

MUDYIWA ELISHA NDEWERE  
versus  
DEBRA KUNYEDA  
and  
BRIAN SEDZE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 11 June and 19 June 2013

### **Civil Trial**

*Ms L Rupaya*, for the plaintiff  
The first defendant in default  
The second defendant in person

MATHONSI J: The plaintiff is the owner of house number 10 Capri Road, Highlands Harare (“the premises”) which he let out to the first defendant by written lease agreement signed on 15 October 2008 through the agency of Vercham Real Estate. The lease agreement expired on 30 September 2009.

The second defendant was married to the first defendant and lived with the first defendant at the premises. In due course the first defendant vacated the premises leaving the second defendant firmly in occupation but this time with a new wife.

The plaintiff instituted proceedings out of this court against the first and second defendants seeking an order for eviction and arrear rentals as well as costs of suit at the scale of legal practitioner and client. In his declaration, the plaintiff averred that since the introduction of multi-currency about March 2009 the defendants had failed, neglected or refused to make full payment of the agreed rentals of US\$450-00 per month for the premises. He went on to aver that, although the defendants had enjoyed statutory tenancy after the expiry of the lease agreement, that has been lost following failure to pay rentals. The plaintiff, later amended his plea to read that the defendants have not been paying rent since September 2011 and were in arrears of US\$4500-00.

The first and second defendants entered appearance to defend the action and in their joint plea they averred that they had been religiously paying their rent to Verocy Real Estate, the plaintiff’s duly authorised agent to the extent that each time they made payment it was

US\$900-00 to cover two months rentals. They averred that by reason of being up to date with their rent, they enjoyed statutory tenancy and could not be evicted. They stated that proof of their rent payments was available and would be furnished to the court.

The plaintiff led evidence from Forward Malinga who was employed by Vercham Real Estate previously the agents of the plaintiff mandated to manage the premises. He talked of how that company split up following the divorce of the two directors who were husband and wife resulting in the establishment of Verocy Real Estate. It is the latter company which was given the mandate to continue managing the premises.

Malinga testified that Verocy Real Estate notified all tenants including the defendants, of the split from Vercham Real Estate and advised them to re-direct their rent payments to the new agency. He stated that at all material times the first defendant was the lease holder for the premises and that he only got to know of the second defendant when he tried to enforce an eviction order the plaintiff had obtained from the magistrates' court for non-payment of rent.

The second defendant had identified himself as the husband of the first defendant and sought to be joined in the proceedings. He then obtained a rescission of the judgment of the magistrates' court. In due course that matter was thrown out for want of jurisdiction as the plaintiff's claim for arrear rental was above the monetary jurisdiction of that court.

Although the witness left the employ of Verocy Real Estate in July 2012 and now cherishes employment elsewhere, he is aware that the defendants have been in rent arrears as claimed by the plaintiff. He is aware that the second defendant had tried to trick the plaintiff by making two bank deposits of US\$900-00 to an account of Verocy Kids Corner (Pvt) Ltd, a retail arm of Verocy. He had then produced the bank deposit slips and the computer receipts as if they constituted four different deposits. However this was easily uncovered as the computer receipts and bank deposit slips bear the same dates namely 12 September 2011 and 2 November 2011 respectively. The receipts and deposit slips were produced as exh(s) 2a, 2b, 2c and 2d. They show that a total of US\$1 800-00 was paid in this way.

The witness went on to say that before their mandate was terminated, he had visited the premises and advised the defendants where to pay their rent. The first defendant had also personally advised the witness that she had broken up with the second defendant and they were no longer living together at the premises, she having vacated and was staying with her parents in Hatfield. He had visited the first defendant in Hatfield on occasions to deliver

correspondence and she had informed the witness that she would surrender the keys to the premises in due course. She never did.

At one stage the plaintiff had put the property on the market and out of courtesy the witness had notified the defendants. The second defendant made an offer which was not acceptable to the plaintiff and the property was subsequently removed from the market.

The first defendant was in default and as such could not give evidence in court. The second defendant testified but did not make a good witness at all. He concerned himself with a lot of extraneous issues like his lease of a property in Mount Pleasant which was also managed by Vercham Real Estate as well as the attempt by the plaintiff to sell his Mercedes benz motor vehicle through the messenger of court.

While claiming that he was up to date with rentals, he did not produce a single document to authenticate that claim. He conceded that the only proof of payment which had been produced on his behalf by his lawyers was in the form of two deposit slips (Exhibit 2) only amounting to US\$1 800-00. While claiming that he had paid rent to Vercham for six months during the period of transition when the agency was being transferred to Verocy, he did not produce any proof in that regard.

The defendant also claimed that he made improvements on the premises and had advance rentals paid for the Mount Pleasant house during the Zimbabwe dollar era transferred to rentals for the premises. He however failed to produce proof of that and to point to any figure representing what he wanted to set off against arrear rentals. Nothing could be gained from that.

Although claiming to be a good tenant who always made payments of US\$900-00 instead of the monthly rental of US\$450-00, he was unable to produce proof of such payments except for the US\$1 800-00 produced by the plaintiff. In the end the second defendant admitted that he was claiming occupation through the first defendant as he was not the lease holder. He also admitted that he had no basis for holding onto the premises which did not belong to him and pleaded for time to relocate.

I am satisfied from the evidence led that there are rent arrears which stood at US\$4 500-00 at the time of the amendment to the claim in July 2012. I am also satisfied that the defendants have been bad tenants who did not pay rent timeously hence the arrears. For that reason they do not enjoy the benefit of statutory tenancy.

More importantly, the lease holder who is the first defendant was in default and therefore did not contest the action at the trial entitling the plaintiff to judgment against her. I

also accept the evidence that she has long vacated the premises. To the extent that the second defendant, by his own admission, claims occupation through the first defendant and yet in his plea admits that he now cherishes residency at the premises with his brand new wife, he has no basis for remaining in occupation. In fact he is only liable to the extent of the rent arrears as he has been staying there without paying rent.

I am satisfied therefore that the plaintiff has made a good case for the relief sought. Accordingly I make the following order, that:

1. The first and second defendants together with those claiming occupation through them should be ejected from number 10 Capri Road, Highlands, Harare.
2. The first and second defendants should pay to the plaintiff arrear rentals of US\$4 500-00.
3. Costs of suit on an ordinary scale.

*Mandizha & Company*, plaintiff's legal practitioners  
*Govere Law Chambers*, defendants' legal practitioners