MUGOVE KATEMA
versus
B.J.B. KIRSTEIN
and
BRIGHTON KASETI

HIGH COURT OF ZIMBABWE
MAKONI J & MWAYERA J
HARARE, 17 November 2015 and 17 February 2016

Civil Trial

A Nyamupfukudza, for the appellant
T Muchineripi, for the respondent

MWAYERA J: The court *aquo* granted an order in favour of the respondents as follows:

It is ordered that:

1. The defendants pay compensation in the sum of US$2 334-00 to the plaintiff for repairs carried by the plaintiff on defendant's fowl runs.
2. Defendants pay US$5 168-00 being damages for loss of business by the plaintiff
3. The defendants to pay interest calculated from the date of summons to date of last payment.
4. The defendants are to pay costs of suit.

The appellants were aggrieved by the decision of the court *aquo* and thus mounted the present appeal, in which they sought the court *aquo's* judgment to be set aside. The appellants raised six grounds of appeal which can be summarised as follows:

1. That the court *aquo* erred in finding that there was a landlord tenant relationship.
2. The learned magistrate misdirected himself by finding that the appellants were supposed to give notice to vacate to the respondents.
3. The learned magistrate misdirected himself by holding that the respondent proved loss of business when there was no proof that he could raise $5 168-00

4. The court misdirected itself in holding that the respondent was to be compensated for improvements in the sum of US$2 334-00 yet the respondent never consulted appellants that he wanted to put up improvements, neither did respondent demand his property from appellants.
5. The court misdirected itself by ordering appellants to pay interest on such unproved sums.
6. The court misdirected itself by ordering appellants to pay costs.

It is common cause from the evidence of both appellants and the respondent that the respondent used the appellant's premises for about four years. Further it is not in dispute that the respondents were into a poultry project at these premises. It is also common cause the respondent paid to the appellant on monthly basis. Initially payment was in the form of chickens and later in the form of money which was adjusted from time to time. Although the appellant argued that the money was for water and electricity, there was no explanation why the amount if it was a token of appreciation had to be adjusted by the appellants from time to time. In fact the second appellant's evidence was that there was a landlord – tenant relationship between the parties.

It is trite that in order to decide whether a contract exists one looks at whether or not there is meeting of minds of the parties. From the evidence on record it is apparent that the respondent requested to use the appellant's premises for a chicken project. The appellants agreed, for a consideration. There was consensus *ad idem* and the parties actually went further to transact with appellant adjusting money to be paid by the respondents from time to time and the respondents paying. The doctrine of quasi mutual assent comes in confirming the agreements between the parties.

In the case of *Levy* v *Banket Holdings (Pvt) Limited* 1956 (3) SA 558 at 562A it was stated :

> "If whatever a man's real intention may be, he so conduct himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bold as if he had intended to agree to the other party's terms."

See also *Diamond* v *Kernich* 1947 (3) SA 69 and *Springvale Limited* v *Edwards* 1968 (2) ZLR 141 at p 48 - 49.

In *casu* the appellants agreed to let the respondent use their premises for a consideration adjusted from time to time by the appellants. Such a relationship is clearly indicative of a contractual agreement. The appellant provided premises and the respondent took them up for a chicken project. The respondent paid a consideration. Such type of relationship is easily discerned as landlord – tenant relationship. The respondent was using premises from the appellant as per their contractual agreement albeit not reduced to writing. The circumstances as discerned from the evidence, as correctly summed up in judgment by the court *aquo* reveals the parties entered into a verbal lease agreement. A verbal agreement is as binding as a written agreement. Once it is accepted that there was a lease agreement then the lessee ought by operation of the lease agreement to have been given notice to vacate or be evicted by a court order. The record reveals that no three months' notice was given to the respondent and that no court order for eviction was utilized. The appellants gave out premises to another leasee while the respondents believed they were causing premises to be fumigated. By failure to give notice and taking up new tenants without the respondents' knowledge the appellants breached the lease contract.

Now turning to whether or not the respondent was entitled to compensation in respect of improvements to the appellant's property as awarded by the court *aquo*, the following observations are worth noting. It is not in dispute that the respondents effected some improvement on the appellant's property. It is also agreed on record, by the parties that the respondents having made improvements left everything intact at the appellant's premises which at the time of trial in the court *aquo* were being used by a third party. The respondents quantified the improvements and justified the claim of $2 334-00 as awarded by the court *aquo*.

The respondent was operating a chicken business and being deprived of premises without notice obviously occasioned financial loss in the form of profit. A reading of the record just shows a claim for $5 168-00 as loss of income suffered. No other evidence other than that all orders with Irvine's chickens were not facilitated. As correctly argued by the appellants placing orders with Irvine's Chickens does not translate to a profit of $5 168-00 as claimed. A proper computation of profit and loss account has to be adduced in order to avoid granting anticipated and speculative profit. The respondents, for their part stated that the fowl runs required to be disinfected. The loss incurred during that period would of necessity have to factor in such period

and accordingly be reduced from the claim for profit/loss occasioned during the period of occupation by the new tenant. In the absence of concrete evidence on computation of the profit and loss account then the amount claimed remains speculative and to that extent the court *aquo* erred in granting the amount on mere claim without proof. The respondent's evidence on pp 31 and 35 during cross examination is worth noting.

"Q. How much were you realising per month from the business
A. I was keeping 400 chickens and realising $1 292-00 per month"

Page 31:
"Q. Do you have proof of what you were realising per month
A. from what should the proof come
Q. I take it you do not have
A. I do not have"

This except from the record of proceedings shows the profit claim was not computed in a proper profit and loss business account fashion. The respondent only multiplied $1 292-00 by 4 and came up with a claim of $5 168-00. In the absence of a proper profit computation, the claim remains unsubstantiated. The court *aquo*, in the circumstances ought to have considered absolution from the instance.

The other grounds of appeal as shown above cannot stand and to that extent the appeal ought to fail.

Accordingly it is ordered that the appeal succeeds in part. The order of the court *aquo* is substituted as follows:

1. The appellants shall pay compensation for the repairs effected by the respondent in the sum of $2 334-00.
2. In respect of the claim for $5 168-00 for damages, absolution from the instance is hereby granted.
3. The defendant shall pay interest calculated from the date of issue of summons to the date of last payment.
4. Each party is to bear its costs.

MAKONI J: Agrees:…….

Muchineripi and Associates, respondent's legal practitioners
Phiri & Partners, appellants' legal practitioners