DISTRIBUTABLE (43)

THE REVIVAL UNITED CHURCH OF CHRIST INTERNATIONAL

v

THE UNITED CHURCH OF CHRIST

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & KUDYA AJA
HARARE: 17 JULY 2020 & 13 MAY 2021

Mr *Uriri*, for the appellant
Mr *Madhuku*, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court handed down on 31 January 2019 in which it upheld the respondent's appeal and granted an order for the eviction of the appellant.

BACKGROUND FACTS

The appellant and the respondent were at one time members of the United Church of Christ Zimbabwe (UCCZ). There were disagreements on doctrinal issues amongst the membership resulting in some members being excommunicated. The excomminucated members formed various splinter groups one of which was the United Church of Christ (UCC). These

various splinter groups came together under one umbrella body which they named the Revival United Church of Christ International (RUCCI). RUCCI was used for coordinating activities such as Special Sundays. Otherwise the splinter groups maintained their identities and independence. RUCCI was not involved in the day to day running of the different groups.

In 2010 an application was made to the City of Harare to lease a piece of land under the name UCC. The appellant attempted to change the name on the application from UCC to RUCCI through a letter dated 11 March 2013. The UCC members believed that the appellant wanted to "steal" the stand. They wrote a petition in which they disassociated themselves from the appellant.

On 29 October 2013 the City of Harare and UCC subsequently entered into a lease agreement in respect of Stand No. 535 Willovale, Harare (the property). Both the appellant and the respondent worshipped from the property separately.

The respondent instituted action proceedings in the magistrates court claiming the eviction of the appellant from the property. The basis of the claim was that the respondent held the leasehold title to the property in question. The appellant had no legal right to occupy the property. It thus sought an order to evict the appellant from the said property.

The appellant's defence was that it was the one which entered into the lease agreement with the City of Harare, and not the respondent. The appellant anchored its claim to the lease agreement on the ground that it used the name "United Church of Christ" from its formative stages in 2010 until 29 July 2012, when it changed that name to RUCCI. The appellant further averred that members of the respondent had previously been part of it (RUCCI) when it was still using the

name 'United Church of Christ' before they opted out of same in 2014. Thus the respondent had no legal capacity to bring an action against the appellant. The appellant also averred that it was the lease holder to the property since it was the one paying the rates of the stand to the City of Harare. As a result the appellant sought to have the respondent's claim dismissed.

The learned magistrate found that the respondent failed to lead cogent evidence to prove that it was the one that had entered into the lease agreement with the City of Harare. He further found that the respondent was not in possession of the original lease agreement and had failed to produce any evidence showing that it was paying rates to the City of Harare. In the result the magistrate dismissed the respondent's claim to evict the appellant.

Aggrieved by the decision of the magistrates court, the respondent appealed to the court *a quo* on the basis that the learned magistrate had misdirected himself in finding that the respondent was not the same 'United Church of Christ' that was the lessee in the lease agreement with the City of Harare. The respondent argued that it was the lessee to the lease agreement with the City of Harare. The magistrate had misdirected himself in failing to find that the parties had always been two separate entities. It was the respondent's argument that it being the lessee to the property, it had the right to evict the appellant from same since it had unfettered rights thereto.

The appellant however submitted that the learned magistrate had rightfully found that the respondent had not been the one that had entered into the lease agreement with the City of Harare in respect of the property. It found that the respondent had failed to adduce evidence of its existence prior to the acquisition of the lease as well as evidence showing that it was the United Church of Christ that had entered into the lease agreement. It was the appellant's submission that the respondent had no real right to evict the appellant and thus the learned magistrate had correctly

dismissed the respondent's claim. The appellant therefore prayed for the dismissal of the respondent's appeal before the court *a quo*.

The court *a quo* found that when the initial application for the disputed property was made to the City of Harare in 2010, it had been made under the name of the respondent. The appellant had not been in existence at that time. It only came into being on 12 July 2012. The court further noted that the lease agreement had consequently been entered into in 2013 in the name of the respondent and there had been no objections by the appellant. The court found that the application made to the City of Harare to lease the property had been made by the United Church of Christ (UCC) and the fact that some members of the appellant had been part of the group that made the application was inconsequential since they had done so under the name of the respondent.

The court *a quo* found that the learned magistrate erred in that having made a correct finding that the respondent was a universitas, it went on to ignore the fact that the lease agreement was in the name of the respondent.

In the result, the court found that the respondent was the lease holder to the stated property. It further ordered the eviction of the appellant from the property in question. Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds;

GROUNDS OF APPEAL

" 1. The court *a quo* misdirected itself in making a finding that the respondent acquired the rights to lease the property notwithstanding that the evidence showed that such rights were acquired by the appellant.
2. The court *a quo* erred and grossly misdirected itself in solely relying upon the lease agreement executed in the name of the respondent when overwhelming evidence showed that the appellant was the holder of the rights in respect of the leased property.

3. The court *a quo* erred in finding that the respondent had *locus standi* to evict the appellant."

ISSUES FOR DETERMINATION

The grounds of appeal set out above can properly be redacted to two issues *viz*.

1. Whether or not the court *a quo* erred by finding that the respondent was the rightful lease holder to the property and consequently issuing an order for the eviction of the appellant.
2. Whether the court *a quo* erred and grossly misdirected itself in solely relying upon the lease agreement executed in the name of the respondent when overwhelming evidence showed that the appellant was the holder of the rights in respect of the leased property.

SUBMISSIONS BEFORE THIS COURT

Mr *Uriri* for the appellant made the following submissions. The court *a quo* decided the matter on an improper basis. The question in whose name the lease was concluded was never an issue as it was common cause that it was entered in the name of UCC. What was in issue was a factual question of who of the two protagonists is the entity referred in the lease agreement as UCC. The appellant led evidence that at the time the lease was concluded they were the movers. For administration purposes they used the name UCC. The group now calling itself UCC seceded from the appellant. The issue before the court stood to be resolved not by the document which mentions UCC but by evidence as to who was who at the time the lease was concluded.

Evidence was led and the respondent's evidence was not believed and properly so. The magistrate made a finding that the respondent had not established its cause on a balance of probabilities. The only bases on which those factual findings can be set aside on appeal are settled in law. The disposition of the issue, arising from the factual enquiry, was supported by the

evidence before the magistrate. It cannot be said to be unreasonable and could not therefore be set aside on appeal.

Mr *Uriri* concluded by submitting that the question in what name the lease was entered into was never before the court and the High Court erred in resolving the dispute on that basis rather than the factual inqury that was before the Magistrate Court.

Mr *Madhuku* for the respondent made the following submissions. He started by what he termed a point of principle. He submitted that this Court was the second appeal court. The High Court sat as a court of appeal and the same principles applicable in appeal matters applied. In what circumstances may this Court, sitting as a second appeal court, set aside a decision of the court *a quo* sitting as the court of appeal. Mr *Uriri* argued that the decision of the learned magistrate was not unreasonable. In other words he wants this Court to substitute its view of irrationality for that of the court *a quo*. The correct position is that this Court must be satisfied that the court *a quo* applied the wrong principles or that its decision was grossly unreasonable. The High Court should be given its scope to sit as an appeal court. There might be need to amend the rules to require leave to appeal where one intends to appeal a decision of an appeal court.

He strongly contends that the appellant's Heads of Argument do not address the grounds of appeal and they miss the finding made by the court *a quo*. The court *a quo* found that the court of first instance had misdirected itself in not finding that the respondent had proved its case on a balance of propabilities. Regarding the first ground of appeal the court of first instance made the finding, in respect of the appellant, that it was not the lease holder. The appellant did not challenge this finding before the court *a quo* by filing a cross appeal. The court *a quo* therefore proceded on the basis that the appellant was not the lease holder. In respect of the second ground

of appeal he argues that the appellant unfairly attacks the court *a quo* for solely relying on the lease agreement and ignoring the overwhelming evidence that showed that the appellant was the lease holder. He further argues that the appellant's attack on this aspect ignored the fact that when the court *a quo* heard the appeal that point had already been determined by the court of first instance. The attack also ignored that the court a quo had in the exercise of its appellate jurisdiction analysed the evidence of the court of first instance and found a basis to interfere with its finding.

ANALYSIS

I will adopt the approach taken by Mr *Madhuku* of addressing the grounds of appeal in *seriatim*.

1. **Whether or not the court *a quo* erred by finding that the respondent acquired the right to lease the property notwithstanding that the evidence showed that such rights were acquired by the appelant.**

According to the appellant the court *a quo* erred by finding that the respondent acquired rights to lease the property notwithstanding that the evidence showed that such rights were acquired by it. It was the appellant's case that it was in fact the one that had entered into the lease agreement with the City of Harare, during its transitional stages using the name, UCC, which was later adopted by the respondent. According to the appellant, the respondent did not exist at the time of acquisition of the right to lease the property and as such the respondent could not have acquired any rights when it was not in existence. The appellant's case is that the respondent is not the entity that contracted with the City of Harare and as such it does not have the *locus standi* to evict the appellant from the premises.

It is settled that this Court will not easily interfere with factual findings made by a lower court unless there has been such a gross misdirection by that court on the facts so as to amount to a misdirection in law, in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the conclusion reached by the lower court. *See Chioza v Siziba* SC 16/11. In assessing whether the court *a quo* misdirected itself in finding that the respondent had rights to the property having contracted with the City of Harare, regard is had to the case of *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01, wherein this Court stated the following:

> "An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented."

As was correctly submitted by Mr *Madhuku* the first ground of appeal proceeds from an incorrect premise regarding what was before the court *a quo*. The court of first instance made the following finding;

> " The court identified a desire by both parties to prove that it was or was not defendant (appellant) who contracted with the City of Harare. In this Court's earnest consideration, the argument need not be taken that far since defendant had no one to prove that it was it which entered that Lease Agreement with City of Harare. It is, however certainly or on plaintiff bore to show, on a balance of probabilities, that it is they who entered that Lease Agreement." (*sic*)

The appellant did not challenge the above finding that it had no witness to prove that it entered into the lease agreement. It could have done so by filing a cross-appeal but it did not. That finding remained extant when the court *a quo* dealt with the matter and still remains unchallenged. What was challenged, by the respondent, was the court of first instance's finding that the respondent was not the leaseholder notwithstanding that it is named as the lessee in the

lease agreement. Mr *Madhuku* was correct, therefore, in his submission that the question that was before the court *a quo* could not have been: who between the two parties is the leaseholder?

The basis upon which the court *a quo* upheld the appeal before it was that the magistrate had ignored the fact that the lease was in the name of the respondent. The court *a quo* found that the application for the lease was made in the name of United Church of Christ (UCC) and at the time the application was made Revival United Church of Christ International (RUCCI) did not exist. It found that it was established that UCC was in existence before July 2012 and there was no evidence placed before the court *a quo* showing that UCC had been disbanded and replaced by a new entity, RUCCI. I find no fault with the court *a quo*'s reasoning in this regard.

The appellant's first ground lacks merit and ought to be dismissed.

Whether the court *a quo* erred and grossly misdirected itself in solely relying upon the lease agreement executed in the name of the respondent when overwhelming evidence showed that the appellant was the holder of the rights in respect of the leased property.

The appellant complains that the court *a quo* misdirected itself in solely relying on the lease agreement executed in the name of the respondent when overwhelming evidence showed that it was the holder of rights in respect of the leased property. As was correctly submitted by Mr *Madhuku* the court *a quo* did not solely rely, for its findings, on the fact that the lease was in the name of the respondent. It did an in-depth analysis of the evidence regarding the formation of both the appellant and the respondent. It found a misdirection in the court of first instance's failure to draw the appropriate conclusion from the evidence before it. It found that the court of first instance had, after finding that the respondent was *a universitas*, erred in not finding that the

respondent was a separate entity that could and became a leaseholder in its own right. There was no basis for its finding that the respondent was an affiliate of the appellant. The court of first instance treated without justification, as insignificant, a core fact that the lease was registered in the name of the respondent.

It is pertinent to note that the burden of proof in all civil matters is on a balance of probabilities. The concept of proof on a balance of probabilities was enunciated in *British American Tobacco Zimbabwe v Chibaya* SC 30/19 wherein the court quoted with approval the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, 374 and explained as follows:

> "The concept must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."

This was further emphasized in the text, *Principles of Evidence*, 4th ed (2016) juta: Cape town, wherein the authors Schwikkard P.J and van der Merwe S.E stated that:

> "In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference."

In *casu*, based on the evidence placed before it, the court *a quo* correctly noted that the court of first instance had erred by concluding that the respondent was an affiliate of the appellant in the sense that it was subject to and under the control of the appellant. It further found that some members of the appellant had participated in the application for the lease, however the members were mistaken in the belief that such participation gave them title. The court *a quo* further noted that the respondent was a common law *universitas* and one of the recognized characteristics of such is the capacity to acquire rights and incur obligations independently of its members, in particular the capacity to own property. The respondent being a *universitas*, is

distinct from its members who may come and go, so the appellant cannot claim to have rights and interests in the property on the basis that some of its members were once part of UCC when the lease was concluded. In this regard reference is made to the case of *Zambezi Conference of Seventh Day Adventists v General Conference of Seventh Day Adventists & Anor* 2001(1) ZLR 160 wherein the court stated the following*:*

> "These individual members, who seceded from the Church, even if they be a majority of the members of a particular congregation, have seceded as individuals. They cannot have a claim to property of the SDA. They have formed a *universitas,* a new association of individuals. They cannot have a claim to property of the SDA. It may be that, as individuals, they subscribed towards the funds of the Church. But they did so as members. Having now founded a new *universitas*, they cannot in law claim ownership of Church property." (my emphasis)

In the result, I am of the view that the court *a quo* did not misdirect itself in any way in finding that the respondent was the leaseholder to the property. The court *a quo* having found that the respondent had entered into the lease agreement with the City of Harare and that there was no evidence proving that it had become defunct, there was thus no basis for the court to find that the respondent was not the lease holder. It was therefore correct to make a finding that the respondent had established its case on a balance of probabilities. The second ground of appeal also lacks merit and ought to be dismissed.

As the appellant's first two grounds of appeal have collapsed the finding of the court *a quo* that the respondent can evict the appellant is unassailable. It is a settled position of the law that a leaseholder has the right to evict trespassers.

Before concluding the matter I must address "the point of interest" raised by Mr *Madhuku* on the desirability of restricting the right of appeal from the High Court, sitting as a court of appeal in civil matters, by imposing an obligation on the appellants to seek leave before

doing so. This position obtains in all criminal appeals from the High Court, other than those pertaining to the death penalty. See s 44 (2)(e) of the High Court Act [*Chapter 7:06*]. His view is that the High Court is not being accorded its appellate status. Whilst I agree with him that there might be need to amend the relevant statutes dealing with appeals from the High Court, sitting as an appeal court, my view is that the issue was not properly ventilated as it was raised from the bar without notice to the appellant, who as a result was constrained to make any submissions on the point. Since the matter was not fully argued I will not make a determimation and reserve the issue for determination in an appropriate case.

The respondent prayed for costs on a legal practitioner and client scale but did not advance argument why an order of costs on a punitive scale should be granted. Since the respondent has been successful costs should follow the cause.

Accodingly the appeal has no merit and ought to be dismissed. I therefore make the following order:

The appeal be and is hereby dismissed with costs.

MAVANGIRA JA: I agree

KUDYA AJA: I agree

M. T. Chiwaridzo Attorneys-At-Law, appellant's legal practitioners

Lovemore Madhuku Lawyers, respondent's legal practitioners.