

FRANK NYAKU BADZA

versus

SMM HOLDINGS [PVT] LTD [*Under Reconstruction*] t/a SMM Properties

HIGH COURT OF ZIMBABWE

MAWADZE J & MAFUSIRE J

MASVINGO, 1 March 2017 & 5 APRIL 2017

### **Civil appeal**

Mr *C. Ndlovu*, for the appellant

Adv. *L. Mazonde*, with him, Mr *K. Chuma*, for the respondent

MAFUSIRE J: This was a civil appeal. It was against the judgment of the magistrate's court sitting at Masvingo on 28 September 2016. The facts, the dispute and the issues were all very straightforward. But the pleadings, the trial, the judgment, the appeal, the heads of argument, and even the submissions on the day of hearing, were, with all due respect, replete with confusion on some fundamental aspects of the claim, chief of which being the applicability or inapplicability of the Rent Regulations, 2007, Statutory Instrument 32 of 2007 [*“the rent regulations”*]. This shall soon become apparent.

The respondent's claim [plaintiff in the court *a quo*] was for the ejectment of the appellant [defendant in the court *a quo*], and all those claiming occupation through him, from a certain house, one of many such properties owned by the respondent in the township, or settlement, known as Mashava, some 40km west of the City of Masvingo. The appellant had got into that house, as had several other people from all walks of life, through a lease between himself and the respondent. The houses had become redundant in the early 2000 when the respondent, a mining concern, had gone bankrupt and had ceased operations. It had become heavily indebted to central government. So central government had placed it under reconstruction in terms of the Reconstruction of State-Indebted Insolvent Companies Act, *Cap 24:27* [*“the Reconstruction Act”*]. In line with the provisions of that Act, one Afaras Gwarazimba [*“Gwarazimba”*], was appointed administrator. All this was common cause.

Also common cause was that in or about 2013 the respondent's sole or major shareholder, the Zimbabwe Mining Development Corporation, ["**ZMDC**"], a statutory corporation or parastatal, poured \$1,2 million into the respondent to resuscitate its operations. In anticipation of re-opening of the mines the respondent gave notice to all such persons as were occupying its houses to vacate for its workforce. The appellant was one such occupant. He ignored or neglected or refused to move out. So did several others. The respondent sued for eviction. That was the matter in the court *a quo*.

The first confusion is traced right back to the respondent's summons. Either the rent regulations did, or did not apply, in the sense that either the respondent was an entity exempt from their application by reason of it being one of the entities listed in sub-section [2] of s 2, or, in the sense that the area where the houses were built was *not* one of those listed in sub-section [1].

By sub-section [2] the rent regulations do *not* apply to the letting of a dwelling by:

- [a] the State or a local authority;
- [b] any authority, board, commission, council or other like body, having corporate personality and established for public purposes directly by an Act of Parliament;
- [c] an absentee landlord, whose absence is for six months for purposes of holiday, business, health or the like;
- [d] a landlord in respect of new dwellings constructed after the inception of the rent regulations the rentals in respect of which would be controlled for the next ten years by the Rent Board.

By sub-section [1] the rent regulations apply *only* to the following areas:

- [i] an area where a municipality or town council has been established;
- [ii] any designated part of a rural district council;
- [iii] an area set aside as a township;
- [iv] a local government area as defined.

After describing it as the plaintiff, and a company under reconstruction, the particulars of claim said the respondent was the owner of various properties currently being occupied by

the appellant, and several others. It was then stated, *inter alia*, that the respondent “... *was the local authority for the Mashava area, where these houses are located ...*” It was further stated that the respondent now required the houses for its employees as it had resumed operations and that, despite demand, the appellant and the other persons had refused or ignored to move out.

The reference to the respondent being “... *the local authority for ... Mashava ...*” was plain confusion. In terms of the Housing and Buildings Act, *Cap 22:07*, a local authority is either a municipal council, a town council, or a local board, established in terms of the Urban Councils Act, *Cap 29:15*, or a rural district council established in terms of the Rural District Councils Act, *Cap 29:13*. The respondent is none of these. It is just a private company with limited liability, and registered in terms of the Companies Act, *Cap 24:03*, even though ZMDC, a parastatal, is a shareholder.

It seems the reference to the respondent being a local authority was intended to place it beyond the reach of the rent regulations.

But the confusion did not end there. Either the rent regulations applied or did not apply. If they applied, then the respondent could not move for ejection from the court without having demonstrated compliance with s 30. If they did not apply, then the basis of its claim would be markedly different. The applicable law would be the common-law, not the rent regulations. One major difference would be this. Instead of justifying eviction on the need to house its employees, a requirement under the rent regulations, the respondent would necessarily need to plead the determination of the lease, either by effluxion of time, breach, mutual agreement, notice, *vis majeure*, or on some other basis.

Whatever the case, the determination of the lease would be the justification for the eviction if the common-law applied. This is so because one of the incidents of ownership of a thing is the owner's entitlement to the exclusive possession of the *res*. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some right enforceable against the owner: see **Silberberg and Schoeman's** *The Law of Property*, 5<sup>th</sup> ed., at p 243. Otherwise an owner deprived of possession against his will can vindicate his property wherever found, and from whomsoever holding it: see *Chetty v Naidoo*<sup>1</sup>.

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<sup>1</sup> 1974 [3] SA 13 [A], at p 20B.

A lease, for its duration, suspends the owner's entitlement to the exclusive possession of the thing. It is a contract. It regulates the rights and duties of the landlord and the tenant. Its essential terms are that in return for rentals, the landlord undertakes that the tenant shall have the use and enjoyment of the property. The tenant is obliged to restore the property to the landlord on termination. If the tenant fails to do so, then the landlord, among the other remedies available to him, may move for the tenant's eviction: **Silberberg & Schoeman's**, *supra*, at p 427 – 429; see also *The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms*<sup>2</sup>.

In this country, in relation to dwellings, it is the rent regulations, made under the Housing and Building Act, that limit the landlord's common-law rights to evict a tenant whose lease has terminated: *Timms' case, supra*, at p 314A – C.

*In casu*, the respondent's summons said absolutely nothing about the lease. So, was its mast nailed to the rent regulations or the common-law?

To that confusion the applicant pleaded, after requesting further particulars, which were refused. But he added more confusion. He took a declinatory plea, raising two points *in limine*. The first was that the respondent had no *locus standi* to bring the proceedings, given that it was a company under reconstruction; that as such, it was under the direction and control of the administrator who necessarily had to authorise the commencement of the proceedings in accordance with s 6[b], as read with s 18[1][e], of the Reconstruction Act, and that no such authority had been attached.

The applicant's second point *in limine* was that the respondent had not complied with s 30[2][e] of the rent regulations in that it had not attached a certificate from the appropriate rent board stating that the requirement for the applicant to vacate the house was fair and reasonable and that the date to move out as specified in the certificate had passed.

Section 30[2][e] of the rent regulations prohibits the court from issuing an eviction order on the basis that the lease has expired, either by effluxion of time, or in consequence of a notice having been duly given, so long as the lessee continues to pay rent within seven days of due date and performs the other conditions of the lease, unless:

“[e] the appropriate [rent] board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is **fair and reasonable on some other ground**

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<sup>2</sup> 1973 [1] RLR 307 [GD], at p 314A - C

stated therein, and the date specified in the certificate for the vacation of the dwelling has passed.” [purposefully highlighted by myself]

The appellant’s special plea added more confusion in that the first point *in limine* was thoroughly misconceived. Nowhere in the Reconstruction Act, certainly not the sections cited, is there a requirement that every time the respondent commences proceedings, Gwarazimba’s authorization thereto, and the terms imposed by him, if any, have to be attached.

Section 6 of the Reconstruction Act deals with the effect of a reconstruction order. In Paragraph [b] the effect is that no action or proceeding shall be proceeded with or commenced against the company except by leave of the administrator who may impose terms.

Section 18[1][e] empowers the administrator to bring or defend any action or other legal proceedings in the name, and on behalf of the company.

At any rate, Order 4 r 1 of the Magistrate’s Court [Civil] Rules authorises a party to institute or defend legal proceedings, *inter alia*, either in person, or by a legal practitioner. The respondent’s action was instituted by a legal practitioner. Rule 2 then states, unambiguously, that it shall not be necessary for any person to file a power of attorney to act. Admittedly, the Rule permits the authority of any person acting for a party to be challenged. If that happens, such authority has to be produced within the prescribed times. However, *in casu*, the appellant’s challenge was not on the authority of the legal practitioner to act for the respondent. It was on the legal capacity, or *locus standi*, of the appellant to sue without displaying Gwarazimba’s authorisation.

The appellant’s second point *in limine* was ill-conceived because it undoubtedly assumed the respondent was proceeding in terms of the rent regulations.

The appellant went on to plead over to the merits. He denied breaching the lease agreement. He challenged the respondent’s claim that it required the houses for its employees when it was even failing to pay their arrear salaries. He denied that the respondent was a local authority as envisaged by the Housing and Building Act. Finally, he alleged that the real reason why the respondent wanted him and others out of the houses was so that it could re-let them to third parties at higher rentals.

The confusion in the appellant’s plea on the merits was that the breach of lease which he was denying was not part of the respondent’s claim. It had not been pleaded. Furthermore,

for him to challenge the respondent's claim that it required the houses for its own employees; to say that the respondent was not a local authority, albeit correct, and to assert that the only reason why it required its houses back was so that it could re-let them at higher rentals, only betrayed the predominant confusion permeating this whole matter, namely whether or not the rent regulations applied. In other words, if the rent regulations did not apply, then the respondent did not need to explain why it required its houses back, or what it might do with them afterwards. As indicated already, under the common-law, an owner only needs to show the expiry or lapse of the lease as the contract that suspended the owner's entitlement to its exclusive right of possession.

The parties listed their issues for trial separately. It seems there was no consolidation afterwards. The respondent's issues were:

- 1        whether it required its houses for its employees; and
- 2        whether it had been recapitalised to commence operations

The respondent's issues were characteristic of the prevailing confusion. Issue 1 evidently echoed the rent regulations. Issue 2 did not stem from the pleadings. And it also echoed the rent regulations.

The appellant's issues were:

- 3        whether the respondent had complied with the provisions of s 6[b] and s 18[1] [e] of the Reconstruction Act;
- 4        whether the respondent had complied with s 30 of the rent regulations;
- 5        whether the respondent required the houses for its own use.

The same confusion abounded.

But be that as it may, the special plea was apparently set down for argument well before the trial on the merits. Whether or not the rent regulations apply in any given case is a factual issue, not a legal point. The appellant's special plea was dismissed a whole month before the trial. The magistrate who dismissed it was not the same one that conducted the trial on the merits.

The reasons for the dismissal of the special plea were not on record. But such dismissal should have buried the points *in limine* and put paid to any further confusion

because the appellant did not appeal. Strangely, that did not happen. The confusion persisted, right up to the day of the appeal hearing.

At the trial, the respondent's main witness, Wilson Museva [*"Museva"*], was its properties manager. His testimony was basically that the respondent wanted its houses back for its artisanal employees who either had no accommodation, or that which they had was not commensurate with their grades. He was clear that the basis of the respondent's claim was not the non-payment of the rentals. But he was led to say that the appellant had not paid rent for a considerable period and was \$11 037 in arrears. Museva also said that the appellant's lease with the respondent had long since expired some several years before. In cross-examination, Museva refused to be drawn into answering questions unconnected to the basic reason why the respondent wanted its houses back.

The one major confusion at the trial was the respondent's attempt to lead evidence on the appellant's non-payment of rentals. It had actually called a second witness from the finance department apparently to prove this. The appellant objected. The court upheld the objection. It ruled that the aspect of arrear rentals was not part of the respondent's claim.

Cross-examination and the defence case straddled on a lot of extraneous issues. These mainly related to how the respondent should be non-suited for failure to call Gwarazimba to testify or to produce his authority to sue; how the respondent had failed to show a good and sufficient reason for wanting its houses back; how, demonstrably, it wanted the houses back to re-let them out to Great Zimbabwe University at higher rentals; how the respondent had plenteous accommodation for any of its employees who might need it; how the respondent was in no capacity to re-open and commence operations any time soon, and so on.

The confusion at the trial and the persistent reference to the requirements of the rent regulations is most surprising because Mr *Chuma*, for the respondent, in his response to the appellant's application for absolution from the instance, seemed to have eventually grasped the nub of the matter. He had written as follows:

"Mashava area where these properties are situated is neither a municipality, nor town council, nor a designated area in terms of the Rural District Councils Act, or a township in terms of the Communal Lands Act nor is it a local government area. As a result and because it is not governed by the said Act the provisions of Section 22[2] which provides that before a lessor can eject a tenant, he must show "good and sufficient cause" does not apply. *Ipsa facto*, **the issue of the Plaintiff requiring the houses for its employees, is not even a legal requirement.** That Plaintiff wants its house back, upon its say so, is enough ground." [my emphasis]

The one essential thing Mr *Chuma* overlooked in his espousal of the law though was the determination of the lease agreement. But despite such succinct exposition of the real issues, incredibly the case remained off track. Unbelievably, the confusion persisted in both the closing submissions by counsel, and, with all due respect, in the court's judgment as well.

In its judgment, the court *a quo* first identified the issues as being:

- i] whether the plaintiff required the houses to house its employees;
- i] whether the plaintiff had been recapitalised to commence operations;
- iii] whether the plaintiff required the house for its own use and [if so, whether] the defendant should be evicted.

Plainly, the court's re-statement of the issues reflected the on-going confusion. However, we shall not belabour the point. Suffice it to say that those were not the real issues. The one and only issue was whether the respondent was entitled to evict the respondent. On this, the respondent had to show that the lease had terminated. On the question of the rent regulations, it was the appellant that had claimed that they applied. So, the onus had been on him to prove that they applied. He had failed. His special plea had been dismissed a month before the trial.

The judgment of the court *a quo* did touch on a pertinent point. It said in part:

**“It is important to note that there is no valid lease between the parties, if there had been one then the defendant's right of occupation would have been derived from a Lease Agreement between him and the plaintiff.** In addition, it is the plaintiff's evidence that defendant is in rental arrears of \$11 037.00 according to Mr Museva the Properties Manager of the plaintiff. Although this was disputed, the defendants did not produce any receipt to prove that despite the fact that the Lease has expired he has continued to pay the rent due within 7 days of the due date contrary to the plaintiff's claims. **As such I am of the view that the defendants not being a holder [sic] of a valid Lease Agreement** or up to date payer of rentals he disentitled himself to the protection normally entitled to tenants.” [my emphasis]

Aside the obvious mix up with the issue of outstanding rentals and the tacit reference to a statutory tenancy, the crux of the matter was whether or not the defendant still retained the right to remain in occupation. His right to remain in occupation could only derive from a

valid lease. If he no longer had one then he no longer had the right. That was what the court had to decide.

Regrettably, the actual judgment of the court *a quo* went back to the rent regulations. It ruled that the respondent's notice to the appellant to vacate the house had been in accordance with s 30[2][c] of the rent regulations; that there was no evidence that the respondent wished to lease the house to a third party, and that the respondent had proved that it genuinely required the premises for its own use. This was a misdirection.

In his appeal to this court, the appellant raised six grounds. Grounds 1 to 3 were couched as follows:

- 1 that the magistrate erred in finding that the plaintiff could institute the proceedings without attaching the leave from the administrator stating the conditions imposed by him;
- 2 that the magistrate erred in finding that Museva could represent the plaintiff without the leave from the administrator;
- 3 that the magistrate erred in finding that the rent regulations, particularly s 30[2][e] thereof, did not apply

On the day of hearing, the appellant abandoned all the above. This followed an objection by the respondent. The objection was on the basis that these grounds had been the subject of the special plea which had been disposed of, well before the trial, and about which the appellant had not appealed. The appellant was out of time to raise them as grounds of appeal. He had not applied for condonation.

The appellant's withdrawal of these grounds, though very late in the day, was proper. It had been manifestly inappropriate for him to have included them in the first place. The only explanation for this could be the confusion dogging the case.

The appellant's remaining grounds of appeal 4 to 6 were these:

- 4 that the magistrate erred in finding that there was no valid lease between the parties despite the respondent having acknowledged the existence of one;
- 5 that the magistrate erred in dealing with the issue of rentals since it had never been in issue for determination and had never been respondent's cause of action;

6 that the magistrate erred in finding that the respondent needed the house for its employees when it had admitted letting out houses to Great Zimbabwe, court officials and third parties even after the commencement of the proceedings.

Only ground 4 was relevant.

What puzzled us though was that, having successfully torn into the appellant's incompetent grounds of appeal 1 to 3, thereby forcing him to withdraw them, and after disposing of grounds 4 and 5 as being irrelevant, since the aspect of rentals had not been an issue [which was not quite correct, because ground 4 was relevant], respondent's counsel, amazingly, failed to grasp that ground no. 6, the one he said was the only legitimate ground remaining for determination, was still the same issue of the rent regulations in another form.

Whether or not the respondent wanted its houses back for its own employees, or whether or not it wanted to re-let them to third parties at higher rentals, are aspects relevant to the "*good and sufficient grounds*" principle of the Commercial Premises [Rent] Regulations, SI 676/1983, or the "*fair and reasonable*" requirement of the rent regulations.

If the court *a quo*, before another magistrate, and before the trial, had ruled out the inapplicability of the rent regulations; if the appellant did not appeal that decision, and, to cap it all, if the appellant withdrew grounds 1 to 3 which dealt with *inter alia* that aspect of the rent regulations, ground 6 had no business remaining on record.

The respondent's major argument, both in the heads of argument and in oral submissions, was misconceived. At one point during the hearing, we expressly drew attention to the dichotomy between the rent regulations and the common-law requirements for eviction, and enquired whether in the light of the appellant's withdrawal of grounds 1 to 3, there still remained any basis for the parties to continue arguing on the "*good and sufficient grounds*" or the "*fair and reasonable requirements*", the principles imported by the commercial and domestic rent regulations respectively. Mr *Mazonde*, for the appellant, insisted that there was. He referred to cases such as *Moffat Outfitters [Pvt] Ltd v Hoosain & Ors*<sup>3</sup>; *Checkers Motors [Pvt] Ltd v Karoi Farmtech [Pvt] Ltd*<sup>4</sup>; *Boka Enterprises [Pvt] Ltd v*

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<sup>3</sup> 1986 [2] ZLR 14 [SC]

<sup>4</sup> 1986 [2] ZLR 247 [SC]

*Joowalay & Anor*<sup>5</sup>; *Film & Video Trust v Mahovo Enterprises [Pvt] Ltd*<sup>6</sup>; *Kingstons Ltd v L D Ineson [Pvt] Ltd*<sup>7</sup> and *Tobacco Sales Floor Ltd v Swift Debt Collectors [Pvt] Ltd*<sup>8</sup>.

With all due respect, that was unnecessary clutter. All these cases dealt with evictions under the commercial rent regulations, not the common law. *In casu*, the applicability of the rent regulations not being in issue, those cases were irrelevant. In *Timms* above, a case cited in *Boka Enterprises*<sup>9</sup> and *Tobacco Sales Floor*<sup>10</sup>, BEADLE CJ, at p 314A – C, had this to say:

“When the respondent entered into this lease she knew perfectly well the lease expired in May, 1973. She is, therefore, trying to resile from her common law **and moral** obligations by relying on the Rent Regulations. **Were there no Rent Regulations under the common law, she would have no right to remain in occupation.** It is quite true that the Rent Regulations do allow a statutory tenant to evade his common law and his moral obligations by remaining in occupation, but it does seem to me that the protection given to tenants to evade common law **and moral obligations** should not be extended further than is necessary to comply with the spirit of the Regulations.” [my emphasis]

The only point that should have concerned the parties from the beginning to the end should have been whether or not the respondent still had a valid lease agreement with the appellant; whether this had been pleaded; and whether the evidence in the court *a quo* had sufficiently canvassed it.

As demonstrated above, a valid lease excludes an owner’s entitlement to exclusive possession of the *res*. The court *a quo* made a specific finding that the appellant’s lease had been determined. We have examined the record and assessed the evidence. The court was correct. Museva said in his evidence-in-chief that when the appellant occupied the house as a tenant, it had been explained to him that, among other things, at some point the respondent would reclaim the house. He said the appellant had been duly served with a notice to vacate. In fact, the aspect of the notice was common cause.

In cross-examination, Museva maintained that the appellant’s lease had expired in or about 2008 and that he had never had it renewed. Of course, the appellant disputed this. Both Museva and the appellant were quizzed extensively on it in cross-examination. The appellant said on inception, he had been given a lease which would expire within a year. On whether or

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<sup>5</sup> 1988 [1] ZLR 107 [SC]

<sup>6</sup> 1993 [2] ZLR 191 [H]

<sup>7</sup> 2006 [1] ZLR 451 [S]

<sup>8</sup> 2011 [1] ZLR 486 [H]

<sup>9</sup> At p 116

<sup>10</sup> At p 486

not he had had the lease renewed, the appellant prevaricated. He claimed to have had the lease, and those of several others, renewed by some member of parliament. But according to his testimony, that alleged renewal had only been in the year prior to the proceedings. That would be 2013. Yet he had started staying in the house in 2006.

In our view the evidence established, on a balance of probabilities that, firstly, the appellant's lease had been determined by effluxion of time. It had been for one year from 2006. It had not been renewed. Therefore, it had lapsed. There was no proof that another lease had been incepted in the year preceding the trial as the appellant claimed, or at all. The onus had been on him to prove this. He failed to discharge it.

Secondly, and more importantly, it was apparent that the appellant occupied the house at the respondent's pleasure. He took occupation on the understanding that whenever the respondent wanted its house back, he would have to vacate. The respondent was not into real estate. The houses had been built for its own employees. It was only because of the downturn in its business that the houses had become white elephants. The respondent had been deserted by a large number of its employees. In order to cut down on its losses, a decision had been taken to lease the houses to third parties. The appellant had been one such.

Of course, the appellant would be entitled to a reasonable notice. This had been duly given. There was no contest on whether or not the notice had been given, or on whether or not the period thereof had been reasonable. Therefore, the lease between the appellant and the respondent had been determined. It being the only basis for suspending the respondent's entitlement to the exclusive ownership of the house, the appellant had no basis for resisting eviction.

The appellant was not a statutory tenant. The issue of statutory tenancy does not arise. There is no such thing as statutory tenant under the common-law. A statutory tenant, as the name says, is a creation of statute. He or she or it is created by the rent regulations, both domestic and commercial: see *Timms, supra*, at p 314.

Having been satisfied that the evidence in the court *a quo* sufficiently canvassed the issue of the determination of the lease agreement, what remains is to consider whether the pleadings did so too.

The basic and fundamental principles of pleadings is threefold:

- 1 to ensure that the parties know the point or points of issue between them so that they know what case they have to meet;

- 2 to assist the court by defining the limits of the action;
- 3 to place the issues raised in an action on record so that a judgment on such action may bar further litigation on the same issues again;

see *Hackleton Investments [Private] Limited v Time Bank of Zimbabwe Ltd*<sup>11</sup> and **Beck's Theory and Principles of Pleading in Civil Actions**, 5<sup>th</sup> ed., at p 32.

Pleadings must be brief and concise. They must be couched in summary form. They should state facts, and relevant facts only. Evidence and/or law are/is not pleaded: **Beck, supra**.

A summons should disclose a cause of action. Cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed: see *Dube v Banana*<sup>12</sup>. The facts must enable the court to reach a conclusion regarding the point in issue: see *Controller of Customs v Guiffre*<sup>13</sup> and *Patel v Controller of Customs & Excise*<sup>14</sup>.

*In casu*, the respondent's summons, as stated earlier, averred that it was the owner of the house occupied by the appellant; that it now wanted its house back and that the appellant had ignored its notice to vacate.

Admittedly, such thrift in the formulation of the cause of action can be perilous. However, this case was proceeding in the magistrate's court, not the High Court, where, comparatively, formalism is less stringent. But at any rate, the cause of action was sufficiently disclosed. Among other things, although the lease and its determination were not expressly pleaded, in our view, the averment that the respondent had demanded that the applicant should vacate the house, was sufficient to inform the court that whatever right the appellant had previously obtained to occupy the respondent's house, it had since been terminated. So this averment was speaking to the determination of the lease agreement. We are fortified in this finding by how the appellant went on to plead. Undoubtedly, he quite understood that the respondent was pleading the determination of the lease. In his plea on the merits he stated:

“1 The Defendant avers that he has not breached the conditions of the lease agreement.”

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<sup>11</sup> 2000 [1] ZLR 60 [H]

<sup>12</sup> 1998 [2] ZLR (HC), at p 95

<sup>13</sup> 1971 [2] SA 81 (R) at p 84A

<sup>14</sup> 1982 [2] ZLR 82 (H) at p 85

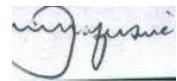
Of course, the respondent's cause of action was not breach, but termination on notice.

When the matter came to trial, the evidence covered both termination on notice and by effluxion of time. Therefore, we are satisfied that the respondent proved its case. The appellant should not seek to evade his common law **and moral** obligations by remaining in occupation.

Regarding costs, we agonised over whether to follow the general rule that they should follow the event, or whether to deprive the respondent given that, in our view, it had been both the major architect and genesis of the confusion that permeated this case. However, having regard to the appellant's common law and **moral obligations** as a tenant to give up rented premises upon the expiry of the lease, and his refusal to do so, we felt it unnecessary to penalise the applicant for having taken steps to evict him.

In the circumstances, the appeal is hereby dismissed with costs.

5 April 2017



Hon Mawadze J concurred: \_\_\_\_\_

*Ndlovu & Hwacha*, legal practitioners for the appellants

*Chuma, Gurajena & Partners*, legal practitioners for the respondent