

MOIRA MAKWANGALA  
**versus**  
LYDIA TEMBO  
and  
THE CITY OF BULAWAYO

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 13 SEPTEMBER 2018 AND 25 OCTOBER 2018

### **Civil Trial**

*B Masamvu* for the plaintiff  
1<sup>st</sup> defendant in person  
*H Chimbetete* for the 2<sup>nd</sup> defendant

**MOYO J:** Plaintiff issued summons against the defendant claiming:

- a) Payment of \$10691-59 being water charges leveled by second defendant.
- b) Interest thereon as leveled by the 2<sup>nd</sup> defendant per annum.
- c) Costs of suit at an attorney and client scale

Plaintiff and first defendant were landlord and tenant respectively. During the tenure of the first defendant's tenancy agreement, an astronomical bill was incurred in the sum of \$13484-32. This bill is the sum remaining after the second defendant granted a rebate for the water leakage at the premises. First defendant has defended the claim stating that she could not have consumed water at such levels even if for argument's sake she was conducting a home business (which she was not).

She avers that water bills for that area average \$20- \$30 per month per household. She avers that she paid a sum of \$600-00 although plaintiff says it was \$500-00. She offers to pay the difference at the average rate of consumption per month and does not accept liability for the bill that accrued as a result of the water leakage because she is adamant that she advised the

plaintiff's property manages well in time about the leak, when the bill was still about \$700-00 and they did not solve the water leakage problem.

On the other hand, plaintiff's witness avers that the first defendant reported the water leak late and that soon after she reported it, it was attended to. First defendant avers that it took a long time after the discovery of the leak for the property to repair it, hence the huge water bills.

Second defendant has filed pleadings to the effect that it will abide by the decision of the court since the alternative relief that was being sought against it was abandoned by the plaintiff through an amendment filed on 27 November 2017.

The relief sought is therefore the main one as against first defendant. The following facts are common cause.

- 1) That the parties were in a landlord and tenant agreement
- 2) That the first defendant was responsible for payment of the water account.
- 3) That the plaintiff or his property managers were responsible for any repairs including repairs to water leaks.
- 4) That sometime during the first defendant's tenancy there was a water leak in the premises leading to the accumulation of an astronomical water bill.
- 5) That first defendant made a payment of \$500-00 towards the water bills.
- 6) That defendant was in occupation of these premises from June 2013 to February 2015 a period of 21 months.
- 7) That the average monthly water consumption for the area is a maximum of \$30 per month.

The parties disagree on whether first defendant reported the leak timeously. Plaintiff says first defendant was negligent in not reporting the leak timeously and the first defendant denies having reported the leak late, and says in fact she reported in July when the bill was just \$700-00.

She says plaintiff's property managers delayed to attend to the leak and even after attending to it failed to repair it effectively.

On this point, the plaintiff has the onus of proof. Plaintiff has however just used the word of mouth of Mr Ncube plaintiff's witness to say defendant came in October 2014 to report the

leak, first defendant on the other hand also gave evidence by word of mouth that she reported the leak in July 2013.

It is plaintiff's word of mouth against first defendant's word of mouth. None of the parties were discredited during cross examination and therefore the court is not in a position to find that either of them is being untruthful. Plaintiff had the onus of proof of his case against the first defendant on a balance of probabilities and where plaintiff's evidence is at par with that of the defendant it means that plaintiff has not discharged the onus on him for plaintiff can only discharge such onus if his case is evidentially weightier than that of the defendant. Where the court is unable to find for either party it means that the court cannot find for the plaintiff. It means that plaintiff would have failed to prove its case as against the defendant. It follows therefore that this court will grant an order to the extent that first defendant offers payment. First defendant offers to pay at the rate of \$30 per month multiplied by 21 months that she was in occupation that leaves us with a sum of \$630-00 due as total of water charges for the period of first defendant's occupation. She has paid \$500-00 of that amount by plaintiff's witness' admission leaving a balance of \$130-00 due and payable by first defendant to second defendant.

Plaintiff's property managers had a duty to prove that first defendant was negligent on her failure to report the leak on time and they should (as property managers) practice appropriate administration procedures as in formulating forms that tenants fill in if there are any issues with the status of the property being leased. Proper office administration requires that all documentation relating to a report of leaks and other problems on the property be properly documented for the ease of solving disputes like this one. It would not be enough for property managers who have been engaged in their official capacity to come to court with no evidence in the file as to all the issues/complaints/attendance to a property as that renders their administration challengeable by a defendant in the manner this case has revealed. A plaintiff has the onus to prove a case and the property managers knowing that they act at the instance of the party who is most likely to be a plaintiff in litigation proceedings, they should practice proper record keeping so that the plaintiff being the property owner they represent is able to discharge the onus on him or her. Mr Ncube did not tender any documents to support the time the leak was reported, neither did he tender any documents to support when the leak was attended to

effectively. In any event the property managers were duty bound to amend the records at the City of Bulawayo so that the water bills are directly attached to the name of the tenant, in which case this litigation would be unnecessary as first defendant would carry the burden of the huge bill by herself.

It is for these reasons that I make the following order.

- 1) The first defendant is ordered to pay the sum of \$130-00 to plaintiff's water account held with the second defendant being the balance due by first defendant on the average monthly water charges for the period she was in occupation of plaintiff's property.
- 2) That each party bears its own costs.

*Dube-Tachiona and Tsvangirai*, plaintiff's legal practitioners  
*Coghlan and Welsh*, 2<sup>nd</sup> defendant's legal practitioners