

AUSTIN W. MTOMBA
versus
GLEN FOREST TRAINING CENTRE TRUST

HIGH COURT OF ZIMBABWE
ZHOU & TSANGA JJ
HARARE, 8 & 17 November 2021

Civil Appeal

E Nyakunika, for appellant
FT Chingoma, for respondent

1 ZHOU J: On the 6th of July 2021 we dismissed the appellants appeal against eviction from the administrator's house at Glen Forest Training Centre Trust, payment of holding over damages as well as costs of suit. The reasons for dismissal were given *ex tempore* at the appeal hearing and have been requested in writing for purposes of an appeal. These are they.

The background facts

2. Appellant's employment contract with the respondent, Glen Forest Training Centre Trust, terminated in June 2018. The appellant, however, had continued occupying the house allocated to him on the basis that he was owed salary arrears. The issues for decision in the lower court had therefore been whether appellant had a right to occupy the plaintiff property; whether or not the defendant (appellant) had a lien over the property until his arrear salaries were paid up; and whether or not he should pay holding over damages at the rate US\$ 400.00.

3. As regards his arrear salaries, the lower court had found that he had successfully sued for his arrear salaries in the Labour Court and simply had to execute that order through the messenger of court. The court had also made a finding that appellant was allocated the premises by virtue of a contract of employment and therefore no longer had a right to retain the property since the employment had ended. The fact that he was owed arrear salaries was said to be immaterial and

not a basis for remaining in the property. (*Chingwena v SMM Holding Pvt Ltd & Anor* HB 97/18). Regarding improvements that the appellant had argued that he had effected on the property, the lower court found that the appellant had not raised any counter claim to that effect.

4. As regards the payment of holding over damages, the lower court's finding was that it was the appellant himself who had given the sum of US\$250.00 as being the fair rental value of the property and hence that amount was held to be equitable for holding over damages. The lower court concluded that the respondent (as the plaintiff) had on a balance of probabilities proved that it was entitled to evict.

5. Whilst a point *in limine* had been raised by the appellant in the court below at the commencement of the trial in the magistrate's court regarding the fact that the trustees had no *locus standi* due to lack of quorum in that they were four instead of five, the lower court had dismissed that point at the onset. This was on the basis that whilst the respondent had indeed confirmed that they were operating with four trustees instead of five, this could not be a ground for the dismissal of the plaintiff's claim at that stage as there was a need to hold a full and final trial as instructed by the High Court. (insert why matter had come to High Court)

6. Having heard the parties in the action the lower court had therefore ordered that Defendant be evicted from the administrator's house at Glen Forest Training Centre Trust. The court had also ordered the payment of holding over damages at the rate of US \$250 per month converted at the prevailing auction rate calculated from date of judgment to date of vacation.

Grounds of Appeal

7. In summary the appellant's three grounds of appeal were that the court erred and misdirected itself as follows:

1. In failing to uphold the point *in limine* raised by appellant that there was no proper plaintiff before the court as respondent was operating with only 4 trustees notwithstanding the provision in its deed of trust that the number should never be less than 5 and that quorum should be 5 trustees present in person

2. In granting an order for eviction despite existence of lien over the property
3. In ordering holding over damages when holding over damages were not specifically proven by the respondent.

8. The appellant therefore sought that the appeal be allowed with costs and that the judgment of the court a quo be set aside and substituted with the dismissal of the plaintiff's case (respondent) with costs.

Submissions by the parties

9. Plaintiff's submissions

On the ground concerning the point *in limine* on *locus standi*, the appellant submitted that the record confirmed that that the trustees shall never be less than five and no more than eleven and that it was not challenged that the Trust was operating with less than five trustees. Appellant further argued that there was no reason for dismissing point *in limine* apart from the fact that the lower court had been instructed by the High Court to hold a trial. Furthermore, the appellant maintained that a point *in limine* on the law can be raised at any time and that the respondent lacked capacity to prosecute claim due to lack of quorum. Reliance was placed on the case of *Muchakata v Netherburn* 1996 (1) ZLR 153 (S).

10 On the lien and the right of retention, the appellant drew on the cases of *Zimbabwe Commercial Farmers Union v Nyamakura* HH 208/16 and *Bak Storage v Grinsdberg Investments Pvt Ltd* 2015 (2) ZLR 477 at 479 on the right to hold on to property until compensated if one has incurred expenses. In essence, his argument was that he had a right to retention as he had not been paid his dues and he had also made improvements on the property.

11. On holding over damages, the appellant argued that he was not an expert in valuation and that it was a serious misdirection on the part of the lower court to rely on his mere estimation to justify holding over damages when the respondent should have proven these. Moreover, he

maintained, the onus of proving market rentals for purposes of proving holding over damages lay with the respondent. Based on these grounds, his contention was that his appeal was meritorious.

Respondent's submissions

12 On whether there was a proper plaintiff before the court, the respondent's submission was that the onus was on the appellant to prove that the Trust was operating with only four trustees. On the lien, the respondent submitted that parties are bound by their pleadings and are not allowed to depart from these without leave of the court. Reliance was placed on the case of *Smith v Smith SC 50/20*; *Dube v Bushman Safaris HB112/13* and that of *Matambanadzo v Magna 1971 (1) RLR 543*. The appellant was as such said to have been bound by his pleadings where he stated that he had a lien until arrear salaries and benefits were paid. It was emphasised that at no time had he pleaded improvements and in any case these had not been proved. The respondent also emphasised that it was proceeding on the basis of *rei vindicatio* and the case of *Nyahora v CFI SC 81/14* was drawn upon for the following principle:

“The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application”.

13 The respondent equally drew on the case of *Lafarge Cement v Mugove Chatizembwa HH 413/18* where Mafusire J stated thus:

“I have stated before that an employee who has lost employment has no right to hold onto the property of the former employer allocated to him or her by virtue of employment or as a condition of employment merely on the grounds that he or she is challenging the termination of the employment contract. See *Montclair Hotel and Casino HH 501-15*. The point is also made in *William Bain & Co Holdings (Pvt) Ltd v Nyamukunda HH 309-13* that a former employee cannot lawfully confiscate or hold onto a former employer's property after termination of the employment contract because the right to hold on to the property is extinguished by the termination.

Put in another way, a former employee does not acquire a right of retention as can be used to resist a *rei vindicatio* on the basis of a challenge of a completed dismissal

from employment and a forlorn hope that such dismissal may be reversed at a future uncertain date.”

14. Also highlighted by the respondent was the case of *Chingwena v SMM Holdings Pvt Ltd* HB 97/18 where it was again emphasized that the fact that one is owed arrear salaries is not a valid reason to continue holding on to property as an applicant had other available remedies and is at liberty to sue for such arrear salaries.

On holding over damages the respondent argued that it was not appellant’s argument that these were unreasonable.

Reasons for dismissal

15 The matter of eviction was a trial matter and as such evidence was expected to be led. On the first ground of appeal regarding the failure to uphold the point *in limine* on the number of trustees, there was no reason why it had not been pleaded. This was particularly so as the matter of the number of Trustees was said to have arisen in 2016. It was therefore a factual issue which was supposed to have been pleaded as opposed to raising it as a point of law. The appellant’s counsel agreed as much even though he submitted that it ought to be taken as an admission because it was not disputed. This appeal court concluded that this was an issue which could not be raised without giving evidence. The court reached this decision on the basis that in a trial matter all factual issues are resolved in pleadings and as such, the issue having not been raised in pleadings, it could not be dealt with at the trial without the pleadings being amended.

16 On the second ground of appeal concerning the retention of a lien, the appellant conceded that no lien on improvements had been pleaded. This court dismissed the second ground of appeal on the existence of a lien over the property, on the basis that there was no connection between the payment of his salary and the property over which lien is being sought to be exercised. In other words, the court’s finding was that the appellant could not refuse to vacate on the basis that he had not been paid. In this regard the cases referred to by the respondent in the heads of argument were apt.

17 Regarding the third ground of appeal that holding over damages were not specifically proved, the record revealed that the appellant himself suggested and accepted the amount of US 250.00 (or its equivalent) to be reasonable holding over damages based on rentals for a property of that nature. Page 8 of the record specifically captured that the respondent had conceded to the amount of US250.00 and as such this was an admitted fact. Moreover, this court noted that the respondent had claimed an equivalent of US\$400.00 and therefore the court below could not have been faulted for accepting a lower amount which the appellant had himself suggested.

18. On costs whilst the respondent sought costs on the higher scale, we found these to be unmerited since the appeal grounds were taken on the basis that these were legal as opposed to factual issues. We did not share the respondent's view that the appeal was an abuse of court process and as such the case did not qualify to be a special case for the payment of costs on the higher scale.

19 In summary, the appeal was dismissed on the basis that the issue of lack of quorum ought to have been pleaded. Secondly, on the issue of a lien, there is no right of retention as salaries and benefits are not connected to the house. Thirdly and lastly, on the quantum of holding over damages, the appeal was dismissed on the basis that the amount came from the appellant and was therefore admitted.

Accordingly, the appeal was dismissed with costs on an ordinary scale.

TSANGA J Agrees

Dondo & Partners, appellant's legal practitioners
Jiti law Chambers, respondent's legal practitioners