RAINBOW TOURISM GROUP LIMITED
versus
JJ AND BB (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 6 July 2017 and 4 April 2018

Civil appeal

J Chikura, for the appellant
S Simango, for the respondent

CHITAKUNYE J. This is an appeal against the magistrate court's judgment delivered on 23 February 2016.

The circumstances of the case are that:

In 2006 the appellant and the respondent entered into a written Lease Agreement in terms of which the appellant leased to respondent, certain premises being a portion of Number 1 Pennefather Avenue, White House Complex, Rainbow Towers, Harare.

Pursuant to the lease agreement respondent took occupation of the premises. As is the norm with most lease agreements the parties agreed on monthly rentals that the lessee was to pay which rentals were subject to review periodically in line with market rates at that time.
When the written lease agreement expired the respondent remained in occupation of the premises as a statutory tenant under the same terms and conditions as in the written lease agreement.

On 11 September 2014 the appellant sued the respondent in the magistrate's court alleging that respondent had breached the terms of the lease agreement by failing to pay rentals. In the summons the appellant sought the following:

(a) An order ejecting the Respondent from the premises known as Number 1 Pennefather Avenue, White House Complex, Rainbow Towers, Harare;
(b) An order directing that the respondent remove all its equipment from Number 1 Pennefather Avenue, White House Complex, Rainbow Towers, Harare and make good all surfaces.

(c) An order against the respondent for payment of USD4 965.02 (Four thousand Nine hundred and sixty five United States dollars and two cents) being the arrear rentals due as at 30 June 2014 and all other arrear rentals that become due and owing from 1July 2014 until the date of vacation at the rate of USD151.55 (One hundred and fifty one United States dollars and fifty five cents) per month;

(d) Interest thereon at the rate of 1.83% per month calculated from the date of issue of summons until the date of final payment

(e) Costs of suit on an attorney – client scale as per the lease agreement.

The respondent in its plea denied being in breach of the lease agreement and thus owing appellant any arrear rentals. In its plea respondent contended that it effected some improvements to the property which appellant had agreed to compensate it but had not done so. The parties had eventually agreed that respondent would set off his money for improvements effected by defendant. In the same vein respondent contended that appellant owed respondent USD7 788.00 as compensation for the improvements.

The respondent also made a counter claim for the same sum of USD7 788.00.

A contested trial was thus held after which the trial magistrate made findings to the effect that:-

i) The respondent made improvements to the premises and the parties had been in communications over that;

ii) The parties wanted to set off rentals that was payable with the renovations effected by respondent but for change of management;

iii) The respondent did not breach the lease agreement as parties were negotiating for a set off which due to change of management could not be finalized.

iv) That both claims by the parties are legitimate thus each party succeed to the extent of its claim;

v) Interest in favour of the appellant at the prescribed rate in respect of the USD877.00 for arrear rentals.

As a consequence of the above findings the court a quo granted judgement for the plaintiff in the sum of US$877.00 as arrear rentals with interest at the prescribed rate of 5%. This was the balance after subtracting the respondent's claim of $7 788.00 from the appellant's claim of $8 665.46.

The appellant being dissatisfied with the judgment lodged this appeal.

The grounds of appeal were couched as follows:-

1. The court a quo erred in its decision that the respondent was not in breach of its Agreement of lease with the appellant.
2. The court *a quo* erred in its decision that the parties had agreed to a set off agreement when there was no evidence placed on the record to suggest that such a set off agreement was made between the parties.
3. The court *a quo* erred in concluding that communication produced as exh 3 was clear testimony of an agreement between the parties when in actual fact a reading of the documents does not even disclose the subject that the documents referred to.
4. The court *a quo* erred in its conclusion that a Rates Confirmation Certificate was evidence to suggest a set off agreement between the parties when it does not even refer to any agreement.
5. The court *a quo* erred in concluding that the respondent's counter claim in the sum of US$7 788.00 (seven thousand seven hundred and eighty-eight United States dollars) was legitimate in the absence of any receipt to support the amount claimed.
6. The court *a quo* erred in its finding that the respondent was entitled to a set off when the Respondent clearly confirmed in its evidence that the Agreement of Lease stipulated that in the event of the lessee effecting any improvement it would not be entitled to compensation by the lessor.
7. The court *a quo* erred in concluding that the Appellant was not entitled to interest in terms of the Agreement between the parties even though the Respondent conceded the existence of the lease agreement.
8. The court a quo erred when it concluded that the Appellant was not entitled to costs of suit when it was clear the respondent's defence was only dilatory.

In light of the above grounds of appeal the appellant sought an order that the appeal be allowed with costs and that the order by the court a quo be substituted with an order that:-

1. The respondent be and is hereby ejected from Number 1, Pennefather Avenue, White House Complex, Rainbow Towers, Harare.
2. The Respondent be and is hereby directed to pay the appellant the sum of US$8 665.46 (Eight thousand six hundred and sixty five United States dollars forty-six cents) being arrear rentals due as at 28 February 2016 and all other arrear rentals that become due and owing from the 1 March 2016 to the date of vacation at the rate of US$151.55 (One hundred and fifty one United States dollars) per month.

3. The respondent be and is hereby ordered to pay interest on the aforementioned amount at the rate of 1.83% per month from the date of issue of summons being 11 September 2014 until the date of final payment.
4. The respondent be and is hereby ordered to pay the costs of suit on a legal practitioner and client scale.

Though there are eight grounds of appeal I am of the view that grounds 3, 4 and 6 in fact relate to the evidence on the issue of set off that is covered in ground 2. In effect therefore there are 5 substantive grounds of appeal. These will be dealt with as follows:-

1. The court *a quo* erred in its decision that the respondent was not in breach of its Agreement of lease with the appellant.

The appellant argued that the respondent was clearly in breach of the agreement as evident from non-payment of rentals which led to arrear rentals in the sum of $8 665.46.

The issue of whether or not a party is in breach of a contract is dependent on the obligations of that party in terms of the agreement. It is axiomatic that breach of a contract occurs when one of the parties to a contract fails to honour its obligations in terms of the contract. (The Law of Contract in Zimbabwe, by I Maja, at p 115.)

It is trite that where a party enjoys occupation of immovable premises that belongs to another, pursuant to an Agreement of Lease, the same is required to make payments for its tenancy.

In *Supline Investments (pvt) Ltd v Forestry Commission* 2007 (2) ZLR 280 (H) MAKARAU JP (as she then was aptly held that:-

> "A tenant has an undisputed obligation to pay rentals for property that he hires from the landlord. That is the sine quo non for his continued occupation of the leased property. He has no right to occupy the landlord's property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view that challenge does not absolve the tenant from paying any rentals at all."

In *casu*, it was common cause that the respondent had not been paying rentals for a number of months leading to the suit in question. The evidence led showed that the respondent did not dispute that in terms of the lease agreement it was required to pay monthly rentals without fail. The respondent's witness did not dispute the monthly rentals that were due and which were not paid. In this regard the respondent confirmed the figures on exhibit "1" as a correct reflection of the rentals it had not paid. As confirmation of this, the respondent's chief

executive officer appended his signature to exhibit 2 confirming that as at 31 December 2015, there were rent balances due to appellant in the sum of $8 665.46.

The respondent's failure to pay rentals in terms of the lease agreement was thus not denied. The respondent's defence seemed to be that as it had a claim against the appellant there was no breach. As noted in the *Supline Investments (Pvt) Ltd v Forestry Commission (supra*), the fact that a lessee has a claim against the lessor does not absolve it from complying with its own obligations. The respondent had clearly failed to honour its obligation to pay rentals in terms of the lease agreement and was thus in breach of the agreement.

In fact, even after the trial magistrate had deducted the sum respondent had been claiming as set off there was still arrear rentals in the sum of $877.00. Thus whichever way one decided the respondent was in rental arrears. It was thus a serious misdirection on the part of the trial magistrate to hold that the respondent had not breached the contract whilst at the same time making a finding that there were rental arrears in the sum of $877.00. Such arrears could only have arisen as a result of respondent's failure to pay rentals as stipulated in the lease agreement.

> 2. The court *a quo* erred in its decision that the parties had agreed to a set off agreement when there was no evidence placed on the record to suggest that such a set-off agreement was made between the parties.

This ground is intertwined with grounds 3, 4 and 6 and so the substance of the grounds will be dealt with in the same discourse.

The pertinent issue is whether from the evidence adduced the respondent proved on a balance of probabilities that the parties agreed on a set off and the quantum of the debt to be set off.

In *Metallon Gold* v *Golden Million (Private) Limited* SC 12/15 ZIYAMBI JA quoted with approval the words of INNES CJ in *Schierhout v Union Government* 1926 AD 286 at p 289 – 290 wherein the doctrine of set-off was explained as follows:-

> "The doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognized principle of our common law. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."
> see –*Southern Cape Liquors (Pty) Ltd* v *Delipcus Beleggings* BK 1998 (4) SA 494(C)

In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350(S) at 353C, GUBBAY CJ had this to say on set-off:-

> "At common law, set-off or *compensatio* is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced."

After considering the doctrine of set-off as espoused in the above cases the learned judge in the *Metallon Gold* case (*supra*) opined that:-

> "For set-off to operate the defendant must be in a position to say "the plaintiff owes me a debt" rather than "I have a claim against him". The debt must be capable of easy and speedy proof." (p5)

There are two basic requirements that emerge namely that:-

a) The parties ought to be mutually indebted to each other; and
b) Both debts ought to be liquid and fully due.

In *casu*, as the appellant denied that it owed the respondent any compensation, the onus was on the respondent to establish that there was such a liquid debt that was due. A careful examination of the respondent's evidence shows that the respondent's position was that it had a claim against the appellant in that appellant had agreed to reimburse it for improvements. Those improvements were effected in 2006 when it took occupation of the premises. Apparently the written lease agreement had just been entered into.

It is pertinent to note that in his findings the trial magistrate did not actually find that the parties had agreed on set –off. To quote his words, he stated thus:

> "Secondly, there was the issue of whether or not the parties agreed that the plaintiff would set off the rentals that was payable with the renovation that had been effected exhibit 4 is in point in this regard. Indeed the parties wanted to set off. The problem in the progress of such negotiations is attributable to change in management."

It is apparent that the trial magistrate acknowledged that no agreement had been reached on the issue of set off. Exhibits 3 and 4 that the trial magistrate seemed to have relied on as evidence that the parties wanted to settle are themselves not clear on the subject matter. For instances exhibit 3 is e-mail correspondence between appellant's employee Francis and respondent's chief executive officer (CEO), J Mambo. The dates of the e-mail correspondence are indicated as 24 and 25 July 2012. The subject matter is stated as 'Outstanding bill for 2800.00'.

Exhibit 4 on the other hand is a letter dated 26 July 2012 by respondent's CEO addressed to appellant's general manager. The subject is indicated as 'outstanding Developments costs for office 20 HICC for JJ and BB Accounting Services (pvt) Ltd.

That letter, other than giving the impression that it was a letter of demand, there is nothing in it to confirm that parties had agreed to any sum as due to respondent. In the absence of agreement that a refund for improvements was due and the quantum thereof, it was incumbent upon the respondent to prove that such an agreement had been reached and to thereafter prove the quantum of the refund.

Another document sought to be used was exhibit 5. This is an exchange Rates Confirmation Certificate. The trial magistrate alluded to the Rates Confirmation certificate (Exh 5) as evidence in support of the assertion that improvements were effected. However, exh 5 is simply a Rates Confirmation certificate from the Reserve Bank of Zimbabwe addressed to the respondent indicating what the rate of exchange between the Zimbabwe dollar and the United States dollar was as at 11 October 2007. There is nothing to be gained from that document as its relationship with the costs incurred in 2006 when respondent alleged it effected improvements it was now claiming compensation for was not explained.

Besides the above exhibits there was nothing else the respondent tendered as proof of the costs for the development or even as proof that it carried out any developments upon which it was entitled to be compensated.

The finding by the court a quo that- 'the parties wanted to set off. The problem on the progress of such negotiations is attributable to change in management' puts paid to any assertion that the parties had agreed on set-off. It is fallacious to conclude that just because the parties were in negotiations therefore they must have reached agreement.

In the absence of an agreement on a set off reliance has to be placed on the terms of the lease agreement. The question is did the agreement provide for set off or compensation for improvements?

In his evidence the respondent's witness confirmed that in terms of the lease agreement respondent was not entitled to be compensated for improvements.

The following exchange under cross examination of respondent's witness confirms the above (at p 22-23 of the record of appeal):-

"Q. You confirm you entered into a lease agreement with plaintiff?

A. Yes

Q. Confirm the balance is $ 8 665-65?

A. Yes

Q. What does the lease say about improvements?

A. It says I can do, but cannot claim monetary value from them."

Later on the witness confirmed that the lease agreement required the lessee to return the premises in its original state at the end of the lease.

When asked on what basis he was now claiming compensation in view of the fact that the lease agreement stated clearly the respondent cannot claim for any improvements, the witness stated that:-

"The office that I partitioned is being enjoyed by plaintiff."

In my view therein lies the basis for the claim. It is clearly not a result of an agreement for set off but respondent felt aggrieved that its partition was being used by the appellant.

It was for the respondent to prove that the clause in the lease agreement that clearly stipulated that the lessee cannot claim for improvements had been varied to now provide for compensation. I am of the view that the respondent failed to prove any variation in the lease agreement entitling it to compensation for any improvements if any was effected. Respondent also failed to prove that its claim, if any, was liquid. The costs of the alleged improvements were not proved at all. It would appear that the learned trial magistrate in reaching what he deemed negotiations or discussions towards a set off or concluding that the lease agreement had been varied in the absence of proof was in fact now creating a new contract between the parties. This was clearly a misdirection. As aptly stated in *Kundai Magodora & Others v Care International Zimbabwe* SC 24/14 at p7:

> "In principle, it is not open to the court to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is a matter of public policy.. Nor is it permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms."

Clearly it was wrong for the learned magistrate to read into the agreement an agreement to compensate for improvements when this was contrary to what both parties conceded was in the contract.

3. The court erred in concluding that the Respondent's counter claim in the sum of $7 788.00 (seven thousand seven hundred and eighty eight United States dollars) was legitimate in the absence of any receipt to support the amount claimed.

In his reasons for judgement the trial magistrate noted that whilst in its counter claim respondent claimed $7788.00 for improvements, in its evidence it tendered a document showing a sum of US 13 800 which its witness was now alleging was due from the appellant. The witness did not explain why its counter claim had a sum of $7788.00 when the document it sought to use as proof of what was owed to it had a sum of $13 800.00. Such could only serve to discredit respondent's evidence on the nature and extent of the improvements it alleged it effected. In fact it may be noted that the respondent's basis for the counter claim was the same as for its claim for a set-off.

The onus was on the respondent to prove that appellant was legally entitled to pay for the improvements, prove such improvements and then prove the costs of such improvements. It is my view that from the evidence adduced before the court a quo, the respondent lamentably failed to prove its claim. It was thus shocking to find that the court a quo held that respondent had proved its case in the circumstances. The reasons for judgement are bereft of any cogent explanation for such a finding as no credible prove of the costs incurred was tendered.

The differences in the sums claimed and those on the document respondent sought to rely on only served to compound the respondent's quandary.

It was thus misdirection for the trial magistrate to thereafter hold that respondent had proved its claim when its own evidence on quantum was conflicting.

4. The court a quo erred in concluding that the Appellant was not entitled to interests in terms of the Agreement between the Parties even though the respondent conceded the existence of the lease agreement.

Though both parties agreed that their lease agreement had been in writing neither tendered a copy thereof into evidence for court to examine its particular terms. In the absence of consensus between the parties as to what the rate of interest was it was within the magistrate's discretion to allow interest at the prescribed rate. Clearly, in my view had appellant been intent on interest at any other rate it was up to appellant to prove such a rate. The appellant did not do so. The learned magistrates cannot be said to have erred when appellant did not lead evidence to prove the rate of interest being claimed.

5. Costs of suit.

The appellant argued that the respondent's defence and counter claim were dilatory and only meant to delay proceedings and so appellant should have been awarded costs on the legal practitioner and client scale. In this appeal appellant sought costs on that higher scale.

Costs on a higher scale may be given in deserving cases where court deems that a party or a litigant was either abusing the court process or falls foul of a number of factors. These factors include that a party or litigant may have been acting in a dishonest manner or malicious conduct in that he pursued proceedings that were vexatious or frivolous. See *Mahembe* v *Matambo* 2003 (1) ZLR 148 (H).

The award of costs on the higher scale should be used sparingly lest it be viewed as a way of discouraging litigants who for one reason or another, albeit, ill advised feel they have a cause to defend an action. This is not a case one can say the respondent's defence was so hopeless as to amount to abuse of court process.

Whilst the case may not have warranted costs on a higher scale, I am of the view that the court a quo ought to have awarded costs to the appellant as the case was decided in its favour on the net award. Since judgement is silent on the reasons for not awarding costs to appellant, one can only surmise that costs were not awarded to either party because both parties were successful in their claims. In the circumstances the result of this appeal will naturally mean the losing party has to pay costs. This will however be on the general scale as in my view no justification has been made for costs on a punitive scale

Accordingly the appeal be and is hereby allowed with costs. The judgement of the court *a quo* is hereby set aside and is substituted with the following:

1. The Defendant be and is hereby ejected from number 1 Pennefather Avenue, White House Complex, Rainbow Towers, Harare;

2. The Defendant be and is hereby directed to pay the Plaintiff the sum of USD 8665.46 (eight thousand six hundred and sixty five United States dollars and forty six cents) being arrear rentals due as at the 28th February 2016 and all other arrear rentals that become due and owing from the 1st March 2016 to the date of vacation at the rate of USD151.55 (one hundred and fifty one United States dollars and fifty five cents) per month.

3. The Defendant be and is hereby ordered to pay interest on the aforesaid amount at the prescribed rate of 5% per annum from the date of issue of summons being 11th September 2014 until the date of final payment.

4. The Defendant's counter-claim be and is hereby dismissed with costs.

5. The respondent be and is hereby ordered to pay costs of suit on the general scale.

NDEWERE J I agree ……

Hove and Associates, appellant's legal practitioners
Nyikadzino Simango and Associates, Respondent's legal practitioners