ANNA BANNISTER
versus
GESTLAM INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 1 & 4 November 2016 and 22 February 2017

Civil Trial

Ms *L Rubaya*, for the plaintiff
T. Sengwayo, for the defendant

MUREMBA J: The plaintiff's claim is for the eviction of the defendant from 7.5 Mile peg Simon Mazorodze Road, Waterfalls, Harare, payment of arrear rentals in the sum of US$31 500-00, holding over damages in the sum of $1 500-00, being monthly rentals from April 2015 to date of eviction, payment of arrear water bill in the sum of US$20 800-00 as of March 2015, payment of current water bill that shall be accruing from the date of issuing the summons to the date of eviction.

In her declaration the plaintiff an old lady aged 83 years averred that in March 2012 she entered into a lease agreement which was to run for 4 years with the defendant through Heaven on Earth Real Estate. In terms of the lease agreement, it was agreed that the defendant would pay a monthly rental of US$ 1 500-00 subject to it effecting the following improvements on the property for no cost to the plaintiff.

a) <u>Existing House</u>
   - Interior and exterior painting of the entire property
   - Attend to minor damages in the main house
   - Ceramic tiling of the kitchen and bathrooms.

   This should have been completed by 30 September 2012.

b) Erection front and immediate back durawall

It was supposed to be built of brick with 2 gates on the front wall and one gate on the back wall. This should have been completed by 30 September 2012.

c) Erection of far backyard durawall.

This should have been completed by 29 February 2013.

d) Erecting a workshop shed

This was supposed to be done in liaison with lessor in terms of position, type of construction and to see whether it is supposed to be on the plan. This was supposed to be completed by 29 February 2013.

The plaintiff averred that in July 2013 the defendant defaulted payment of rentals. In September 2013 plaintiff through her agent Heaven on Earth Real Estate sued the defendant in the magistrates court and obtained a default judgment which was however rescinded for the reason that Heaven on Earth Real Estate had no authority to sue on behalf of the plaintiff. It was also held that the costs of improvements effected by the defendant should be taken into account. The plaintiff deducted the costs incurred by the defendant from her claim, but still the defendant failed, neglected and refused to pay rentals.

On 28 January 2015, the parties held a meeting whereupon they agreed that the defendant pays current rentals of US$1 500-00/month and starting June 2015, it was to pay US$3 000-00/month made up of US$1 500-00 current rentals and US$1500-00 going towards payment of all arrears. Further, the defendant was to pay the water bill which was standing at US$19 700.00 as at that date. Despite this agreement, the defendant has failed to comply. Instead it is now subletting the premises and pocketing the rentals. Now the plaintiff's claim has exceeded the jurisdiction of the Magistrates Court.

In its plea the defendant made the following averments. It disputes the eviction because it was not given notice by the plaintiff that she intends to cancel the lease agreement. It denies the arrear rentals on the basis that it has made improvements on the property the value of which far exceeds the plaintiff's claim for arrear rentals. It admits that the rentals continue to accrue but these should be checked against the value improvements. The water bill is not due to the plaintiff but to the Harare City Council. The parties negotiated the lease agreement in August 2012 and

entered into it in September 2012. The parties did not conclude the lease agreement in March 2012. The lease agreement that was produced in the magistrates court in case no. 20803/13 is a forged lease. The defendant admitted that the rental was US$1 500-00 per month but averred that the value of improvements it made was supposed to be deducted from the rentals. It averred that the parties agreed that these costs would set off the arrears. The defendant does not dispute or agrees with the reasons why the plaintiff's case was dismissed in the magistrates court. The defendant admits that the parties held a meeting on 28 January 2015 with the plaintiff's son in law, but avers that the parties reached a stalemate after the son in law had insisted that all improvements were to be completed by the end of the month. The defendant disputes that it has put in tenants in the premises. The defendant has never dealt with the plaintiff in person, but through Heaven on Earth Real Estate.

The parties agreed on the following issues for trial.

"1. Whether or not defendant defaulted paying rentals since July 2013.
2. Whether or not failure to pay utility bills constitutes breach.
3. Whether or not plaintiff's total claim for arrear rentals exceeds the claim for renovations.
4. Whether or not plaintiff is entitled to evict defendant from the premises."

The plaintiff's evidence

Pascalia Mashasha the manager responsible for the department which deals with leasing of houses at Heaven on Earth Real Estate testified as follows. The plaintiff an old woman aged around 89 years old is their client. They advertised her property in question in August 2012. The respondent responded to it being represented by Terrence Mapariravana. The rental was $2 500-00/month but the defendant indicated that it wanted to renovate the property at its own cost and asked if it was possible to reduce the rentals to enable it to do the renovations. The plaintiff was engaged and she was agreeable to it. She agreed that the defendant paid $1 500-00/month for 12 months it being agreed that the defendant would use the difference of US$1 000-00/month to do the renovations and it was expected that the renovations would be completed within the 12 months. The parties signed a lease agreement and these terms were captured in it. The lease was to run for 4 years starting from 1 September 2012. The lease agreement was produced as exh1.

The witness said that the defendant did not effect the improvements it said it was going to effect. From 1 August 2013 to November 2016 when this trial commenced, the defendant did not pay any rentals. The last rentals were received in July 2013. They went to the magistrate court,

but the matter was dismissed. On 5 December 2013 Heaven on Earth Real Estate and the defendant entered into a deed of settlement wherein they agreed that starting from 7 January 2014 the defendant would be paying US$3 000-00 per month broken down to US$1500-00/month for current rentals and US$1 500-00 per month for payment towards arrear rentals. The deed of settlement was issued in the Magistrates Court at Harare on 11 February 2014. However the total amount of arrears was not stated in the deed of settlement. The deed of settlement was produced as exh 2. The parties agreed that if the defendant did not comply, the plaintiff could proceed with the claim for eviction.

Pascalia Mashasha said that thereafter the defendant did not fulfil its obligations and through its lawyers offered to vacate the plaintiff's premises. A letter which was written by Mr *Sengwayo* for the defendant on 23 March 2015 to Ms *Rubaya* for the plaintiff admitting that his client, the defendant had not been *bona fide* in paying the rentals and arrears. He said that he had advised it to vacate the premises at the end of the month in March 2015. The letter was produced as exh 4. The witness said that despite the promise that the defendant would vacate in March 2015, the defendant has remained in occupation.

Pascalia Mashasha said that the defendant was also supposed to be paying utility bills, but as at 31 May 2015, the water bill stood at $25 117-24. She said that when the defendant took over the premises the utility bills were up to date. The witness said that the defendant had assured them that it had entered into a payment plan with the City of Harare, but upon checking with the City of Harare, they discovered that no money was ever paid. The water bill was produced as exh 5.

The witness said that the agreement was that for the improvements that the defendant was going to effect on the property its compensation lied in the $1 000-00/month which had been deducted from the monthly rental of $2 500-00 the plaintiff initially wanted for her property. The witness said that despite this, upon being sued in the Magistrates Court, the defendant indicated in its plea that it wanted to be compensated in the sum of US$12 500-00 for the improvements it had effected. The plea was produced as exh 6. The witness said that when they notified the plaintiff about this claim by the defendant, the plaintiff said that to resolve the matter the witness should just deduct the US$12 500-00 from the total amount the defendant was owing, so that it paid the difference or the balance to her.

The plea which was produced as exh 6 shows that it was filed on 7 February, 2014 and the parties then had a deed of settlement issued by the clerk of court on 14 February 2014.

The witness said that when the summons was issued on 15 April 2015, the arrear rentals stood at US$31 500-00 calculated from1 August 2013 at the rate of US$ 1500-00/month. It is a period of 22 months excluding April of 2015. She said that from April 2015 they were expecting rentals of US$1500-00/month to date. She said that they want the defendant evicted because it has not paid any rentals and it has not paid the utility bills. The witness said that after the claim for $12500-00 they have not received any further claims for renovations from the defendant. She said that at the time of giving evidence in November 2016 the arrear rentals now stood at U$$60 000-00 and US$12 500-00 was supposed to be deducted from that amount. The witness said that the plaintiff has been prejudiced for a long time, if the defendant cannot pay it should just vacate the premises to allow the plaintiff to look for another tenant.

The witness said that she was surprised to hear that the defendant had erected a service station on the property because the parties never agreed on this and the plaintiff knows nothing about this. She said that as the manager of the property she never spoke with the defendant about the construction of a service station. She said that she last went to the property in early 2016 but there was no service station except some tanks which she saw. She said before issuing summons in April 2015 there was no service station. The witness said that after litigation had commenced in the Magistrates Court she did not expect any further renovations by the defendant. Pascalia Mashasha said that in its pleadings the defendant never mentioned the issue of the service station. She said that if the defendant put up structures then it is trying to build up its case. She said that she would take it that the defendant is only entitled to compensation in the sum of US$12 500-00 although it did not do any renovations or improvements. The plaintiff said that the defendant should get this amount so that the matter can come to a conclusion.

During cross examination the witness was referred to the lease agreement. It turned out that in terms of clause 3 thereof, the rentals were US$1 500-00/month for the first 24 months not 12 months as she had said in her evidence in chief. Despite that, she insisted that the parties had agreed on 12 months yet she could not point out to any clause in the agreement which spoke of 12 months.

On the lease agreement being said to have been signed in March 2012, the witness stated that the plaintiff (owner of the property) must have made a mistake on signing the lease agreement and wrote March instead of September 2012. She said that the plaintiff was not available to sign the lease agreement in September 2012. She was only available in March 2013 and on signing it she ought to have signed March 2013, but then signed March 2012. She said, however, the parties put their signatures on each page of the agreement. Asked if it was the plaintiff who had signed the agreement she said that it was signed by her daughter. It was put to her that the defendant built a service station on the premises pursuant to clause 15. 1.d. which states that the defendant was to erect a workshop shed. Mr *Sengwayo* said that the erection of a workshop shed involved the erection of a garage and a fuel service station. The witness disputed it saying that the agreement did not mention anything about a service station, but a workshop shed. Mr *Sengwayo* said that the US$12 500-00 claimed in the Magistrates' Court by the defendant was indicative of the service station which was being built and the plaintiff was aware of it. The witness disputed this saying that the plaintiff does not reside at these premises and as such could not have been aware of its construction. She also said that it was never agreed that the US$12 500-00 the defendant was claiming in the Magistrates Court was for the construction of a service station.

It was put to the witness that US $125 393-00 had been put on the renovations and this far exceeds the plaintiff's claim. The witness said that the parties never agreed on the erection of such a big structure. It was put to the witness that the defendant stopped payment of rentals because at a meeting which was held, the plaintiff's son in law had said that the defendant would not be compensated for the renovations it made. The witness said that she was not aware of any such agreement and any such meeting as the representative of the plaintiff.

During re-examination Pascalia Mashasha said that the workshop shed that the defendant was supposed to erect was for the servicing and repairs of the defendant's heavy trucks as it said that it was in the trucking business.

The defendant's evidence

Terrence Mapiravana, the defendant's Managing Director testified as follows. He said that when the lease agreement was signed a lot of negotiations had been made in relation to the

renovations and developments that were supposed to be made on the property as the premises were in a bad state. He said Pascalia Mashasha and one Nyaradzo had then given an assurance that if the defendant would effect renovations and developments to suit its business, it would be compensated for such. Subsequently, the parties signed a lease agreement on 10 December 2012. Pascalia Mashasha and Nyaradzo however, took with them that lease agreement but never returned it. I have difficulties accepting this because this version of events was never put to Pascalia Mashasha by Mr *Sengwayo* during her cross examination. Mr *Sengwayo* never said that the agreement was signed on 10 December 2012, but on 29 August 2012, commencing on 1 September 2012 which was consistent with what Pascalia Mashasha was saying.

Terrence Mapiravana said that the lease agreement that the plaintiff had produced as exh 1 is not the agreement he signed. He said that it is a fraudulent document with doctored or falsified contents. He disputed the whole of clause 15 saying that it was different from the clause 15 of the lease agreement which he had signed which dealt with the issue of improvements and repairs. He said that the one he signed dealt with bill of quantities for all the projects or improvements the defendant was to make. He also said that according to the lease agreement he signed, there was a clause which said that after the first 4 years of the lease agreement the lease term would be renewed for another 4 years on the same conditions except for the issue of renovations and developments. I did not find the evidence of the witness on this issue credible at all because all this was never put to the plaintiff's witness Pascalia Mashasha when she gave her evidence. This was not mentioned at all in the defendant's plea. It does not feature in the summary of evidence. In fact, in the plea the defendant did not dispute the renovations the plaintiff said the parties had agreed upon. In her declaration, the plaintiff listed all the improvements and renovations the defendant was supposed to make in para 4.2. In its plea to this particular paragraph, the defendant did not dispute the list except it said that the renovations were supposed to be compensated for by the plaintiff. It is surprising that the defendant's managing director was now seeking to dispute the clause and even the period within which the projects or improvements ought to have been completed. He was now saying that the lease agreement is totally different from the one that he signed. If this is what happened it should have been stated in the defendant's plea. What makes matters worse for the defendant is that in its summary of evidence it said that it was made to sign a blank lease agreement which was never returned to it.

With these inconsistencies it is difficult to rely on the evidence of Terrence Mapiravana. In the pleadings the defendant did not dispute the renovations and improvements the plaintiff says the parties agreed on. He said that the lease agreement was signed in August 2012 and commenced in September 2012. In the summary of evidence he says he was made to sign a blank lease agreement. During trial and in his evidence he said that he signed a lease agreement which captured the terms and the conditions the parties had agreed upon on 10 December 2012. His evidence is totally unreliable in so far as he tries to dispute the lease agreement the plaintiff produced as exh 1.

Terrence Mapiravana however, admitted that the agreed rental was $1500 for the first 24 months and that it was reviewable after that. He said that he is not the one who signed on the lease agreement that Pascalia Mashasha produced.

Terrence Mapiravana said that in the lease agreement that he signed it was a term of the agreement that the defendant would erect a garage that would provide fuel for its haulage trucks and a section for repairs and maintenance. He said that the parties did not agree that the defendant would build a workshop shed. He further said that he even went to site with Pascalia Mashasha and Nyaradzo and agreed on the positions where the defendant was going to put the fuel tanks and shades for the fuel pumps. He said that all this happened before he signed the lease agreement. I am at pains to accept this evidence by the defendant's managing director because all of it is totally new evidence which only came out for the first time after the defendant's case had opened. None of all this was put to Pascalia Mashasha by Mr *Sengwayo*, for the defendant during her cross examination. It was not put to her that in the lease agreement that the parties had signed on 10 December 2012, the parties had specifically agreed that the defendant would erect a garage with provision for a fuel section and a section for repairs and maintenance of the trucks. It was not put to her that it was never agreed that the defendant would erect a workshop shed. Instead Mr *Sengwayo* put it to her that in clause 15. 1. d which caters for the erection of a workshop shed that is where the construction of the service station was covered. In fact when Mr *Sengwayo* cross examined Pascalia Mashasha, he never put it to her that clause 15.1 which deals with improvements and repairs was disputed at all. From the way he questioned Pascalia Mashasha he did not dispute any of the terms and condition of the lease agreement except the date of 15 March 2012 which is the date the agreement of sale was signed when it had

been entered into on 29 August 2012 for commencement on 1 September 2012. The other issue he challenged was the signature of the lessor which Pascalia Mashasha explained that it had been signed by the lessor's (plaintiff's) daughter. It is therefore surprising to the court for the defendant's managing director to completely depart from what the defendant's legal practitioner was saying all along during the plaintiff's case. The inconsistence is just unbelievable. On one hand the lawyer says the construction of the service station was catered for under the workshop shed clause of the lease agreement which was produced by the plaintiff as exh 1. On the other hand the defendant's witness, contrary to what Mr *Sengwayo* said, says in a different lease agreement that the parties signed on 10 December 2012 the parties agreed on the construction of a garage and not a workshop shed. Such disparity induces a sense of shock. If it is the truth why was it not put to Pascalia Mashasha? Why was it not put to her that she had even gone to site with Terrence Mapiravana and Nyaradzo before the lease agreement was signed and that they all agreed on where the garage was to be constructed? What further complicates the case of the defendant is that in its summary of evidence it said that it had signed a blank lease agreement. If it signed a blank lease agreement where then were all these terms and conditions Terrence Mapiravana was talking about during trial captured? With such inconsistencies the court does not know which version of the defendant to believe anymore. Terrence Mapiravana said that it is Pascalia Mashasha who said that the construction of the service station would be overseen by Nyaradzo. Thereafter Nyaradzo would come to the premises every 2 – 3 months to oversee the project. She saw the construction of the service station from the word go and was fully aware of what was happening. This again was never put to Pascalia Mashasha in cross examination by the defendant's counsel. The issue of the service station does not feature anywhere in the pleadings and in the summary of evidence. Clearly the defendant decided to ambush the plaintiff in the conduct of its trial which thing is not proper. I have no reasons to believe that Terrence Mapiravana told the truth when he said that Nyaradzo was aware of the construction of the service station and that she had been assigned by Pascalia Mashasha. If it was the truth then it should have been put to Pascalia Mashasha.

Terrence Mapiravana produced documentary exhibits which showed that the defendant had obtained the necessary licence to operate a service station and that it had complied with all the necessary processes and statutory requirements for the construction of the service station.

They range from exh 7 to 10. Although they had not been discovered, the plaintiff's counsel consented to their production for purposes of expediency.

Terrence Mapiravana said that he does not dispute the mathematical calculations of the arrear rentals made by the plaintiff, but said that by virtue of the improvements the defendant made on the property it does not owe the plaintiff any money as the value of the improvements it made amounts to US$123 506-95 as evidenced by the bill of quantities it attached to its bundle of documents. He said that this amount far exceeds the plaintiff's claim. He said that he had stopped payment of rentals to the plaintiff because of the confusion surrounding the lease agreement as the plaintiff's son in law, Mr Valley said that the defendant would not be compensated for the improvements it had made. He also said that too many people were getting involved from the plaintiff's side making it difficult for him to know to whom exactly he was supposed to pay rentals to. Surprisingly, this was never put to Pascalia Mashasha in cross examination. It was also not put in the pleadings as one of the reasons the defendant had failed to pay rentals to the plaintiff.

Terrence Mapiravana said that the water bill of US$20 000-00 was not correct because when the defendant took occupation of the property the plaintiff owed US14 000-00 to the city of Harare. He said he even raised that issue in the magistrates' court but a look at exh 6 which was the defendant's plea in the magistrates court does not show that issue was raised. A look at the defendant's para 8 of the summary of evidence of the present trial shows that the defendant was saying when it took occupation of the premises the plaintiff's water bill had arrears of US$7 000-00. It is surprising that during trial Terrence Mapiravana changed the figure and decided to double it. Now it stands at US$14 000-00 yet there is no proof whatsoever of what he was saying about that amount. The court is satisfied that this was just a creation of his own imagination. What supports this is the averment that the defendant made in its plea to the claim for the water bill. It said that the water bill is not due to the plaintiff but to the City of Harare. Despite that, it never said that of the US$20 800-00 that is on the bill US$14 000-00 is owed by the plaintiff. If this was so, why was it not mentioned in the plea? Better still it could have been put to Pascalia Mashasha during cross examination by Mr *Sengwayo*, but it was never put. All this shows that Terrence Mapiravana was lying about the plaintiff owing part of the water bill. The whole water

bill is due by the defendant. I am satisfied that when the defendant took occupation of the premises the water bill was up to date.

During cross examination Terrence Mapurisana left me satisfied beyond doubt that he is not ashamed of lying. I would describe him as a compulsive liar because he lied with ease and found comfort in it even when presented with the truth in cold, hard facts. When he was asked when he took occupation of the premises he said that it was on 11 January 2013 saying that in September 2012 the previous tenants were still in occupation. This is contrary to what is contained in the defendant's plea which clearly says that the defendant took occupation of the premises in September 2012. It is also contrary to what the defendant's counsel was saying when he was cross examining Pascalia Mashasha.

Terrence Mapiravana admitted that he had ceased paying rentals in July 2013. He admitted that although he was saying that he had made improvements on the property and wanted compensation he had not formally filed a counter-claim before the court. He also admitted that over and above the improvements the defendant was supposed to make, it also had an obligation to continue paying rentals. He admitted that he had never received communication from Heaven on Earth Real Estate that the defendant should stop paying rentals to it. He said that he had received verbal communication to this effect from Mr and Mrs Valley, Mrs Valley being a daughter of the plaintiff. This explanation in my view does not make any sense because it was not Mr and Mrs Valley the defendant had entered into a contract with, but the plaintiff as represented by Heaven on Earth Real Estate. The defendant therefore had no business getting instructions from Mr and Mrs Valley. In any case it appears to me that this was just but a lie by Terrence Mapiravana because this was never put to Pascalia Mashasha.

Terrence Maparivana admitted that the defendant has painted the interior and exterior of the house; put ceramic tiles in the kitchen and bathroom. He said that on these, he was still erecting the workshop shed although he chose to use the words garage shed. He said that he was still erecting the front and immediate backyard durawall. He said that work was still in progress and not yet completed. He admitted that these improvements and renovations were agreed to between the parties. I would like to remark that this is in consistence with clause 15.1 of the lease agreement that the plaintiff produced as exh 1 which she says is the lease agreement binding the parties.

Terrence Mapiravana pulled yet another shocker when during cross examination he said that after signing the lease agreement the defendant took about three months before taking occupation of the property. If we go by what he said in his evidence in chief that he signed the lease agreement on 10 December 2012 then it means that the defendant must have taken occupation in April 2013 which is now contrary to what he said in his evidence in chief that the defendant occupied the property on 11 January 2013. I am forced to reiterate what I said earlier on that Terrence Mapiravana is a compulsive liar.

Asked when the defendant acquired the permit to construct a service station he said that the date can be seen on the Firebrigade document from the City of Harare which was produced as exh 10. Looking at it, it is dated 17 February 2016. All other documents to do with the construction and operation of the service station which were produced as exh(s) 7, 8 and 9 bear the dates 4 March 2016, 2 March 2016 and 29 February 2016 respectively. What is interesting to note from these documents is that when the defendant embarked on the construction of the service station in February 2016 legal proceedings in the present matter had long commenced on 15 April 2015 when the plaintiff issued summons. By 24 November 2015, the parties had already filed the joint PTC minute in preparation of the trial. So what is clear is that if it is true that the defendant indeed constructed the service station on the property, it only did so 3 months after the pre-trial conference had been held and at a time when the parties were waiting for the trial to commence. It is therefore clear that the issue of compensation that the defendant was raising as its defence in its pleadings had nothing to do with the construction of the service station as this had not yet been constructed. Pleadings in the matter were closed well before the service station had been built. So the issue of the claim for compensation of US$123 506-00 by the defendant from the plaintiff does not even arise in the present proceedings. It is a claim that the defendant cannot claim in the present proceedings. So the bill of quantities that Terrence Mapiravana was referring to in respect of the service station is irrelevant in the present matter.

In any case even if the claim was valid it is not an issue that I would have determined because the defendant did not make a counter claim in the pleadings. However, I must point out that the fact that the defendant produced documents to show that construction of the service station was only commenced in February 2016, 3 months after the Pre-trial conference had been held shows that Terrence Mapiravana lied to the court that Nyaradzo of Heaven on Earth Real

Estate had overseen the construction of the service station soon after the lease agreement had been signed in 2012. This shows that Pascalia Mashasha was telling the truth that the plaintiff and her agent, the real estate were not aware of any construction of the service station at her property. They could not have been aware of this because it was done long after litigation between the parties had commenced and at a time when they were awaiting trial for the resolution of the dispute that was between them which dispute had started long back in August 2013 when the defendant ceased payment of rentals. How would the plaintiff or her agent allow the defendant to start or effect development of such a big project under such circumstances? In any case it is puzzling that the defendant would embark on such a project on the plaintiff's property when it knew that they were in the middle of litigation knowing that the plaintiff wanted it evicted from the premises. It is further puzzling that the defendant would do such a development when it says as long back as August 2013 it ceased payments of rentals because it had been told by Mr Valley, the plaintiff's son in law that it would not be compensated for any developments or improvements or renovations it made. This is all a fallacy by the defendant. The reasoning is just faulty and unsound. It cannot therefore be true that Nyaradzo of Heaven on Earth Real Estate oversaw the construction of the service station and would visit the site every 2-3 months. This could not have happened at a time when the pre-trial conference in the matter had already been held.

Terrence Mapiravana was just pathetic in the way he testified. He said that at the time the defendant effected discovery, exh(s) 7 to 10 which relate to the service station were already there. However, its discovery, schedule and affidavit were issued by the registrar on 24 November 2015 yet exh(s) 7 -10, like I said above, have February and March 2016 dates. They were only obtained almost 3 months after the pre-trial conference had been held. I get the impression that they were only obtained for the purposes of covering up this case. Whether or not they are authentic is another issue.

Mr *Sengwayo* then made an application that the court goes for an inspection in *loco* to see if the service station is there, but he abandoned the application after Ms *Rubaya* argued that there was no point in doing it because the defendant might have constructed it in 2016 since Pascalia Mashasha had said that she had last been to the property in January 2016. The court also did not see the point in going for an inspection in *loco* since it was already clear to it that the issue of the

existence of the service station or otherwise was neither here nor there in the determination of this matter.

Analysis of evidence

The analysis that I have already done whilst outlining the defendant's evidence shows that the lease agreement that was produced by the plaintiff as exh 1 is the one that the parties entered into. It was entered into in August 2012 for commencement on 1 September 2012. It is just that an error was made on the date by the plaintiff's representative upon signing it and she inserted the date as 15 March 2013. Pascalia explained the error in a satisfactory manner. The court accepts the explanation.

The court is not convinced that the parties entered into a different agreement from exh 1 on 10 December 2012 as the defendant's Managing Director wanted it to believe. He was just trying to mislead the court. If there was ever such an agreement would he then have, in the summary of evidence, said that he was made to sign a blank lease agreement? No I do not think so.

In terms of exh 1, the agreed rentals were US$1500-00 per month. It is not disputed that from August 2013 to the time of trial the defendant did not pay any cent towards rentals. It does not even dispute the quantification of the rentals made by the plaintiff except that it says that it is not liable to pay the arrear rentals because it is entitled to a set off based on the improvements it made on the property. To begin with the defendant did not give any valid excuse for its failure to pay the rentals. The issue of payment of rentals is a separate issue from the issue of compensation for renovations and improvements. In any case clause 15:1 stated that the defendant was to effect the improvements at its own costs with no refund. It was further agreed that the defendant would not remove such improvements upon vacation when the lease terminated. However, even assuming that the defendant was entitled to compensation for the improvements, that was no bar to the defendant from paying rentals.

Most importantly, when the parties appeared in the magistrates court the defendant claimed US$12 500-00 for the improvements it had made pursuant to clause 15.1 of the lease agreement. The matter was not resolved in the magistrates court, but for the resolution of the matter, the plaintiff was agreeable to deducting that amount from her claim. Pascalia Mashasha

said that the plaintiff wants that amount deducted and I will do just that. So from the claim of US$31 500-00 for arrear rentals, I will deduct $12 500-00 leaving a balance of $19 000-00 for arrear rentals.

For reasons I have already discussed while outlining the defendant's evidence I will not award any compensation to the defendant in respect of the service station it says it erected on the plaintiff's property. Firstly, the erection of the service station only commenced almost 3 months after the pre-trial conference had been held. The issue about compensation for its value does not therefore arise in the present matter as it does not form part of the pleadings. Secondly, even if the defendant was entitled to compensation for its value, the defendant ought to have made a proper counter-claim in the pleadings.

It is not in dispute that the defendant has remained in occupation of the property from 15 April 2015 when the summons was issued to date. It has not been paying rentals which remain pegged at US$1500-00 per month. The plaintiff is thus entitled to holding over damages as claimed in the summons.

As at the time the summons was issued the water bill was at US$20 800-00. It is in the plaintiff's name and no cent has been paid towards it. The plaintiff is entitled to the claim since she is the one who remains liable to pay the debt to the city council. The water bill also continued to accrue from the date of issuance of the summons, 15 April 2015. The plaintiff is entitled to payment of that accrued water bill too.

Clearly the defendant has been in breach of the lease agreement by not paying rent and the water bill. As such the plaintiff is entitled to his eviction.

In view of the foregoing it be and is hereby ordered that:

1. the defendant and all those claiming occupation through it vacate 7.5 Mile peg, Simon Mazorodze Road, Waterfalls, Harare.
2. the defendant pays arrear rentals amounting to US$19 000-00 to the plaintiff.
3. the defendant pays holding over damages in the sum of US$1 500-00 per month being monthly rentals from 1 April 2015 to date of vacation.
4. the defendant pays to the plaintiff US$20 800-00 for the water bill as at 31 March 2015.

5. The defendant pays the current water bill accrued from the date of issuance of summons, 1 April 2015 to date of vacation.
6. The defendant pays plaintiff's costs of suit.

Mandizha & Company, plaintiff's legal practitioners
Trust Law Chambers, defendant's legal practitioners