

HONEYCOMB HILL [PVT] LTD
versus
HERENTALS COLLEGE [PVT] LTD

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28 January 2016; 2 & 19 February 2016; 27 April 2016

Civil trial

M.E. Motsi, for the plaintiff
Adv S. Hashiti, with him, *Adv G. Sithole*, for the defendant

MAFUSIRE J: The plaintiff sought the ejectment of the defendant from certain premises. The cause of action was that the lease between the parties had expired due to the effluxion of time. It was said the lease had been for two years and that the defendant had not renewed it.

In its defence and counter-claim, the defendant accused the plaintiff of concealing relevant information. It denied that the relationship between the parties was simply that of landlord and tenant, or that the agreement was a simple lease. The defendant said the ultimate transaction between the parties was a sale of the land in question, the plaintiff being the seller, and the defendant being the purchaser. The defendant said it had already paid the purchase price in full. The lease had just been a façade to enable the defendant to get occupation of the property pending the regularisation of the sale agreement in terms of the Regional, Town and Country Planning Act, [*Chapter 29: 12*]. It was said that at the time, the land in question was still to be sub-divided and a sub-division permit still to be granted.

The defendant's counter-claim, despite the imprecision of the averments, was effectively for specific performance. From the premise that it had bought the land in question, the defendant's prayer was for the plaintiff "... to carry out all formalities of passing title of the property in question to the defendant, ..." failing which the Sheriff should be empowered to sign the necessary documents in place of the plaintiff.

The plaintiff called one witness, Givemore Matimura [*“Matimura”*]. He was, and had been, the plaintiff’s Managing Director. He had been the central player from the side of the plaintiff.

The defendant also called one witness, Emmanuel Silas Mahachi [*“Mahachi”*]. He was, and had been, the defendant’s Executive Director. He had also been the central player from the side of the defendant.

The totality of the evidence betrayed some confusion that dogged the parties as they tried to craft an agreement to reflect the relationship that they had truly desired, given the proscriptions of the Regional, Town and Planning Act. The plaintiff pleaded a lease agreement. But evidently, the relationship was much more than that of landlord and tenant. The defendant pleaded a sale agreement. But again, it was not, or could not have been, a simple sale.

However, despite that confusion, there were certain aspects of the evidence that were common cause. They were these. The plaintiff was the owner of the land in question. It was called the Remaining Extent of Lot 7 of Subdivision A of Tynwald South of Fontainbleau, measuring 8, 0706, otherwise known as No.7 Cowie Road, Tynwald, Harare [hereafter referred to as *“the property”* or *“the land in question”*].

The defendant operates a number of educational institutions. It was interested in a portion of the property. It wanted to build a primary school. There was disagreement or confusion between the witnesses over the actual size of the portion of the land that the defendant was interested in. Matimura claimed the portion had not been defined. He said he had identified it to the defendant by merely pointing out the general direction and area. In cross-examination, Mr *Motsi*, for the plaintiff, referred to 3 acres. But throughout his testimony, Mahachi was adamant the portion was 3 hectares. I find that the portion was indeed 3 hectares. I shall explain.

The biggest conflict between the parties’ evidence was whether they started off with a straight lease, or a straight sale, or whether it was first a sale in principle, then a lease as a stop-gap measure, pending a sale proper.

Matimura said it was a straight lease. He said there had been negotiations for a straight sale but that these had subsequently collapsed. The parties could not agree on the purchase price. He admitted though that the plaintiff had received from the defendant an amount in the sum \$140 000. He said of that amount, \$20 000 had been the defendant’s rent for the property for two years from 12 January 2012. The balance, \$120 000, was a loan. If

the defendant did not move out after the expiry of the lease, then the \$120 000 would be set off against the rent accruing for the defendant's continued occupation, that is, if the plaintiff did not pay back the loan.

As proof that the agreement between the parties was a straight lease, Matimura produced a written agreement signed on 12 January 2012. Some important aspects of that agreement were that the lease would endure for two years, but subject to a right of renewal for a further period of four years. The rent for those initial two years was \$20 000. This would be paid within twenty-four hours of signing. The defendant would use the leased property for the purpose of an educational institution. Clause 8 of the lease allowed the defendant to effect such improvements as would suit the requirements for its business. At the termination of the lease, the defendant would remove those improvements. However, if these could not be moved, the defendant would remain in occupation until such time that the plaintiff had paid for the value of the improvements.

Clause 9.3 of the lease gave the defendant the option to buy the property, or the shares of the company that held the property, in the event that these were offered for sale. In this context, the plaintiff warranted that it would not sell or encumber the property without the prior written consent of the defendant.

As further proof that the parties' agreement was a straight lease, Matimura referred to certain correspondence between the parties' legal practitioners. Three of those letters were from Gill, Godlonton & Gerrans [*GGG*], the defendant's legal practitioners, to Mabulala & Motsi [*MM*], the plaintiff's legal practitioners. They were dated 12 January 2012, 16 May 2012 and 9 May 2013. Although addressing different subjects, all of them referred to the lease agreement. In particular, the second letter above said in part:

“Our record shows that contrary to the allegations made by your clients, the correct position is that the contract concluded between our respective clients is a lease agreement, not an agreement of sale ...”

As further proof that the \$120 000 aforesaid was a loan, Matimura produced an acknowledgement of debt by himself and his wife, in favour of the defendant, in the sum of \$35 000, payable within 11 months into the lease period. To that acknowledgement of debt, the plaintiff stood surety in terms of a written deed of suretyship.

Matimura also produced an affidavit by himself to back up that acknowledgement of debt. The affidavit confirmed the amount of \$35 000. It confirmed that the amount was a loan. Clauses 3 and 4 said:

- “3. However, in the event that a Sub-division permit is obtained by ourselves in respect of certain immovable property currently being leased from us by Herentals College ... and further in the event that an agreement of sale is concluded between us and Herentals College in respect of that immovable property, the amount of money advanced to us as stated herein together with all previous advances will be channelled towards the purchase price for the immovable property in question.
4. Further, it is our understanding that in the event of an agreement of sale being concluded as aforesaid, the purchase price shall not be more than US140 000.00.”

As proof that the lease agreement between the parties had definitely terminated, Matimura referred to a letter from MM to GGG dated 15 May 2013, the last paragraph of which read:

“Our client also takes this opportunity to advise that they will not be renewing the lease at its expiration at the end of December 2013 and that this letter serves as a notice to that effect.”

On the other hand, Mahachi said through the agency of one Didymus Noel Edwin Mutasa [*“Mutasa”*], a former government minister who was closely associated with an entity called Cold Comfort Farm Trust, the shareholder in the plaintiff, the defendant had purchased the property from the plaintiff for \$140 000. The defendant’s intention was to establish a primary school. It had been running a school at an adjoining property. However, it had run into endless problems there. Mutasa had referred the defendant to Mr and Mrs Matimura who owned the plaintiff.

Meetings had been held in Mutasa’s office, culminating in the agreement of sale. The defendant had paid the purchase price in less than six months. MM had drafted an agreement of sale. However, before Mahachi signed, he had requested that GGG should have a look at it. At GGG, the parties were advised that a straight sale was not possible given that the land in question was still to be subdivided. Such a sale would run foul of the Regional, Town and Country Planning Act.

To get round the problem, and as a contingency plan, the parties would enter into a lease agreement whereby the defendant would rent the property for two years at \$20 000. Two years is what was envisaged it would take for the subdivision permit to be processed.

Meanwhile, the payments already made by the defendant towards the purchase price would be treated as loan advances. Once the subdivision permit was granted and the sale agreement perfected, the amounts would revert to being the purchase price.

Matimura said that the plaintiff wanted the plaintiff out of the property so that it could use it itself. However, the plaintiff had no intention of running a school. As such, it would have no use for the defendant's improvements. In any event, those improvements were illegal for want of authorisation by the City of Harare, the local authority with town planning jurisdiction over the property. Matimura charged that the defendant had no proper permit to run the school. But he conceded that the general site plan for the larger property had zoned the land in question for a school. He also conceded that there had been no change of use.

On the other hand, Mahachi maintained that the defendant operated the school with the full blessing of the government. The school had been opened by Mutasa when he was still in government. Furthermore, meetings had been held with the ministry of education at which no less than the minister himself, his permanent secretary and several other senior officials had attended and at which the defendant had been authorised to operate the school pending the formal granting of the permit. The school was a registered centre for examinations.

The actual infrastructure at the school included classroom blocs for grades 0 to 7. Mahachi could not be categorical that there had been site inspections and approvals from the local authority during construction. On this he referred to the defendant's building foreman whom he said should have all the details and could be called to testify if the court saw it fit.

Apart from ejectment, the plaintiff also claimed holding over damages at the rate of \$10 000 per month. Asked in cross-examination what proof he had that any business would generate that kind of money for the plaintiff, Matimura conceded he had none, but said that he was building houses in the area for re-sale. Earlier in his evidence-in-chief, and in answer to a similar question by plaintiff's counsel, Matimura had said he was not getting anything from the land in question yet he could be leasing it for \$10 000 per month.

That was basically the case before me.

In my view, Mahachi's version rang truer. It accorded more with probabilities. For, example, Mr *Motsi* painted a picture of a lease of land that had never been defined with any precision; a picture that the lease had simply referred to the leased property as being 7 Cowie Road, Tynwald, it being the entire 8 hectare plot, and that, as such, the defendant could not persist in claiming transfer of an undefined property. In cross-examination, Mr *Motsi* kept pressing Mahachi to admit to some 3 acres. But Mahachi maintained that 3 acres might have

been the actual space taken up by the buildings. He insisted that the total area of the portion of the land in question was 3 hectares. He admitted though that he could not be very certain about it.

I believe Mahachi was being candid. I have no doubt that both parties were *ad idem* on 3 hectares. On this, there was Matimura's own acknowledgement of receipt one month after the lease agreement. It expressly referred to 3 hectares. In it Matimura acknowledged receiving from the defendant, on behalf the plaintiff and Cold Comfort Trust, an amount of \$10 000 as being part of the deposit towards the purchase price in the sum of \$140 000. The material portion of that acknowledgement read as follows:

"I **Givemore Matimura** do hereby acknowledge receipt of \$10 000 ... from Herentals Group of Colleges. I accept the above mentioned money on behalf of the following:

- **Cold Comfort Trust / Cde. Didymus Noel Edwin Mutasa**
- **Honey Comb Hill [Pvt] Ltd / Mrs. Nelia Matimura**

I accept that amount received is for a deposit from a purchase price of \$140 000 ... *for 3 [Three] Hectares* [my emphasis] of Lot of subdivision of Tynwald South of Fontain Bleau and known as No 7 Cowie Road Tynwald, Harare.

I declare that amount received towards the purchase is now \$40 000.00 ... of the agreement of sale which has been verbally concluded while awaiting a subdivision permit for that purpose. I accept that the Lease agreement that was signed was for purpose of as [sic] enabling Herentals to move in and take occupation while we pursue the subdivision permit to its logical conclusion.

I therefore accept and acknowledge receipt of \$10 000 ... towards that purpose of the purchase from Herentals Group of Colleges this 14th day of February 2012."

In fact, the above document marked the defendant's entire case.

In my view, the parties were *ad idem* on the plaintiff selling, and the defendant buying, 3 hectares of that 8 hectare plot. Plainly, the parties had actually concluded an agreement of sale. In evidence, Matimura said the property was worth \$860 000. But he did not say whether that was the value then, when there were no improvements, or now, when there are developments.

What I find more probable is that then the plaintiff had wanted \$180 000 as purchase price for the property. The defendant had bargained. Eventually the parties settled at \$140 000. The plaintiff's lawyers drafted an agreement of sale. Mahachi wanted it checked by the defendant's lawyers first before he could sign. The defendant's lawyers saw a problem. The sale would be contrary to s 39 of the Regional, Town and Country Planning Act. That provision is, of course, the one that prohibits or voids any agreement for a change of ownership of a property without a subdivision permit.

I further find that in order to get round the Regional, Town and Country Planning Act, the parties agreed that they would enter into a two year lease. The rent payable for those two years would be \$20 000. Two years was what was envisaged as the period it would take the plaintiff to procure the subdivision permit. But the ultimate goal was the defendant taking transfer of the 3 hectares.

Within six months of their agreement the defendant had paid off the full purchase price. This was done over several instalments. The total paid was \$140 000. Of that, \$20 000 was disguised as rent. The balance, \$120 000, was disguised as loan advances. Once the subdivision permit was granted, the payments would revert to being the purchase price. This was expressly stated in Matimura's affidavit of 13 July 2012 which he signed in support of his acknowledgment of debt for \$35 000 referred to above.

To complete the disguise, the lease was crafted in such a way that it gave the defendant, in clause 9.3, the option to purchase the leased property in the event that it was offered for sale.

The plaintiff insisted that in interpreting the rights and obligations of the parties, the court should look at nothing else but the lease. That was naïve. In fact, one remarkable thing about this case was that by the time of the trial the parties had actually swapped positions, the plaintiff relying on a straight lease, and the defendant on a straight sale. Yet previously, the position had been the other way round, the plaintiff relying on a straight sale and the defendant on a straight lease. The proof of this swap was the letter from GGG on 16 May 2012 referred to above. It stated as follows:

“... contrary to the allegations made by your clients, the correct position is that the contract concluded between our respective clients is a lease agreement, not an agreement of sale ...”

As for the plaintiff, the evidence that at all times it regarded the agreement between the parties as being one of sale and not a lease, is overwhelming. Apart from Matimura's unequivocal acknowledgement of debt above, the plaintiff actually once sued in this court, under HC 6441/12. The action was for the eviction of the defendant from the property. The cause of action was that the defendant had breached the agreement of sale between the parties. The cause of action was crafted in much the same way as Matimura's acknowledgement of debt above. The action was subsequently withdrawn. I was not advised why. But evidently it had been doomed. The sale was undoubtedly in *fraudem legis*.

A month before that action, MM had written to GG on 3 May 2012 stating in part:

“We are now waiting for the subdivision permit. In the interim our client has indicated that the purchase price of \$140 000.00 was premised on the assumption that yours would pay this amount at once and she would want the purchase price to be raised to \$180 000 which she originally agreed with yours.”

There was also another letter from MM to GGG seven days later. In it MM insisted that the agreement between the parties was that the defendant would pay the full purchase price of \$180 000 upon the signing of the agreement. The defendant was being accused of having breached the agreement by not paying, and that despite such breach, it had gone ahead with construction, moreover, without the relevant approvals. The letter ended by demanding payment of the balance of the purchase price in the sum of \$110 000 failing which the plaintiff would sue. A month later the plaintiff sued.

Before an amendment at the start of the trial, the first issue that had been agreed upon by the parties at the pre-trial conference had been whether or not the parties had entered into a valid contract of sale in respect of the land in question. It had been agreed that the onus on this issue would lie on the defendant.

I find that the parties had indeed entered into an agreement of sale. However, it is manifestly obvious that the agreement was contrary to s 39 of the Regional, Town and Country Planning Act. The section says that, among other things, no person shall subdivide any property, or enter into any agreement for the change of ownership of any portion of a property, except in accordance with a permit issued in terms of the Act. Any contravention of this prohibition is an offence punishable by a fine or imprisonment, or both a fine and imprisonment.

In *X-Trend – A – Home v Hoselaw Investments*¹ the Supreme Court interpreted s 39 of the Act to mean that what is prohibited is the agreement itself that may lead to a change of ownership of any portion of a property, irrespective of the time of signing that agreement.

In casu, both parties knew that the agreement of sale was illegal. That is why they went to great lengths to disguise it in various ways. But, wittingly or unwittingly, they went on to consummate it. It was not the defendant's case that it had at any stage exercised the option given to it in terms of clause 9.3 of the lease to enter into another agreement. All the steps taken by the parties were manifestly in furtherance of that dud sale agreement. *In casu*,

¹ 2000 [2] ZLR 348 [S]

the defendant, in its counter-claim, even sues on it. It seeks specific performance. That is not competent. Courts do not enforce illegal agreements. The sale was a contract *ex turpi causa*. The law says an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. The rule is absolute. It admits of no exception. It is expressed in the maxim *ex turpi causa non oritur actio*, meaning “**no action arises from an immoral cause**” see; *Dube v Khumalo*² and *Mega Pak Zimbabwe [Pvt] v Global Technologies Central Africa [Pvt] Ltd*³:

Explaining the rationale of the *ex turpi causa* rule, MAKARAU JP, as she then was, with characteristic graphics, put it this way in *Mega Pak Zimbabwe*⁴:

“In my view, the general principle expressed in the maxim does not permit litigants to bring their ‘dirty’ transactions into the clean halls of justice. Justice will not soil its hands by touching such transactions. ‘Dirty’ in this regard not only refers to immoral transactions, contracts specifically prohibited by law but also includes transactions that seek to defeat the law.”

In *Jajbhay v Cassim*⁵ reference was made to:

“... **no polluted hand shall touch the pure fountains of justice**”⁶

Therefore, the defendant’s counter-claim must fail.

I now turn to deal with the plaintiff’s claim.

Having shown that the true agreement between the parties was one of sale rather than a lease, I consider that, in this action, for the plaintiff to have based its cause of action on the putative lease was fatal. The lease was a sham.

The plaintiff’s sole cause of action, as set out in the pleadings, was the defendant’s alleged failure to renew the lease. It was said the lease had expired by the effluxion of time. The plaintiff also relied on the purported notice by its lawyers that the lease would not be renewed. But even if I were to rely on all that, the plaintiff has no right to evict the defendant. There are a number of reasons why.

² 1982 [2] ZLR 103 [S], at 109D - F

³ 2008 [2] ZLR 195, at

⁴ At p197G – 198A

⁵ 1939 AD 537, at 551

⁶ Quoting WILMOT LCJ in *Collins v Blantern* [2 Wilson, 347] [1767]

Firstly, by their own agreement, the defendant was entitled to remain on the property until such time that it had been paid for the value of the improvements. That was expressly stated in clause 8 of the lease. In June 2015, following an order of this court, prior to the holding of the pre-trial conference, the improvements were valued by an estate agent company at \$1 741 417. At the pre-trial conference, the parties agreed that all the permanent improvements had acceded to the land. The plaintiff admitted that the defendant was entitled to fair compensation. At trial, Matimura conceded that the plaintiff had not yet paid the compensation. He sought to evade responsibility by alleging that the structures put up by the defendant were illegal for want of approval by the local authority.

But I find that until it pays for the value of the improvements erected by the defendant on the property, the plaintiff has no right to evict the defendant. Not only is the plaintiff entitled to stay put on the basis of an improvement lien [see *Bak Storage [Pvt] Ltd v Grindsberg Investments [Pvt] Ltd*⁷], but also this was what the parties expressly agreed upon.

Matimura's claim that the improvements are illegal was not borne out by the evidence. Although Mahachi left that question to the defendant's foreman, who was never called, I am not prepared to condemn a \$1.7 million infrastructure without proper evidence of illegality or irregularity. In my view, the probabilities are that the local authority had approved the structures in principle, as Mahachi said, and that all that had remained had been the formal written endorsement which awaited the production of the subdivision permit. Matimura said the subdivision permit was now available. He conceded that the site plan zoned the property for a school. As a matter of fact, there was a school built. Therefore, until such time that the defendant is paid for the improvements, the plaintiff cannot evict it.

The second reason why the plaintiff is not entitled to evict the defendant is that it has not paid back the \$120 000-00. Admittedly, clause 11 of the lease said that the written document was the entire contract between the parties and that no additions or collateral or replacement agreements would be of any force of effect unless reduced to writing and signed by the parties. However, it was abundantly clear that not only would the lease have to be read together with all the other relevant documents, such as the lawyers' letters and Matimura's affidavits and acknowledgements, but also that it had to be interpreted in the context of the surrounding circumstances.

⁷ HH 837/15

The parties' documents said \$120 000 was a loan. They showed that the amount would be paid back. Matimura admitted that the plaintiff had not paid it back. Mr *Hashiti*, for the defendant, accused the plaintiff of wanting to have its cake and eating it. It was not an improper accusation. Nowhere in its pleadings, or in Matimura's evidence, did the plaintiff tender to return the money. Instead, there was a further claim in the plaintiff's prayer for \$10 000 per month as holding-over damages.

So, if I grant the plaintiff's claim, it will end up with both the defendant's money and the property. The defendant will end up with neither the property nor the money. That the money might have been advanced under a sham arrangement does not absolve the plaintiff from paying it back. The plaintiff cannot profit at the expense of the defendant. That is unjust enrichment. The law does not permit it. Both parties were responsible for the sham agreement. The *in pari delicto* rule cannot apply.

In its classical form, the *in pari delictum* principle says that in case of equal wrong, the loss stays where it falls; he who is in possession prevails [*"in pari delicto est conditio possidentis"*]: see *Schierhout v Minister of Justice*⁸; *Dube v Khumalo*⁹; *Matsika v Jumvea Zimbabwe [Pvt] Ltd*¹⁰ and *Gambiza v Taziva*¹¹.

The rationale for the *in pari delictum* principle is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights in furtherance of an illegal transaction. In *Schierhout's* case INNES CJ said, at p 109:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."

There should be no confusion between the *in pari delictum* rule and the *ex turpi causa* principle under which the defendant's counter-claim has failed. Both seem to be cognates. But they are distinct and different. As said already, the *ex turpi causa* rule is inflexible and admits no exception. The *in pari delicto* rule is flexible and is subject to exceptions, especially those grounded on public policy. *Ex turpi causa* **prohibits the enforcement** of immoral or illegal contracts. *In pari delicto* **curtails the rights of the delinquents** or

⁸ 1926 AD 99

⁹ 1986 [2] ZLR 103 [SC]

¹⁰ 2003 [1] ZLR 71 [H]

¹¹ 2008 [2] ZLR 107 [H]

offenders **to avoid the consequences** of their performance, or part performance of such contracts [per STRATFORD CJ in *Jajbhay v Cassim, supra*, at p 540 – 541].

In *Dube v Khumalo*, *supra*, GUBBAY JA, as he then was, confirming the position that in suitable cases the courts will relax the *in pari delictum* rule, said that this is done “...[to do] *simple justice between man and man*” [also *Jajbhay, supra*, at p 544].

In casu, Mr Motsi touched on the illegality of the purported sale. But this was merely to defeat the defendant’s counter claim for specific performance. He did not deal with the *in pari delictum* rule in relation to the plaintiff’s claim. But that is neither here nor there. If plaintiff wants the defendant to be evicted and yet does not tender to refund the purchase price that it had received for the land in question, albeit under an illegal contract, it will end being unjustly enriched at the expense of the defendant. Therefore, even on this other ground, the plaintiff’s claim for eviction is incompetent.

The third reason why the plaintiff’s claim for eviction, or cause of action, is incompetent is for want of compliance with s 22 of the Commercial Premises [Rent] Regulations, SI 676/1983 [*“the rent regulations”*]. The defendant had not pleaded this defence. However, at the hearing, Mr *Hashiti* successfully moved for its inclusion and for an amendment to the issues for trial.

Section 22[2] prohibits a court from ordering the recovery of possession of commercial premises, or the ejection of a lessee therefrom, on the basis that the lease has expired, either by the effluxion of time, or by notice having been duly given by the lessor, for as long as the lessee continues to pay the rent due within seven days of the due date, and performs the other conditions of the lease. The exception to this prohibition is if the court is satisfied that the lessor has good and sufficient grounds for wanting the premises back.

In this connection, the plaintiff’s cause fails because, firstly, with regards to rent payments within seven days of due date, the defendant was entitled, as Mr *Hashiti* argued, to ride on the \$140 000 still owed by the plaintiff. The defendant was entitled to treat the amount as rent paid in advance. The evidence supports that view. After the defendant had refused to vacate, MM wrote to GGG, on 3 July 2013, stating that in the light of that refusal the plaintiff would not be paying back the \$140 000 because:

“... the likelihood of having to use that amount to off-set holding over damages due to your client’s attitude is high.”

Furthermore, in his evidence, Matimura, conceded that for as long as the defendant remained on the property, the \$140 000 would be set-off against the accruing rent. The correct amount though was \$120 000 since \$20 000 had already been used up in the two years that the lease had run. But the point is, if a statutory tenant is not in default with its rent payments, or with the other terms of the lease, it is not competent for a court to order its eviction simply because the lease has expired by the effluxion of time, or that a notice of cancellation was given, precisely the plaintiff's case herein.

Secondly, it is not enough for the respondent to simply demand its property back. It is not enough for it to say it wants the premises for its own use: see *Moffatt Outfitters [Pvt] Ltd v Hoosein Ors*¹² and *Kingstons Ltd v L D Ineson [Pvt]*¹³. The landlord must show what use it wants the property for. The court is entitled to know. It must be satisfied that the landlord has “*good and sufficient grounds*” for wanting its premises back. In *Kingstons Ltd v L D Ineson [Pvt]* GUBBAY JA, as he then was, said¹⁴:

“Each case of an owner genuinely seeking the use of lease premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: ‘The premises belong to me and I now desire to use them for my own purposes’. That would not constitute good and sufficient grounds. The court would want to know the precise use to which it was intended to put the premises. If that were found to be illegal or frivolous or, having regard to the owner’s circumstances, unreasonable, the eviction of the lessee would be refused.”

At trial, Matimura maintained that the plaintiff had no intention of running a school if it got back its premises. But he did not say what other use the plaintiff would put the premises to. The property was zoned for a school. Matimura conceded that no change of use had been applied for, let alone granted. Thus, the plaintiff has not established that it has good and sufficient grounds for wanting the premises back. Under such circumstances the commercial rent regulations do not permit a court to grant an eviction order. Thus, the plaintiff's cause also fails on this other requirement of the law.

In all the circumstances therefore, the plaintiff is not entitled to an order of eviction of the defendant.

Regarding holding over damages, I consider that for as long as the defendant remains in occupation of the property, the plaintiff is, in principle, entitled to them. It seems to me the

¹² 1986 (2) ZLR 148

¹³ 2006 (1) ZLR 451 (S), at p 457C

¹⁴ At pp 115A – B

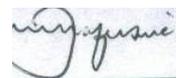
principle was within the contemplation of the parties even though they might not have agreed on the rate at which such damages would accrue. The plaintiff claimed \$10 000 per month. But this figure was demonstrably a thumb-suck. It was not supported by any evidence. The nearest evidence was that in their lease the rent had been agreed at \$20 000 for the two years. That worked out at \$10 000 per year. When asked how he would justify \$10 000 per month, Matimura's answers were largely meaningless. Therefore, without evidence on the rate of the holding over damages, I consider that the appropriate order is that of absolution from the instance.

Both parties have failed in their claims. Therefore, they should meet their own costs.

In the final analysis, I make the following order:

- 1 The plaintiff's claim for an order of ejectment of the defendant from premises situate on a portion of the property called the Remaining Extent of Lot 7 of Subdivision A of Tynwald South of Fontainbleau, otherwise known as 7 Cowie Road, Tynwald South, Harare [hereafter referred to as "*the property*"], is hereby dismissed.
- 2 The defendant is hereby absolved from the instance in respect of the plaintiff's claim for holding over damages over the property.
- 3 The defendant's counter-claim against the plaintiff for transfer of the property is hereby dismissed.
- 4 Each party shall bear its own costs.

27 April 2016



M.E. Motsi & Associates, plaintiff's legal practitioners
Mambosasa, defendant's legal practitioners