ZUVA PETROLEUM LIMITED
versus
S CHIRENJE

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 21 January 2016 and 2 March 2016

Civil Appeal

E Jera, for the appellant
E Jena, for the respondent

MUNANGATI-MANONGWA J: The appellant (then plaintiff) sued respondent(then defendant) in the court *a quo* for ejectment from the premise at Number 8 Bindura Township in the district of Bindura commonly known as No. 8 Main Street Bindura or simply Bindura Service Station, payment of US$3 400-00 being the amount due in respect of the agreed rentals, holding over damages at the rate of US$800-00 per month from 1 August 2014 to the date of vacation, 5% interest on all the amounts and costs. At the close of the defendant's case the defendant applied for absolution from the instance which application was granted by the magistrate. The plaintiff appealed against that judgment.

On 21 January 2016 this court allowed the appeal by the appellant against the court *a quo's* dismissal of the appellant's claim against the respondent at the conclusion of trial. The following order was granted:

a) The appeal be and is hereby allowed with costs.
b) The respondent and all those claiming occupation through him be and are hereby ejected from the premises at Number 8 Bindura Township in the district of Bindura commonly known as No. 8 Main Street Bindura or simply Bindura Service Station.

c) The defendant be and is hereby ordered to pay the sum of US$3 400-00 being the amount due in respect of the agreed rentals and costs as at 10 June 2014 with interest thereon at the rate of 5% *per annum* calculated from 1 July 2014 to date full payment.

d) The defendant be and is hereby ordered to pay holding over damages at the rate of US$800-00 per month from 1 August 2014 to the date of vacation with interest there at the rate of 5% *per annum* reckoned from the date that each amount becomes due and payable.

e) The defendant shall pay the costs of suit on a legal practitioner and client scale.

The background facts to this matter which facts are common cause are as follows:

On 4 January 2013 the appellant entered into a lease agreement with a company called Kadkoy Motors (Pvt) Ltd (hereinafter called "the lessee") for the lease of stand no. 8 Bindura Township in the district of Bindura commonly known as No 8 Main Street Bindura or Bindura Service Station. After a period of about 3 months the lessee Kadkoy Motors (Pvt) Ltd gave up the premises due to non-viability of its business. Upon taking possession of the premises the appellant discovered that the previous lessee had placed various sub-tenants in the premises who included the respondent. The appellant engaged the respondent with a view to negotiate a dignified exit conceding to their request that they vacate the premises by 31 December 2013 but the respondent was not co-operative. The appellant issued summons for the respondent's eviction on the basis that he was an illegitimate occupant who was not paying rent. The appellant further sought payment of US$3 900-00 as payment for the respondent's occupation and holding over damages at US$1 300-00 per month from January 2014 until the respondent vacated, and further claimed interest and costs.

The matter proceeded up to pre-trial conference stage, where the parties negotiated and signed a deed of settlement on 10 June 2014. The document stated *inter alia* that the respondent was to vacate the premises on or before 31 July 2014 and set amounts to be paid by the respondent. The deed of settlement was filed and is part of the record. For a while, the respondent obliged with the terms stated in the deed of settlement as agreed by paying money to the appellant for its occupation pending its vacation of the property and then stopped. When the respondent stopped paying for its occupancy, no consent order had been granted by the court as

per the deed of settlement. The appellant finally set the matter down for trial for the conclusion of the dispute.

The issues that were up for determination were as follows:

1. Whether or not the defendant should be evicted from the premises he is occupying
2. Who should bear the costs.

At trial the plaintiff's evidence remained as outlined earlier persisting with its claim. The defendant whilst acknowledging that it has no lease agreement at all with the appellant apart from an arrangement to occupy the premises done through the appellant's manager, his defence and evidence was that the appellant could not evict him as it is not the owner of the premises. Hastening to add that at the close of the plaintiff's case the defendant made an application for absolution from the instance which application was refused. Trial proceeded and at the end thereof, once again the defendant applied for absolution from the instance and in granting same, the magistrate sitting in the court *a quo* remarked "I should have granted absolution from the instance at the close of the plaintiff's case." Aggrieved by this finding the appellant appealed against the decision.

The grounds of appeal were stated as follows:

"1. The court *a quo* also erred in ordering absolution from the instance without assessing the evidence led by the parties for the eviction of the defendant notwithstanding that there was clear and sufficient evidence to warrant ejectment of the defendant and all those claiming occupation through him from the premises at Stand Number 8 Main Street, Bindura.

2. The court *a quo* erred in finding that the appellant's witness should have produced authority to represent it in court notwithstanding that this is not a requirement at law.

3. The court *a quo* also erred in finding that the appellant should have proved its ownership of the premises in question in order to be able to evict the defendant from the premises notwithstanding the fact that this is not a requirement at law for a person who was a subtenant where the main tenant has vacated the premises.

4. The court *a quo* erred in finding that the appellant should have called the evidence of its business manager when such evidence was totally unnecessary in view of the established and undisputed facts.

5. The court *a quo* also clearly erred in dismissing the appellant's claim without determining the evidence adduced to the court by the defendant.

6. The court *a quo* also erred in failing to appreciate the fact that the Deed of settlement signed by the parties, itself not withdrawn constituted a compromise agreement that should have been upheld.

7. The court *a quo* erred in ruling that no *prima facie* case had been established notwithstanding the fact that he already found, in dismissing the earlier application for absolution from the instance that there was a *prima facie* case.

8. The court *a quo* also erred in failing to deal with the losses being suffered by the appellant as a result of the fact that the respondent's is simply occupying the premises without paying anything. As a result he effectively perpetuated the loss being suffered by the appellant by granting absolution from the instance."

Despite the several grounds of appeal which we found repetitive, the pertinent issue for determination is whether or not in the circumstances of this case the court *a quo* misdirected itself in granting absolution from the instance at the close of defendant's case..

The leading case on the question of absolution from the instance is *Supreme Service Station (1969) Private Limited* v *Goodridge Private Limited*.[1] In this case Beadle CJ referred to and accepted that the *locus classicus* case on absolution from instance is *Gascoyne* v *Paul Hunter* 1917 TPD 170. Deriving therefrom Beadle CJ clearly stated that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case but to grant it if the defendant promptly closes his case and renews the application without calling any evidence. This he said would not create any inconsistency because:

> "the test to be applied when application is made before the defendant closes his case is "what **might** a reasonable court do?; whereas the test to be applied when the application is made after the defendant closes its case is "what **ought** a reasonable court do"

He further explained that:

> "The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment.[2]"

In the court *a quo*, both parties had given evidence, thus upon application by the respondent for absolution from the instance after it had closed its case (the defence case) the correct test was what judgment it 'ought' to give which in essence has to be a correct judgment.

[1] 1971 (1) RLR 1
[2] 1971(1)RLR at F-H

Where all evidence has been led, there is no room for error. This is different from a scenario where the application is made at the end or close of the plaintiff case where the court in applying the test "what might a reasonable court do" there is allowance of making a reasonable mistake and come up with an incorrect judgment. Where the defendant has closed his case, the court has to fully assess the evidence in its totality, fully conscious of the burden now upon it to weigh the probabilities raised by the adduced evidence before it. The test becomes stringent what 'ought' a reasonable court do.

It is common cause that the magistrate in the court *a quo* bemoaned his failure to grant the application for absolution at the close of the plaintiff's case. From the reasons of judgment as appearing on record, the court *a quo* blatantly applied the wrong test given that a full trial had ensued and the application was made after the defendant closed its case. The *Gascoyne* case was clearly misconstrued as the court considered the wrong question "Is there evidence upon which a reasonable man might find for the plaintiff?" Nowhere in the record did the magistrate refer to the question "what ought a reasonable court do" the applicable test in the circumstances. In fact there seems to have arisen a mix up and the court a quo seems not to have been conversant with the test to be applied in the different scenarios. Therefore by applying the wrong test the court misdirected itself as reflected by its finding that "there is no *prima facie* case" a pronouncement made at the end of trial. Since the court applied a wrong test it arrived at a wrong decision in granting absolution from the instance when the respondent closed his case. In that regard the appeal ground raised by the appellant has merit and is upheld.

It is pertinent to note that in applying the test on absolution from the instance at the close of the defendant's case, the court is not only looking at the evidence alone, it has to consider the law and apply same to the facts. In this case an understanding of the law pertaining to tenancy was crucial. In deciding the issue of eviction the court *a quo* had to consider the legal status of the respondent. Further it was important to consider what rights the respondent had regarding the occupation of the premises having determined his status. In *Omarshah* v *Karasa* 1996 (1) ZLR 212 HC at p 215 Gillespie J held that:

> "The rights of a subtenant as against a landlord are coterminous with those of the lessee. No greater rights may be acquired by her than those enjoyed by the lessee under the head lease. See *Bright* v *Truump Garage (Pty) Ltd* 1949 (3) SA (C) at 359. The proposition is applied in our law to the extent that a sub-lessee does not enjoy the protection of a statutory tenant where the lessee has surrendered any right of occupation under the head lease. This protection, it said,

> 'could never have been intended to apply when there never was any *vinculum Juris*, either contractual or quasi – contractual between an owner and a person whom he is seeking to eject from his premises"

The Omarshah case clearly sets out that the rights of a subtenant as against the landlord end when those of the lessee terminates, and that the subtenant cannot enjoy greater rights than those bestored on the lease holder. Where the lessee gives up occupancy the subtenant cannot seek protection as a statutory tenant. In simpler terms the rights of a subtenant are subservient to those of the lessee and when a lessee leaves the premises the subtenant has no legal basis to remain in occupation.

In *casu* the respondent was a subtenant of Kadkoy (Pvt) Ltd the lessee. The demise of the lessee's tenancy or the surrender of occupancy by the lessee meant the extinction of any rights that the respondent had. Conversely the respondent's status could not be termed a statutory tenant and he could not enjoy the protection accorded to a statutory tenant as espoused by the Omarshah case. Not being a recognized tenant, the respondent had no right to remain in occupation of the premises beyond the negotiated date and hence the order for eviction should have been granted. Thus the court *a quo* patently misdirected itself on the law when it made a finding that respondent was a statutory tenant and failed to order his ejectment. Apart from the legal position, factually the respondent could not be a statutory tenant as he had no lease agreement and was not paying rentals. A statutory tenant is one who despite the expiry of the lease agreement continues to pay rent and abide by the terms of the lease agreement. This could not be said of the respondent. The respondent's occupation of the premises remains illegal and the court *a quo* should have cut the appellant's losses by granting the order sought.

It is also clear that the decision of the court *a quo* is hinged on the fact that the appellant not being the owner of the premises it could not evict the respondent .This is surprising because it is common cause that after the departure of the lessee the respondent negotiated a temporary reprieve with the appellant's manager, paid rentals to the appellant only to later stop payments and challenge the appellant's rights. The learned magistrate clearly misdirected himself on the law and certainly did not appreciate the import of the case of *Hillock and Another* v *Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 when he dismissed the appellant's case on the basis that it did not own the premises. The *Hillock* case, to the contrary is authority that a party other than the owner can recover premises from a third party without having to prove ownership. This flows

from the legal premise that a lessee is not allowed to challenge the right or title of the lessor[3]. Given that legal position, the appellant was within its rights as the lessor to evict the respondent and the respondent was estopped from resisting ejectment on the basis that the appellant did not have title to the premises. That the property was owned by Zuva Petroleum 2 was neither significant nor important as the appellant was the recognized lessor. The appellant's contention therefore has merit because the court *a quo* misconstrued the law.

Further, the court *a quo* certainly misdirected itself on a point of law in finding that the appellant's witness should have produced authority to represent it in court. This is not a requirement at law. A witness needs not produce any authority as they are coming to testify or give evidence on facts pertaining to the matter, which facts are in the witness' personal knowledge. In this instance the witness Mr *Pillay* was the appellant's legal officer and he knew of the facts characterizing the occupation of the premises in issue. That in itself was sufficient. Mr *Pillay* did not institute the proceedings on behalf of the appellant, rather he came to support the appellant's claim by way of giving evidence, in that regard the question of *locus standi* did not arise. The appeal ground by the appellant on this point is thus upheld.

Tying up to this, is the misdirection by the court *a quo* once again as pointed to by the appellant, where the court made a finding that the appellant should have called the evidence of its business manager. Such evidence was totally unnecessary in view of the established and undisputed facts. It was common cause that the original lessee had given up the lease and vacated leaving the respondent in occupation. The respondents where now in occupation by virtue of an arrangement they had with the business manager, they had paid rentals and stopped and now where challenging the appellant's rights to ownership when the appellant sought to evict the respondent. In the light of that evidence there was no need to call the business manager.

Overally, the court *a quo* seems to have lost track of the issues that came up at the pre-trial conference which issues it had to consider and determine. Such a consideration would have kept the court alert to what was the necessary evidence. Conscious of what had to be proven, the court would have assessed the evidence using the proper test and applying the relevant law. This, the court *a quo* failed to do and consequently came up with a wrong decision. The appellant had proven his case on a balance of probabilities and the court ought to have

[3] Hillock case at 516D.

granted judgment in the appellant's favour. It is due to the foregoing reasons that the court upheld the appeal with costs and granted the order prayed for.

MWAYERA J agrees:……

Moyo & Jera, applicant's legal practitioners
Jena & Associates, respondent's legal practitioners