the property was US750.00, per month.

Mr *Mudhara* further submitted that the plaintiff's title to the property was not challenged. He remained the owner of the property until his title was impeached. As the owner, he was entitled to full enjoyment of possession and the fruits thereof. He had been deprived of all that since acquiring ownership. His real rights were enforceable against the world. To support his submission counsel referred to section 14 of the Deeds Registries Act (the Act)¹, and the case of *Efrolou v Muringani*². The plaintiff's title had not been revoked in terms of s8 of the Act.

Counsel further submitted that the evidence placed before the court by the third defendant merely confirmed that while the late Chitiyo tried to get title as alleged, he never obtained it. His agreement of sale for the Lochinvar property was not even with the first and second defendants, but with D.K. Transport. That property was subsequently registered in the name of D.K. Transport. Counsel further submitted that in view of the evidence placed before the court, the third defendant had no reason to remain in occupation of the property.

In her response, Ms *Jakara* for the third defendant argued that the third defendant was a lawful possessor of the property. Lawful possession was one of the defences available to a claim for the *rei vindicatio*. To support this argument, counsel referred to the case of *January v Maferefu*³. Counsel further submitted that the third defendant's claim to lawful possession was based on the swap deal between the late Chitiyo and the first and second defendants. It did not matter that the property was now registered in the name of the plaintiff. The court was further referred to the case of *CBZ Bank Limited v Moyo*⁴ to support the third defendant's contention that there were special circumstances that justified his continued possession of the property.

Ms *Jakara* further submitted that what made the third respondent's position unassailable was that the late Chitiyo took occupation in 2004. Attempts to transfer the property into the

¹ [Chapter 20:05]

² HH 112/13

³ SC 14/20

⁴ SC 17/18

deceased's name were made as far back as 2009, as confirmed by the CGT Certificate. At the time the property was attached, the first and second defendants were no longer the owners of the property. Counsel further submitted that there existed special circumstances in the form of legal impediments that hindered the transfer of the property to the late Chitiyo. That was the import of the *CBZ Bank v Moyo* judgment. The second defendant had all but confirmed that they had surrendered the property to the late Chitiyo, and what remained was the transfer of title.

The requirements of the *rei vindication* were aptly set out in the case of *Savanhu v Hwange Colliery Company*⁵, where ZIYAMBI JA said:

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo*⁶:

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).

The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner... (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp 382E, 383)...”⁷

The law jealously guards the rights of an owner and sanctions what has been described as a “ruthless vindication of the owners’ rights”.⁸ The requirements of the common law action of the *rei vindicatio* are twofold. The plaintiff must prove ownership of the property and that the defendant was in possession of the property when the action was instituted. In *CBZ Bank Limited v Moyo* the court held that a deed of transfer is not conclusive proof of ownership. The court discussed the point further as follows:

“A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable.

Once it is accepted that a title deed or registered cession is not conclusive proof of ownership or cessionary rights, it follows that the appellant merely has a *prima facie* right to execute against the attached property registered in the names of the judgment debtor, Nompiliso Maphosa, and her husband, Tarisai Matsveru. The *prima facie* right is open to rebuttal. This may therefore be a basis for setting aside the sale in execution if the first respondent proves the existence of special circumstances.

⁵ SC 8/15 at p2 of the judgment

⁶1974 3 SA 13 (A)

⁷ See also *January v Maferefu* SC 14/20 at p6 of the judgment

⁸ Per MAKARAU JP (as she then was) in *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236

Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser.”⁹

While the *CBZ Bank Limited v Moyo* case has settled the position of the law that special circumstances can defeat an owner’s claim for the *rei vindicatio* or the attachment of a property in execution on account of a claim by a purchaser who bought the property at a time when it was free from any encumbrance, the circumstances in that case are distinguishable from the present case.

In the *CBZ Bank Limited* case, the purchaser approached the court for an order staying execution pending the institution and finalisation of interpleader proceedings. The court granted the order for stay of execution pending the institution and finalisation of those proceedings. It was that order that the judgment creditors appealed against to the Supreme Court. Before that, the purchaser had previously obtained a provisional order staying execution of the same property by Lizhibowa Real Estate (Pvt) Ltd, which had registered a caveat on the same property in respect of a debt owed by one of the sellers

In the present matter, the late Chitiyo instituted interpleader proceedings against the judgment creditor, Mugwagwa. He and his legal practitioners were in default on 3 February 2016 when the matter was heard before FOROMA J. It meant that there was nothing to forestall the impending execution, once his claim was dismissed. The sheriff declared and confirmed the plaintiff as the highest bidder on 20 April 2016. The property was transferred to the plaintiff on **30 September 2016**, some six months later.

The current proceedings were instituted on 28 October 2016. The third defendant was appointed Executor to the estate of the late Chitiyo on 4 April 2017. He was subsequently joined to these proceedings. At that point he became aware, if he was already not aware before then, of the circumstances under which the plaintiff had acquired title in the property. Through his legal practitioners of record, he filed his plea, but did not lodge a counterclaim to challenge the plaintiff’s title.

The swap deal involving the late Chitiyo and the first and second defendants is shrouded in secrecy. Both the second and third defendants confirmed there was a swap deal. The agreement of sale for the Lochinvar property cited D.K. Transport as the purchaser. From the evidence led in

⁹ At p7 of the judgment

court, that property was subsequently registered in that entity's name. That agreement of sale does not refer to a swap deal. It was a direct sale, with the purchase price of \$160 000 000.00 payable on terms. That agreement of sale was actually prepared by a firm of lawyers who would have been alive to the need to recite, by way of preamble, the fact that the arrangement was a swap deal.

No agreement of sale was placed before the court to confirm the sale of the Waterfalls property to the late Chitiyo. The ZIMRA CGT certificate cited as the reason for disposal, "SALE-CGT-PAID NIL". The value of the property is stated as \$160 000 000.00. That certificate was generated as far back as February 2009. If the reason for the disposal was a swap deal, one fails to fathom why that was not stated.

The manner in which the late Chitiyo and the third respondent treated this matter left them in a very precarious position. The agreement of sale for the Lochinvar property was signed on 24 March 2004 by the late Chitiyo himself. Following his demise, the third respondent did not attempt to have the order granted in default by FOROMA J set aside. That order confirmed the Sheriff's notice of seizure and attachment and declared the property executable at the instance of the judgment creditor. That paved the way for the sale of the property to the plaintiff.

The third defendant appears content on simply seeking refuge in the swap deal between the late Chitiyo and the first and second defendants. That is the basis on which he sought to impeach the plaintiff's title herein, in his plea and his testimony before the court. But then a plea is a defence and akin to a shield. It is not a weapon through which a defendant can assert some form of relief against a plaintiff.¹⁰ The third respondent ought to have instituted separate proceedings of his own to challenge the plaintiff's title for the same reasons that he sought to advance in his defence. This court cannot decline the plaintiff's relief herein when there is no such challenge pending before any court and the property still remains registered in the plaintiff's name.

In view of the foregoing, the court finds that there exist no special circumstances to deny the relief sought by the plaintiff herein. The third respondent has failed to demonstrate that he is in lawful possession and occupation of the property. He has also failed to demonstrate that the plaintiff's title is impeachable, having failed to take any steps to assert the late Chitiyo's rights in the property. The third defendant and those claiming through him have no lawful basis to retain occupation and possession of the property.

¹⁰ See *Indium Investments (Pvt) Ltd v Kingshaven (Private) Limited & Ano* SC 40/15 at p7

The quantum of the holding over damages

Having determined that the third defendant and those claiming through him have no legal basis to remain in occupation of the property, what remains to be resolved is the quantum of the holding over damages that the plaintiff is entitled to as rental income. In support of his claim, the plaintiff produced a rental valuation report prepared by Neville Property Valuers and Consultants. That evidence was not challenged by the third defendant. The third defendant's counsel did not address that issue in her closing submissions either.

The report was based on a market survey that involved comparable properties within the same locality. It considered the rentals being asked for in respect of similar properties on the market within that low density area. That evaluation took cognizance of the fact that the properties considered differed in terms of size, location and quality amongst other factors. The report was prepared in March 2017. It focused on four properties within the same locality whose actual rentals as at January and February 2017 ranged between US\$400.00 – US\$550.00. The asking rental ranged between US\$400.00 and US\$600.00.

The report stated that:

“We certify that on the basis of our inspection and the description of the property provided below and that having considered all the relevant factors pertaining to the property market and from our knowledge and experience of the market, we are of the opinion that the realistic assessment of the Market Rent of Stand 182 Midlands Township, known as, No.182 Bradley Road, Midlands, Harare, as at 14 March 2017, can be fairly represented in the following sum: Market Rent US\$750 (Seven Hundred and Fifty United States Dollars).”¹¹

It is not clear why the amount of rentals for this property was pitched higher than the other four properties that were considered in the survey. It seems the property has the added advantage of having a cottage, which the other properties did not have. The report states that access could not be gained in order to view the interior of the cottage. Having considered that the actual maximum rental for similar premises was pegged at US\$550.00, I find no justification from the report to place rentals for the property at US\$750.00, in the absence of detailed reasons.

The assessment of damages is not an exact science. They cannot be determined with the exact precision as is the case with mathematics. Having considered that what perhaps sets the

¹¹ See p11 of the plaintiff's bundle of documents.

property apart from the others in the same locality is the cottage, I find an amount of US\$600.00 to be more representative and justifiable as the actual rental for the property.

There is yet another legal issue to be surmounted. The claim for holding over damages is with effect from 1 October 2016 to date of eviction. On 22 February 2019, the country introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (S.I. 33/19). The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act).

The new currency ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

Section 22 of the Finance Act provides as follows:

“22 Issuance and legal tender of RTGS dollars, savings, transitional matters and validation

1) Subject to section 5, for the purposes of section 44C of the principal Act, the Minister shall be deemed to have prescribed the following with effect from the first effective date—

- (a) that the Reserve Bank has, with effect from the first effective date, issued an electronic currency called the RTGS dollar; and
- (b); and
- (c) that such currency shall be legal tender within Zimbabwe from the first effective date; and
- (d) 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 section 44C (2) of the principal Act) shall on the first effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar; and
- (e) that after the first effective date any variance from the opening parity rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollar for the United States dollar on a willing-seller willing-buyer basis; and
- (f)

The plaintiff’s claim must therefore be contextualized to the two periods stated in the law, that is the period before and the period after the first effective date. Mr *Mudhara* conceded that the claim in respect of the period before the first effective date metamorphosed into an RTGS claim

by operation of that law. As for the claim in respect of the period after the first effective date, although it could be made in the United States dollars, it had to be converted at the prevailing Reserve Bank of Zimbabwe auction rate so as to comply with the law. That rate was only introduced way after the first effective date. For that reason I find the alternative rate, which is the interbank rate, more apposite to apply in the circumstances.

It is with the above in mind that the court makes the following order:

DISPOSITION

Resultantly it is ordered that:

1. Judgment be and is hereby granted in favour of the plaintiff for the eviction of the third defendant and all those claiming occupation through him from the premises known as Number 182 Bradley Road, Waterfalls, Harare.
2. The third defendant or any persons claiming right of occupation through him shall pay holding over damages calculated as follows:
 - 2.1 In respect of the period from 1 October 2016 to 22 February 2019, ZW\$600.00 per month from 1 October 2016 to 22 February 2019;
 - 2.2 In respect of the period after 22 February 2019 to the date of eviction, a sum equivalent to US\$600.00 calculated at the prevailing interbank rate for each month.
3. Interest on the amounts referred to in paragraphs 2.1 and 2.2 above at the prescribed rate of interest calculated from due date to date of payment in full.
4. The third defendant shall pay the plaintiff's costs of suit.

Mundia & Mudhara, plaintiff's legal practitioners

Atukwa Attorneys, defendants' legal practitioners