

RITENOTE PRINTERS (PVT) LTD
and
JOHN KANOKANGA
versus
A. ADAM & COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 3, 4, 5, 6, June 2014 & 10 September 2014

Civil Trial

E. Hamunakwadi, for plaintiffs
E. R. Samukange, for defendant

CHIGUMBA J: In what circumstances should the civil law punish one person for wrongful or blameworthy conduct which causes harm to another? The answer to this question depends on the meaning that has been attributed to the phrases: “wrongful”, “blameworthy conduct”, and “harm”. This is a case in which the first plaintiff is claiming damages arising from its alleged “unlawful, wrongful and malicious” eviction from two premises that it was leasing from the defendant. The first plaintiff claims that it suffered damages due to loss of trade. The second plaintiff claims that, as a result of the unlawful eviction of the first plaintiff by the defendant, he suffered from chronic depression and was unable to run the affairs of the first plaintiff as he had done since its inception. We must determine whether the eviction of the first plaintiff from the defendant’s premises was unlawful and wrongful as alleged. We must also determine whether the second plaintiff suffered from chronic depression as a result of the alleged unlawful eviction. If both these questions are answered in the positive, our last order of business will be to determine the quantum of damages due to either or both plaintiffs, if any.

The plaintiffs averred, in the declaration, that, on the first of November 2010, defendant unlawfully, wrongfully, and intentionally procured the first plaintiff’s eviction from premises known as number 147 Mbuya Nehanda Road, Harare and from Winston House, 109 Leopold Takawira Street, Harare. The first plaintiff carried on its printing, photocopying and related

business from those premises which belong to the first defendant. The plaintiffs averred further, that as a result of the aforesaid eviction, they suffered losses by reason of failure to trade from those premises 147 Mbuya Nehanda road for the period ranging from first November 2010 to date, and from Winston House from first November 2010 to 29 June 2011. The plaintiffs' claim was founded on *injuria*, and on consequent damages arising there from, such as loss of business, and chronic depression arising as a result of defendant's conduct.

On 24 September 2012, the defendant entered appearance to defend. The defendant's plea on the merits was to deny causing any harm to the plaintiffs either intentionally or negligently, to deny being at fault in any way in causing the plaintiffs' eviction, and to aver that they acted reasonably at all times. Intention to cause *injuria* was denied, knowledge of the second plaintiff's depression was denied, illegal conduct was denied, and defendants prayed for dismissal of the action together with costs on a higher scale. The plaintiffs replicated on 13 February 2013, and reiterated that they clearly pleaded fault on the part of the defendants. At the pre-trial conference, on 24 September 2013, a joint pre-trial conference minute was filed of record, in terms of which the following issues were referred to trial:

1. Whether or not plaintiffs' summons and declaration disclose a cause of action at law?
2. Whether or not the second and third defendants have been erroneously joined to the present matter?
3. Whether or not defendants acted negligently, unlawfully and wrongfully in evicting the first plaintiff?
4. Whether plaintiffs sufficiently set up a cause of action warranting the dismissal of the exception to which the defendants have pleaded over?

The 2nd and 4th issues were disposed of in a separate judgment that is reported under a different case number. The ratio of that judgment is that the directors of the defendant had been erroneously joined to the proceedings as being liable in their personal capacities. The court ordered that they be removed as parties to the proceedings, because no application had been made to pierce the corporate veil, and there was no justification for piercing the corporate veil. The merits of the exception were not determined by the court. It was held that the exception was not properly before the court, because the defendant pleaded over to the merits at the same time, putting paid to the claim that it was unable to plead because the summons and declaration did not disclose a cause of action. This trial commenced to determine two issues, whether or not

plaintiffs' summons and declaration disclose a cause of action at law, and whether the defendant acted negligently, unlawfully, and wrongfully in evicting the first plaintiff.

PLAINTIFF'S CASE

Mr. John Kanokanga gave evidence at the trial on his own behalf and on behalf of the first plaintiff, a duly registered company that he is a director and shareholder in. He told the court that he is 52 years old and has been running businesses since 1987. He chronicled his vast experience in business for the benefit of the court. The second plaintiff testified that, when he took over Copyworld, it was a booming business, the first photocopying bureau in this country, with the largest equipment for photocopying. It had eighty employees and considerable profit margins. It had two branches in Bulawayo and three in Harare. It had a delivery truck and motor vehicles as assets of value. The witness told the court that he expanded the business by introducing litho printing of textbooks, calendars, and invoice books. He stated that first plaintiff recapitalized and bought new equipment and replaced the photocopiers from analogue with digital ones. He told the court that first plaintiff was generating so much business that it bought two motorbikes for deliveries and five smaller motor vehicles for use by its executives. The second plaintiff tendered an evaluation of first plaintiff which was prepared by consultants named Njana private limited on the first of May 2012.

According to the evidence tendered, the first plaintiff's fixed assets as at 1 May 2012 were valued at US\$ 424 000-00. Its net value was pegged at US\$610 912-00. Its debtors owed it US\$82 209-50. A schedule was entered into evidence, which showed the income generated by first plaintiff for the twelve months preceding its eviction by the defendant, from November 2009 to October 2010. The first plaintiff generated US\$1 375 166-00 in total during the twelve month period. The second plaintiff testified that he had prepared the schedule of income, with the help of his children, and that he had relied on bank statements, which were attached to plaintiffs' bundle of documents, at record pages 213-316. The court was satisfied, after being taken entry by entry through the bank statements, that the statements were the source of the schedule of income prepared by the second plaintiff. The court was satisfied, that the second plaintiff was telling the truth when he testified that, according to the bank statements filed of record, first plaintiff's income which was banked in the period November 2009 to October 2010 was US\$808 000-00, and that the income which came in as cash amounted to US\$580 000-00,

bringing the total income generated in that period to US\$1 300 000-00. He told the court that this income was generated by six branches of the first plaintiff. The Mandela branch, on Mbuya Nehanda street, brought in an income of US 109 280-00 during that period. Divide that by twelve, its income comes to US\$9 106-80 per month. The Winston branch, on Leopold Takawira street, brought in US\$88 892-00. Divide that by twelve months and its average monthly income comes to US\$7 407-08. The second plaintiff told the court that first plaintiff's combined income for the twelve month period was US\$1 375 166-00.

The second plaintiff told the court that he had a cordial relationship with Mr. Musa Adam, a director of the defendant, for a very long time, which included numerous business transactions and leases of multiple properties, to such an extent that he considered this gentleman a brother, and a friend. Their cordial relationship spanned a period of twenty years, until Mr. Musa Adam brought in his son, Tariq Adam to run the affairs of the defendant. He told the court that trouble started in 2009, when Mr. Musa Adam decided to turn the premises at 147 Mbuya Nehanda Street into fifteen offices.

The witness testified that as a result of this plan he was advised that first plaintiff could not continue to carry on its business as usual whilst renovations were being done. Negotiations ensued, which the second plaintiff testified culminated in a written agreement that first plaintiff vacate the premises within two months. More trouble arose when the second plaintiff refused to vacate the premises and insisted that the defendant provide the first plaintiff with an alternative premises to operate from.

In 2009, under case numbers HC 649/09 for the premises on Mbuya Nehanda Street and HC2624/09 for the premises on Leopold Takawira Street, defendant sued the first plaintiff for its eviction, out of the High Court. The second plaintiff told the court that, the litigation proceeded to trial stage, whereupon defendant withdrew both matters without tendering any explanation. Three months after withdrawing the High Court actions, fresh proceedings were brought, out of the magistrates court, under case numbers 15121/10 and 15122/10. Defendant initially claimed arrear rentals in the sum of US\$70 000-00, which was later abandoned to claim a total US\$4000-00, presumably to bring the two claims within the monetary jurisdiction of the magistrates court. The magistrate's court issued two court orders for the first plaintiff's eviction on 25 September 2010, which prompted the plaintiff to note an appeal, then to apply for stay of execution to avoid being evicted. Its application for stay of execution was dismissed by the magistrate's court. The

reason for dismissal was that when the appeal was noted, the eviction orders had been automatically suspended so the application before the court was superfluous. The first plaintiff then applied to the High Court which refused to stay execution on an urgent basis. The plaintiff then appealed to the Supreme Court against the High Court order which declined to stay execution.

Under Supreme Court case number SC 15/11, the plaintiff's appeal was allowed, on 31 May 2011. The second plaintiff told the court that, according to his understanding, the Supreme Court found that the High Court was wrong when it upheld the eviction orders and the refusal to stay execution order of the magistrate's court, which was based on a wrong interpretation of the law. The Supreme Court ordered that the first plaintiff be restored to the premises, pending the determination of its appeal against eviction. As part of the eviction process, a Nashua photocopier and two motorbikes were attached and removed by the Messenger of Court. The second plaintiff told the court that, the first plaintiff was restored to the Leopold Takawira branch after eight months, but never restored to the Mbuya Nehanda branch, because the defendant demolished that building on being served with a copy of the Supreme Court order. The second plaintiff told the court that the eviction of the first plaintiff was malicious and wrongful because it was done without the authority of a court order, and because the Messenger of court was instructed by the defendant to evict first plaintiff without notice, the eviction was done forthwith.

The second plaintiff testified that during the hearing at the Supreme Court, the defendant had told the court that it proceeded with eviction because it was misled by its lawyers. He said that a lawyer acts on its client's instructions not the other way round. For that reason, the second plaintiff feels that the defendant should be brought to book. The second plaintiff tendered a statement which shows that storage charges in the sum of US\$15 580-00 are currently due to Ruby Auctions who have had their two motorbikes in storage since the eviction, and US\$3 463-00 for the storage of the Nashua photocopier. The witness told the court that, as a result of the action of the defendant in demolishing the building after being served with the order for restoration by the Supreme Court, he caused contempt of court proceedings to be instituted against Mr. Tariq Adam, the manager of the defendant under case number HC 717/12. The second plaintiff told the court that he withdrew the application for contempt of court against Tariq Adam out of sentimental reasons; he remembered his friendship with Mr. Musa Adam.

The second plaintiff told the court that he decided to be at peace with himself and with the world. He said that he was diagnosed with depression, chronic depression which left him plagued with feelings of committing suicide. The second plaintiff told the court that he is still suffering from chronic depression, and is under doctor's orders to avoid stressful situations such as going to work full time. He tendered a letter from Dr. Chibanda dated 31 July 2012, who is a mental health specialist which confirms that he was depressed and suicidal. The witness told the court that he has seen Dr. Chibanda twice a year from 2011 to date, and tendered proof that he was on anti depressants, and insomnia sleeping tablets. He said that his depression mainly stemmed from the fact that he had been in business for a long time, and was now unable to fend for his family, which left him feeling useless and hopeless. When he was invited to advise the court why he was claiming so much money in damages, the second plaintiff became emotional and the court had to adjourn because he became incapacitated and could no longer speak. He was sobbing uncontrollably into his handkerchief.

When the trial resumed, the second plaintiff testified that the basis of his claim of US\$25 000-00 for *injuria* was that the evictions were a personal affront to him and an embarrassment to a person of his social standing. He testified further, that the basis of his claim for loss of trade is that as a result of the evictions, the first plaintiff did not trade for eight months until it was restored to the premises in June 2011. He said that the Winston house branch made US\$88 892-00 in the twelve months preceding the eviction, and would have made US\$60 000-00 in the eight months that it failed to trade. He told the court that first plaintiff was never restored to the Mbuya Nehanda branch and that he could have claimed more, taking into consideration that the branch earned US\$109 280-00 in the twelve months preceding the eviction. He stated that he could claim loss of income for this branch for 2011, 2012, and 2013 to date.

The second plaintiff said that he blames the defendant and the wrongful evictions for the loss of future earning capacity, which he pegged at US\$4 million dollars, based on the retirement age of 65 and the number of years that he could have earned US\$1 375 166-00 per year had he not been incapacitated by his illness. Evidence was tendered that, as at 11 September 2013, the second plaintiff was indebted to Watershed College in the sum of US\$10 000-00 for his son's school fees. The witness told the court that he had received death threats from police officers whom he charged with being corruptly induced by officers of the defendant to scare him. Finally

because of the protracted legal battles that are seemingly never-ending, the witness told the court that he owes a small fortune in outstanding legal fees.

During cross examination, the second plaintiff told the court that first plaintiff never had rent arrears as alleged by the defendant. He admitted that it later transpired that the money that he had been remitting to Messrs Bherebende legal practitioners for the rent may not have been forwarded to the defendant. He admitted that the High Court dismissed the application for stay of execution and upheld the order of the magistrate's court in which it declined to grant stay of execution. The witness accepted that the defendant evicted the first plaintiff on the basis of the orders of those two courts. On the issue of the action taken to recover the goods attached by the Messenger of court on eviction, the second plaintiff admitted that no action was taken, other than to present the order of the Supreme Court to that office, to no avail. The witness admitted that he had agreed to vacate the branch at 147 Mbuya Nehanda Street, by September 2009, and that is why his income schedule shows no income from September 2009- October 2010, the time of the eviction. He admitted that he had agreed that first plaintiff vacate the premises, in order to enable the defendant to renovate the premises. The witness told the court that he sold the first plaintiff's assets and liabilities to a company called Colourprinters which was set up by two of his senior managers, and that, from the date of the sale, the first plaintiff ceased to exist. Finally, the witness told the court that the negligence that he is imputing to the defendant in evicting first plaintiff was based on the fact that the defendant failed to get an order allowing it to execute pending appeal, that this was wrongful, and caused the unlawful eviction of the first plaintiff.

The court was unable to accept the veracity of the plaintiff's evidence regarding the status of the Mbuya Nehanda branch lease at the time of the eviction. The second plaintiff prevaricated, he became agitated, and the court formed the impression that he was being untruthful. He was not a reliable witness on that issue, and because of his capacity to become emotionally charged, distorted some of the evidence that would have been useful to his case. Clearly the parties agreed that the Mbuya Nehanda branch needed renovations. Clearly the second plaintiff testified in his evidence in chief that the parties had agreed that first plaintiff would vacate these premise by September 2009 to pave the way for renovations. The second plaintiff testified that he refused to vacate by the agreed date, and insisted that the defendant provide him with alternative premises to operate from. Clearly the City of Harare, from the evidence led, had condemned that building. The court was not satisfied that applicant was in legal occupation as the time of the alleged

eviction. He was a mala fide possessor, having reneged on his undertaking to vacate the premises in September 2009. To prove that point, the plaintiff's income schedule, shows that no income was generated by that ranch from September 2009 to the date of eviction in November 2010. The court concluded that the second plaintiff's hysterics and histrionic behavior stemmed from a layman's lack of knowledge of the concept of occupation. There was no cogent evidence of another agreement as to the lease or occupation as alleged by the plaintiff.

The second witness to testify on behalf of the plaintiffs was Mr. Richmond Charugwa, a qualified chemical engineer who told the court that he has known the second plaintiff since 2002. The witness testified that he sold some lithographic printers to the first plaintiff. He assisted first plaintiff's transition from analogue to digital machines, and to A2 machines. He testified that by November 2010, the business had become very lucrative and first plaintiff had a large market share, and employed more than sixty people. The witness told the court that some of the machines were damaged in the process of moving around, after the eviction. He said that the second plaintiff became withdrawn, lost weight, and became addicted to religion, after the eviction. Under cross examination, the witness confirmed that he had no knowledge of the eviction or its cause. The court found this witness credible.

The plaintiffs' third witness was Mrs. Doreen Asher, who told the court that she was employed by the first plaintiff as an administrator to the CEO (Chief Executive Officer), the second plaintiff, from 16 January 2009. She said that the first plaintiff was the biggest printing company at that time, with a registered trademark, providing services to most government departments and to Non Governmental Organizations. The witness told the court that the evictions of November 2020 were negligent, unlawful, and wrongful, and done in a bad manner. She said that first plaintiff was reinstated by the Supreme Court but before they could move back in the defendant demolished the building at 147 Mbuya Nehanda Street. She placed the blame on defendant's conduct, and blamed plaintiff's failure to generate sufficient income on the eviction, because she said Mbuya Nehanda had housed the biggest branch and brought in the most income. Lastly she told the court that the second plaintiff became depressed after the evictions, and appeared unable to function, coming late to work, taking copious amounts of medication, and playing religious music all day. She tendered the agreement of sale between first plaintiff and Copyworld, of which she is a director, dated 31 May 2012, into evidence at R29-44 of plaintiff's bundle. She confirmed that the second plaintiff took about USD\$80 000-00 and a few

items of furniture, and that no money exchanged hands for the sale of the business. She said that the second plaintiff literally gave the business away. During cross examination this witness told the court that, at the time of the eviction, first plaintiff was occupying a small portion of the premises at Mbuya Nehanda Street, and not generating any income. She told the court that Copyworld was now defunct. The court had no reason to disbelieve this witness, she was calm and confident in the witness stand, but her credibility was colored by her obvious sympathy towards the second plaintiff, her former boss.

The plaintiffs' last witness was Dr. Patrick Mhaka, a specialist psychiatrist an MBCHB in medicine and surgery and a DMH masters in mental health, medicine and psychiatry. He told the court that he knows the second plaintiff and was aware of his treatment by Dr. Chibanda, who was currently out of the country.

The witness told the court that chronic depression is an illness of mood and mental psychiatric illness characterized primarily by a depressed mood where someone feels low, is unable to sleep or sleeps all the time, has reduced appetite, has weight loss, gain, has reduced energy levels, and is unable to concentrate, has loss of libido, feels helpless, hopeless and worthless, and suicidal. He confirmed that the second plaintiff was found to have all of these symptoms, and referred to Dr. Chibanda's letter of 31 July 2012. The witness told the court that the second plaintiff was prescribed with an antidepressant (Cilift) and a sedative, (Lorazepam).

Dr. Mhaka told the court that the second plaintiff has not responded at all to the medications prescribed for him, a fact that confirms his diagnosis, that he is chronically depressed. He said that the second plaintiff's symptoms now included recurrent anxiety. As a result of the chronic depression, the second plaintiff cannot work, or cope with even the simplest task that requires him to make a decision, he is now handicapped, disabled. Under cross examination the doctor stated that there are a number of stressors that can trigger depression, and agreed that the diagnosis relies heavily on what the patient says, although there are diagnostic tools that are used when the diagnosis is made. The plaintiffs then closed their case. The court's opinion of this expert witness is that he is indeed very knowledgeable about the subject of depression. There is no doubt that the second plaintiff's diagnosis is correct. However, from the evidence that was led, the court struggled to find a connection between the onset of the second plaintiff's depression, and its progression to a chronic state, to the unlawful eviction of the first plaintiff. There was an implied connection to the timing of the onset of the second plaintiff's

condition to the time of the eviction. The court would have benefitted from other evidence such a testimony by family members as to whether there were no other triggers of depression in the second plaintiff's personal life, at the time.

DEFENDANT'S CASE

Mr. Tariq Adam testified on behalf of the defendant. He told the court that the reason for the eviction was that first plaintiff was in arrears with rentals for both premises, and that these arrears have not been recovered, to date. He said that litigation is currently pending under case number HC804/13 to recover the outstanding rentals.

The witness testified that defendant obtained a court order from the Magistrates court to evict the first plaintiff from the two premises, and that the High Court upheld the orders, and that, this was the basis of the eviction. He denied foreseeing the possibility of harm to the first, or to the second plaintiff. The witness told the court that defendant was not negligent in any way in procuring the eviction. He denied being motivated by malice, and said that it was purely business, first plaintiff was no longer discharging its liability to pay rent. The witness told the court that the defendant did not owe the plaintiffs any money, as claimed in the summons or at all. He denied causing the second plaintiff's depression, and stated that he was just doing his job as defendant's manager. He said that he did not foresee the possibility that the eviction was unlawful because of the court orders which allowed defendant to evict the first plaintiff. The witness told the court that the Messenger of Court lied on the return of service that defendant destroyed the building at 147 Mbuya Nehanda Street, after being served with a copy of a notice to reinstate the first plaintiff. The court found it difficult to accept the plaintiff's version that a whole building with many floors was demolished overnight. This witness's evidence fits the explanation given by Doreen Asher (plaintiff's third witness) who told the court, during cross examination, that the first plaintiff was in occupation of a reduced portion of the previous leased premises at the date of the eviction. The first plaintiff voluntarily occupied the front of the building, while the back was being systematically demolished. At the time of the eviction, part of the building had already been demolished. In my view, based on the evidence, at the time of the proposed restoration, eight months after the eviction, it is possible that only a small portion of the front of the building was still standing.

During cross examination Tariq Adam told the court that defendant had been represented by Mr. Tavenhave, a Legal Practitioner, who had misled the defendant and given it incorrect legal advice about the legality of executing the eviction orders of the Magistrates court. He referred to a letter which was filed of record, in which he had complained to the Law Society about this lawyer's conduct of this matter, especially since the Supreme Court then found that the eviction was unlawful, because defendant ought to have applied for leave to execute pending appeal before proceeding. Mr. Tariq Adam said that he did not deal with the legal issues on a day to day basis, but simply let Mr. Tavenhave do his job, the assumption that, as a lawyer, he knew best about the law. He said he merely followed his lawyer's advice, although he admitted that a lawyer should act on his client's instructions. He denied instructing Mr. Tavenhave to act unlawfully. There was nothing in the demeanor of this witness which led me to suspect or to believe that he was not being candid with the court. He remained cool under vigorous cross examination by counsel for the plaintiffs. He appeared unruffled. He did not shift his position in any material respect. His evidence was accepted by the court.

Defendant's second witness was Mr. Musa Adam. He is Tariq Adam's father, and the former manager of defendant's properties. He interacted with the second plaintiff directly over a period of twenty years, and oversaw the lease agreement between the first plaintiff and the defendant in respect of 147 Mbuya Nehanda Street, and 109 Leopold Takawira street premises. He told the court that defendant sought the first plaintiff's eviction from these premises because of arrear rentals. He said that it was agreed between himself and the first plaintiff that the second plaintiff would vacate 147 Mbuya Nehanda Street by September 2009 because the defendant intended to renovate those premises. It was after the second plaintiff refused to honor the agreement to vacate that eviction proceedings were commenced against the first plaintiff. The witness denied any intention to cause harm to the plaintiffs, and denied harboring malicious intentions against them. He emphasized that he has always had a cordial relationship with the second plaintiff (a fact which the second plaintiff alluded to in his examination in chief). He said that during the eight month period between the eviction and the order for restoration, the building at Mbuya Nehanda Street was being demolished. He reiterated that the eviction was done on the strength of two court orders, from the Magistrates court and from the High Court.

During cross examination, Mr. Musa Adam denied that the parties entered into a verbal agreement that first plaintiff remain on the premises after September 2009, the agreed date

to vacate the premises. He stated that the building was being demolished while some of first plaintiff's equipment was in some of the front rooms (this was corroborated by the evidence of Doreen Asher). He said that the building was demolished from the rear to the front. The witness was not shaken in his assertion that, at the time that the order for restoration was issued by the Supreme Court, the building had been demolished. He postulated that the Deputy Sheriff was misleading the court when he filed a return of service that the building was demolished within 48 hours of service of the notice of restoration. The witness insisted that as far as he knew, the eviction was handled by the defendant's legal practitioner, whose advice they relied on, and that, at no time did he instruct the legal practitioner to proceed with eviction contrary to the law. He denied that he was aware that it was unlawful to proceed with the eviction because an appeal had been noted. He denied being advised that it was necessary to apply for an order for execution pending appeal. Despite vigorous cross examination, the witness denied instructing defendant's legal practitioner to proceed with eviction despite the noting of an appeal, and despite the absence of an order for execution pending appeal. He told the court that defendant's lawyer handled legal proceedings, and that, all he knew was that they had an order for eviction from the magistrate's court, which had been upheld by the High Court. Mr. Musa Adam is an elderly gentleman. The court believed his testimony. He did not prevaricate. He remained calm under vigorous and at times abrasive cross examination. He did not falter. Or change his testimony. The court believed that, to him, the eviction took place in the normal course of business. There was nothing personal about it, or malicious, or illegal.

The defendant then closed its case.

The Law

“The law of delict is a branch of private law falling under the law of obligations. It deals with civil wrongs as opposed to criminal wrongs... The word delict is derived from the Latin word *delictum*, meaning a wrong. In England and America the term used for what we call a delict is a tort, derived from the Latin word *tortuous*, meaning twisted or wrong. A delict has been defined as:

- (a) A civil wrong to an individual for which damages can be claimed for compensation and for which redress is not usually dependant on a prior contractual undertaking to refrain from causing harm.
- (b) An unlawful blameworthy act or omission which causes damage to a person or his or her property, or injury to personality and for which a civil remedy for recovery of damages is available.

(c) A breach of a general duty imposed by law giving rise to a civil action at the suit of the injured person.” See¹

In other texts, a delict has been defined as:

(d) “a wrong which can be redressed by civil proceedings...such a wrong exists whenever the defendant’s wrongful and blameworthy conduct causes harm to another in the form of either patrimonial loss or an infringement of an interest or personality”. See²

The Supreme Court has already found that the first plaintiff was evicted unlawfully by the defendant. Can damages be claimed for compensation to redress this wrong to the first plaintiff and to the second plaintiff in the circumstances of this case? Firstly the elements of the delict must be established:

“The two main types of loss for which compensation can be claimed under the law of delict are wrongs of substance leading to financial loss and wrongs to personality leading to sentimental loss. Wrongs of substance are wrongs which cause tangible harm, such as injury to a person including psychological harm, damage to property and harm to economic interests...not every harm suffered by a person is actionable in the field of delict. A person can only sue successfully in delict if the law of delict recognizes that there is legal liability for that type of harm”. See³

“Most delictual actions in our system require proof of fault...proof of either intention or negligence. The *acquilian* action requires proof of either intention or negligence. The most important actions in our law of delict include the *Acquilian* action (*action legis acquiliae*), and the *actio injuriarum*. The *acquilian* action provides a remedy for what are known as wrongs of substance. The *actio injuriarum* provides a remedy for wrongs to personality, a remedy for sentimental loss or intangible harm”. See⁴

It is my view that part of the difficulty with the plaintiff’s claim is the failure to separate and recognize the differences between these two separate causes of action in the law of delict. Neither the summons nor the declaration expressly separates the *acquilian* action from the *actio injuriarum* as causes of action. The summons merely says that the plaintiffs’ claims are based on *injuria*. Neither the summons nor the declaration pleads the two causes of action separately, they clearly have different requirements. Clearly the first plaintiff’s remedies lie in the *acquilian* action, and the second plaintiff’s, in the *actio injuriarum*.

¹ A Guide to the Zimbabwean Law of Delict 2012. G. Feltoe -Introduction

² Willie’s Principles of South African Law 1991

³ G. Feltoe p1

⁴ G Feltoe supra p8

I propose to consider whether the requirements of the *acquilian* action were fulfilled first. The general evidential rule that applies to all civil actions, is that the plaintiff must prove his claim on a balance of probabilities, and a defendant must prove his defence on a balance of probabilities. There are four elements which the plaintiff must prove on a balance of probabilities in an *acquilian* action, the wrongfulness requirement, the patrimonial loss requirement, the fault requirement, and the causation requirement:

- (a) There must be some conduct on D's part (i.e. the act or omission, which the law of delict recognizes as wrongful.
- (b) The conduct must have led to physical harm to person or property and thereby to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property.
- (c) D must have inflicted the patrimonial loss negligently or intentionally.
- (d) There must be a causal link between D's conduct and the loss." See ⁵

The Wrongfulness Requirement

This requirement operates as a valve that controls or regulates the scope of actionable negligence. It has been held that, in order to determine the wrongfulness of any given conduct, the court must make a value judgment based on, among other things, the current convictions of the community as to what is fair, just and equitable. See ⁶ It has also been held that wrongfulness and fault are separate and distinct requirements of the *actio legis aquiliae*. See ⁷ Finally, both fault and negligence must be pleaded and proved. See ⁸ Applying these various requirements to the circumstances of the case before the court, I find that, based on the current convictions of our community of what is fair, just and equitable, it was wrongful of the defendant to evict the first plaintiff unlawfully. The illegality, according to the judgment of the Supreme Court, stemmed from the fact that the defendant ought to have exhausted its remedies before the Magistrates Court and made an application for execution pending appeal. The defendant's *prima facie* wrongful conduct appears to be based on ignorance of the law, and reliance on the advice of its legal practitioner. Having said that, it is clear that although wrongfulness was specifically

⁵ G Feltoe supra p8

⁶ Musadzikwa v Minister of Home Affairs and Anor 2000 (1) ZLR 405(H)

⁷⁷ Nyaguse v Skinners Auto Body Specialists & Anor 2007 (1) ZLR 296 (H)

⁸ Border Timbers v ZRA 2009 (1) ZLR 31 (H)

pleaded, and there was no need to prove it because the Supreme Court had already pronounced on the issue, and declared the first plaintiff's eviction to have been unlawful, the element of fault was neither specifically pleaded, nor proved.

The Fault Requirement

It must be proved that the defendant caused harm either intentionally or negligently. See⁹ At p 2-3 of *Nyaguse v Skinners supra*, the court had this to say:

“The distinction between wrongfulness and fault is very ably elucidated by Neethling, Potgieter & Visser: *Law of Delict*, at pp. 29, 113, and 143. According to the learned authors, the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. On the other hand, the enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal concepts requiring specific and separate proof in order to sustain a delictual claim under the *lex Aquilia*.”

In the circumstances of the case before the court the fault requirement was not specifically pleaded. It was implied in the pleadings that the defendant's blameworthy conduct was in its failure to appreciate the vagaries of the Magistrates Court Act [*Cap 7: 10*] and its rules. The defendant's witnesses testified that they were led to believe, by their legal representative, that it was legally proper to evict the first plaintiff on the basis of the refusal by both the Magistrates Court and the High Court to grant the first plaintiff a stay of execution. This evidence was accepted by the court. There was no evidence that the defendant instructed or aided and abetted a deliberate flouting of the law by their legal representative. The plaintiff's did not plead that the defendant's fault lay in relying on an act of incompetence or ignorance of the law on its part, or on the part of its legal representative. In the absence of this averment in the summons and declaration by the plaintiff's, their case must fall short of the onus of proof required in a civil trial. On a balance of probabilities, plaintiffs are found to have failed to fulfill the requirement to specifically plead and prove the fault requirement. The plaintiffs have failed

⁹ *Nyaguse v Skinners supra*, G. Feltoe p12

to plead the manner of the defendant's blameworthy conduct which resulted in the unlawful eviction. If regard is had to the judgment of the Supreme Court, both the Magistrates Court and the High Court operated under a misapprehension of the law and of the operation of the Magistrates Court Act.

What fault or blame can then be laid at the door of the defendant, which accepted the advice of its legal practitioner that two different courts had sanctioned the eviction? In my view, even if the element of fault had been specifically pleaded, it could not have been proven, for this reason. Proof of fault would have required evidence of more than wrongfulness or unlawfulness, or consequential harm; it would have required evidence of intention or negligence to establish a reasonable inference of liability. From the evidence adduced at trial, there was no deliberate infliction of harm, with full knowledge that the eviction would result in harm. There is no evidence before the court that proceeding to evict the first plaintiff on the back of two court orders was an unreasonable manner to proceed in on the part of the defendant. There is no evidence before the court, that an average reasonably careful Zimbabwean would not have proceeded to act in a similar manner if placed in the same shoes as the defendant at the time.

In the *Border Timbers v Zimbabwe Revenue Authority supra* case. At p 10, the court stated that:

“It appears to me that the plaintiff may have proceeded under the incorrect belief that wrongfulness is similar to and the same as culpa and that pleading wrongfulness on its own suffices to satisfy the requirements of the *Aquilian* action. It is not. The two are separate requirements that have to be satisfied in each suit although the evidence led to prove one may be used to prove the other. I can do no better than associate myself with the observations of SCOTT JA in *Gouda Boerdery Bk v Transnet Ltd* 2005 (5) SA 490 (SCA) when he had the following to say in paragraph 12 starting on p 499:

“It is now well established that wrongfulness is a requirement for liability under the modern *Aquilian* action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable. But the issue of wrongfulness is more often than not uncontentious as the plaintiff's action will be founded upon conduct which, if held to be culpable, would be *prima facie* wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for

judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in *Kruger v Coetzee*, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, **it is important not to overlook the distinction between negligence and wrongfulness.**”

Disposition

It is common cause that the eviction of the first plaintiff by the defendant was subsequently declared to be unlawful by the Supreme Court. The question that the court had to determine was whether this unlawful and consequently wrongful act gave rise to liability which was actionable and in respect of which it would be appropriate to redress the wrongful eviction by an appropriate order as to damages. This court has found that the first plaintiff failed to discharge the evidentiary burden upon it to prove all the four elements of the acqulian action on a balance of probabilities. Although the element of wrongfulness was specifically pleaded, and did not require proof, the court had difficulty with the evidence regarding the element of fault. This element was neither specifically pleaded nor proved. There was no averment of intention or negligence. The evidence adduced failed to show such blameworthy conduct, on the part of the defendant, which would have justified a finding that the defendant failed to take reasonable care, and proceeded to cause the eviction of the first plaintiff in circumstances where an average landlord would not have proceeded to evict a tenant. The plaintiffs’ summons and declaration consequently did not disclose a cause of action at law, and there was insufficient evidence that the defendant acted negligently, in evicting the first plaintiff. If the first plaintiff’s claim was not proved, it follows that the second plaintiff’s claim is not sustainable.

In the result, the plaintiffs’ claim is dismissed with costs.

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