TAPERA JEFFREY MUZIRA
and
MONICA MUZIRA
versus
MICHAEL FRANK GBOUN

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 13 January & 24 February 2016

Application for absolution from the instance at close of plaintiff's case

P.R.Samukange, for the plaintiffs
R.F. Mushoriwa, for the defendant

TAGU J: The plaintiffs issued summons claiming from the defendant payment of the sum of US$14 422.68 plus interest at the prescribed rate from July 2014 to date of full and final settlement being the amount due for the repair work done at No.779 Glen Garry Avenue, Highlands, Harare. They also claimed US$4 235.00 plus 10% interest per month calculated from July 2014 to date of full and final settlement being outstanding rentals as well as costs of suit on an attorney and client scale.

The undisputed facts are that the plaintiffs and the defendant entered into a lease agreement on 1 August 2013 for a property situate at Lot 399, Highlands Estate of Welmoed situate in the district of Salisbury otherwise known as No. 779 Glen Garry Avenue, Highlands, Harare. The rental amount monthly was the sum of US$3 500.00. At the time of taking occupation of the said property the defendant paid a deposit of US$7 000.00. At the time of vacation the defendant had some outstanding rentals.

The plaintiffs are now claiming that in terms of the lease agreement the defendant was obliged to attend to repair work before vacating the premises in line with the damages that the defendant had done to the property including the swimming pool and the borehole pump. The plaintiffs further claimed that they carried out massive repair work for a total sum of US$14 422.68. Lastly they claimed that the defendant owed them rentals for the months of May,

June and July 2014. The defendant's defence is that there were no such damages but acceptable wear and tear. He further accepted that he did not pay the rental for June but stated that he made a tender for such payment from the US$ 7 000-00 held by plaintiffs as deposit.
The plaintiffs who are husband and wife respectively testified and were cross examined by the counsel for the defendant. They narrated how they entered into the lease agreement with the defendant. It was their evidence that at the time of occupation of the property the defendant asked them to make certain adjustments to the house which they did. The defendant then took occupation when the house was in perfect condition. They said at the time the defendant vacated the premises he owed them some rentals which were supposed to be paid in advance. They later noted several damages to the property which they itemized. They then carried out the repair works after the defendant failed to repair them. They produced a buddle of documents as exh1 showing the amounts they spent on repairs and where they sourced the materials. They are still owed some rentals and disputed the fact that they were supposed to deduct the rental arrears from the deposit.

However under cross examination their evidence differed as far as the repairs on the swimming pool pump was concerned. The husband said they spent US$ 990.00 in repairing the swimming pool pump but the wife said they did not spent that amount since the swimming pool pump was not repaired by them and is still operational. What they only have is a quotation of what they were supposed to pay should the swimming pool pump breakdown. The swimming pool pump was repaired by the defendant.

To support their evidence they led evidence from Mr Munyaradzi Fidelis Chimanda who is a Production Manager at Astra Paints. He confirmed to the court that the plaintiffs were their regular customer and that they are the ones who manufactured the special paint that was used on house No. 779 Glen Garry Avenue, Highlands, Harare after they visited the said house and assessed the type of materials required for the repairs. Further he confirmed that they issued the invoice of US$ 1 496.06 dated 18th July 2014 in favour of the plaintiffs. According to him the amount quoted on the face of that invoice is the actual cash they received from the plaintiffs. He did not know whether or not the said paint was later used to paint a different house from the one they had assessed. The defendant took issue with the plaintiff's failure to produce the inventory or hand -over- take over documents that showed the state of the property before and after it was leased to the defendant.

At the close of the plaintiffs' case the defendant made an application for absolution from the instance. The basis of the application was that there was insufficient evidence on

which the court might make a reasonable mistake and give judgment for the plaintiffs. The application was opposed by the plaintiffs.

It is necessary to restate the principle applicable in an application of this nature. The applicable principle in an application for absolution from the instance was enunciated in *Gascoyne* v *Paul & Hunter* 1917 TPD 171 at 173. The same principle was followed in many other subsequent cases some of which I will cite later as follows:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but close his case immediately, the question for the Court would be, "Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?"."

The same principle was stated by the appellate Court in *Oosthuizen* v *Standard General Versekeringsmaatskappy* Bpk 1981 (A) at 1035H- 36A as follows:

> "If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution."

However, in *Gordon Lyod Page & Associates* v *Rivera & Another* 2001 (1) SA 88 at 92 the Court said that:

> "The test for absolution to be applied by a trial court at the end of the plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms:
>
> " ….(W)hen absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff…."

Applying the above principle the question to be asked in the present case is whether or not the plaintiffs established a *prima facie* case, that is, have they proved all the essential elements of the claim? In *Mazibuko* v *Santam Insurance Co. Ltd and Anor* 1982 (3) SA 125 Corbett JA at 132 said-

> "In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff, in other words, whether the plaintiff has made out a prima facie case. This is trite law."

In casu it has been proved that the defendant leased the plaintiff's property for some 19 months. It has been proved and partially admitted that a number of people assembled and some prayer sessions took place at the property, though they said the prayer sessions took

place in the gazebo. It has been proved and partially admitted that some rentals have not been paid to date and according to the lease agreement is now higher due to interest. It has also been proved and partially admitted in the correspondences by defendant that he carried some and did not do some renovations at the property. The plaintiffs filed buddle of documents showing to some extent, by means of receipts the expenditure they under took in repairing the property in question. It has however, been shown that the other invoice was not paid for. For example the plaintiffs have failed to prove that they spent about US$ 990.00 in repairing the swimming pool pump. Otherwise other expenditures have been proved.

In my view if absolution from the instance is to be granted it may only be granted in respect of that expenditure they failed to prove. The defendant may be put to his defence in respect of the other claims. This is in line with what was said in the case of *Walker* v *Industrial Equity Limited* 1995 (1) ZLR 87 (S) by Gubbay J (as he then was) when he held that-

> "An application for absolution from the instance is akin to and stands on the same footing as an application for the discharge of the accused at the end of the state case. In that situation, he is entitled to his discharge on any or separate charge on which there is insufficient evidence to justify his being put on his defence. Similarly in a civil action if there is no evidence on which a reasonable judicial officer could or might find for that plaintiff upon some or the separate claims or on the main or alternative cause of action, there is no impediment to it ordering absolution upon them and refusing it in respect of the remainder."

It must be noted that at this stage the court need not concern itself with the credibility or otherwise of the plaintiffs' evidence unless, of course, it is demonstrably clear that the plaintiffs and or their witness that they were palpably broken down under cross examination. To me some degree of truth has been demonstrated. See Vide *The South African Law of Evidence* by DT Zeffertt p 165 where the learned authors cite Solomon in *Siko* v *Zonsa* 1908 TS 1013.

In casu, the evidence led for the plaintiffs and the abovementioned admissions by the defendant clearly evince that the plaintiffs expended some amounts of money on repairs to the property and are still owed some rentals for the property despite the fact that they are holding onto some deposit. The application is therefore misplaced and unnecessary.

Accordingly, the application for absolution from the instance at the close of the plaintiffs' case is dismissed.

Venturas & Samukange, plaintiffs, legal practitioners
Mawere and Sibanda, defendant's legal practitioners