ASSANIEL DOUGLAS MASHANYARE
versus
REGIS GINYA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 July and 6 August 2014

**Civil Trial**

*F.G. Gijima,* for the plaintiff
*Ms D. Machaya,* for the defendant

MATHONSI J: Following an agreement reached by the parties, this matter came before me as a special case in terms of Order 29 of the High Court of Zimbabwe Rules, 1971. The parties filed a brief statement of agreed facts signed by them which is in the following:

> "1. That the defendant is liable to the plaintiff in the sum of $1 894-56 in respect of electricity bill.
>
> 2. That the defendant is liable to the plaintiff in the sum of $800-00 in respect of damages to the property.
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> 3. Parties to make written submissions by close of business on 24 July 2014 as to whether the defendant is liable to the plaintiff in the amount of $3 000-00 paid by the plaintiff to City of Harare in respect of water and rates due on the property, in view of the blanket write off of these utility amounts by the Government of Zimbabwe after the July 31, 2013 general elections.
>
> 4. That there shall be no order as to costs."

As it is with anything human, the defendant only filed his written submissions on 25 July 2014 outside the time frame the parties had, without any influence from anybody, committed themselves to abide by. The plaintiff's written submissions were filed on time.

Be that as it may, the background is that the plaintiff sued the defendant for payment of a total sum of US$9 133-48 in respect of damages to house number 205 Teresa Close, Groombridge, Mount Pleasant, Harare, and unpaid utility bills which accumulated during the tenure of the defendant's occupation of the house belonging to the plaintiff by virtue of a

lease agreement entered into between the parties. The lease subsisted from 1 September 2007 to the end of September 2011.

At the time of the termination of the lease not only had the defendant accumulated electricity, water and rates arrears at the house, he had also caused a fair amount of damage to the property which required repairs. The plaintiff then instituted proceedings out of this court seeking to recover from the defendant certain sums outstanding on the utility bills and the cost of repairs.

The parties have settled the issue of what is owed to the plaintiff by the defendant in respect of the electricity bill, namely $1 894-56. They have also settled what is owed for the repairs to the house, namely $800-00 and as such judgment will be entered in the total sum of $2 694-56, by consent. It is the issue of the sum of $3 000-00 being claimed by the plaintiff as a refund of what he paid to the municipality of Harare, which the parties have placed before me for determination.

From the statement of agreed facts signed by the parties, it appears common cause that the defendant did accumulative arrears of more than $3 000-00 during his stay at the house. It is also common cause that the plaintiff did pay a sum of $3 000-00 to the municipality towards settlement of the arrears. He had in fact agreed a payment plan with the municipality on 5 June 2012 in terms of which he was to pay $2 000-00 on that date with the balance being paid in monthly instalments of $250-00. Indeed there is proof that he had paid $3 000-00 when the arrears were written off by government directive dated 23 July 2013 which reads in relevant part thus:

> "To: All Provincial Administrators
> All Town Clerks
> All Chief Executive Officers
>
> **DIRECTIVE TO WRITE OFF DEBTS BY ALL LOCAL AUTHORITIES**
>
> 1. It has become apparent that the economy has not been operating optimally and in the process relentlessly unleashing severe hardships on the citizenry. Thus, from 2009, rate payers have not been able to meet their obligations in terms of payment of taxes, levies and related charges resulting in an enormous and crippling debt burden frustrating the majority of the population.
>
> 2. Given the above circumstances, all Local Authorities are in terms of section 133 of the Rural District Councils Act [*Chapter 29:13*] as read

with section 303 of the Urban Councils Act [*Chapter 29:13*] directed to write off debts in respect of rentals, unit tax, development levies, licences and refuse charges owed by individual rate payers as at 30 June 2013. In the same vein, money owed by residents for rates, stands prescribed in terms of the Prescription Act [*Chapter 8:13*] as from February 2009 to 30 June 2013.

3. For avoidance of doubt, this directive is meant to cushion individual rate payers from the severe effects of the economic challenges experienced during the period in question.

4. Please note that corporates are expected to pay their obligations in full, and where they have challenges viable arrangements shall be worked out with the relevant Local Authorities.

Dr. I.M.C. Chombo (MP)
**Minister of Local Government, Urban and Rural Development** "

It is not disputed that the defendant was, in terms of the lease agreement obliged to meet the municipality charges. He did not do so resulting in arrears accumulating which he still did not settle at the time that he vacated the premises. To the extent that the arrears were due, they had to be paid and the plaintiff as the owner of the property was obliged to settle the arrears which the defendant, as tenant, had left unpaid. It is also not disputed that the $3 000-00 being claimed was paid well before the write off which was only ordered by the Minister on 23 July 2013. The directive to write off related to arrears which were outstanding as at 30 June 2013 and did not apply retrospectively. The directive in question therefore, applied to what remained unpaid as at that date and not what had already been paid.

Mr *Gijima* for the plaintiff submitted that the defendant was unjustly enriched in that, having been the consumer of the service rendered by the municipality, he was required to pay for such service. He did not. Instead the plaintiff stepped in to pay on his behalf. It is now accepted that the general enrichment action is recognised in our law*;* *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H) 298 B – D; *Trojan Nickel Mine Ltd* v *Reserve Bank of Zimbabwe* HH 169/13 at pp 8-9. The requisites for a general action on enrichment are:

1. The defendant must be enriched.
2. The enrichment must be at the expense of another (i.e. the plaintiff must be impoverished and there must be a causal connection between enrichment and impoverishment.)
3. The enrichment must be unjustified.

4. The case should not come under the scope of one of the classical enrichment actions; and
5. There should be no positive rule of law which refuses the action to the impoverished person.

In *Goncalves* v *Rodrigues* 2004 (1) ZLR 122 (H) 136 D, NDOU J agreed with the above requirements for the general enrichment action as set out by BARTLETT J in *Industrial Equity* v *Walker*, (*supra*), adding:

> "I agree with BARTLETT J with the addition that this principle can be traced even in Roman Law as shown in the excerpts from Pomponius (*supra*). This view received further support in *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H)."

I agree with Mr *Gijima* that the concept of unjust enrichment applies to this case where the plaintiff paid $3 000-00 to the City of Harare on behalf of the defendant who benefited from the service without paying. I did not hear Ms *Machaya* for the defendant to suggest that the defendant did not benefit from the service provided by the City of Harare. Clearly that service was not for free. It had to be paid for.

Instead Ms *Machaya* anchored her resistance to the claim only on the Minister's directive writing off arrears which were outstanding on 30 June 2013. She submitted that the $3 000-00 claimed by the plaintiff stands prescribed as it is covered by the directive. I do not agree. The plaintiff had already paid to the municipality the $3 000-00 which should have been paid by the defendant when the write off was implemented. In fact, one can only write off a debt that is in existence at the time of the write off, not what has already been paid. The write off did not have the effect of refunding what had already been paid.

In my view, even on the basis of contract, casting aside enrichment for a while, the plaintiff would still be entitled to recover contractual damages arising from a breach of contract by the defendant. The lease agreement obliged him to pay the City of Harare bills but in breach of the agreement he did not resulting in arrears accumulating. The landlord was constrained to pay on his behalf and is certainly entitled to recover what he paid as damages. I am therefore, satisfied that the plaintiff has made out a case for the claim of $3 000-00 to which should be added the agreed sum of $2 694-56.

In the result, IT IS ORDERED THAT:

1. Judgment is hereby entered in favour of the plaintiff as against the defendant

in the total sum of $5 694-56 together with interest thereon at the prescribed rate from the date of judgment to date of payment.

2. Each party shall bear its own costs.

*F.G. Gijima & Associates*, Plaintiff's Legal Practitioners
*Machaya & Associates*, Defendant's Legal Practitioners