

SYLVESTER EMEKA
versus
SABUN PAUL

HIGH COURT OF ZIMBABWE
MAKONI & MWAYERA JJ
HARARE, 24 November 2015

Civil Appeal

N Chikono, for the appellant
Miss W Nyakudanga, for the respondent

MAKONI J: At the conclusion of the hearing of this matter, the court gave an ex-tempore judgment. The respondent's legal practitioner has requested for written reasons. These are they.

This is an appeal from the judgment by the Magistrates Court sitting at Harare delivered on 22 July 2015 granting an eviction order for the respondent as against the appellant. The appellant noted an appeal to this court and the grounds of appeal are as follows:

- “1. The Learned Magistrate erred in failing to appreciate that the parties occupy two different shops and that at the time, 1st October 2012. The respondent took over the shop he is renting the appellant was already in his shop and dealing in different products those of the Respondent
2. The Learned Magistrate failed to appreciate that the produced lease agreement did not specify the size of the space granted or given to the respondent such that there was need to call either the landlord or the former occupant to clarify. Thus failure by respondent to invite such evidence meant that he failed to discharge the onus upon him.
3. The court *aquo* failed to appreciate that there was no arrears for the period stated in the summons showing that he plaintiff/respondent was not credible and that appellant through a page of a book he produced showed that for the period he was paying attention he stated that he was not paying to respondent but was simply giving him to pass on to the landlord.
4. The court *aquo* erred in its conclusion that respondent is the appellant's evidence yet there is no evidence to support that”.

The background to the matter is that the respondent issued summons in the court *a quo* against the appellant for eviction and arrear rentals. The basis for the claim was that the respondent entered into an agreement with the applicant whereby the respondent would sublet to the applicant some shop space, which he rented from Sinoa Holdings (Pvt) Ltd. It was a material term that the applicant would pay \$860-00 per month as rentals. It was the respondent's claim that the applicant breached the terms of the agreement by failing to pay rent resulting in arrears in the sum of \$2 800-00.

It was the appellant's defence that he did not enter into a lease agreement with the respondent but that he had a separate agreement with Sinoa Holdings (Pvt) Ltd. The matter went for trial and court made an order in favour of the respondent. This is the order that is the subject of the appeal.

In summary what the appellant is saying is that the court *a quo* misdirected itself by making a finding that the appellant was a subtenant of the respondent and not a co-tenant.

Having gone through the record we are of the view that the respondent in the court *a quo* did not establish, on a balance of probabilities, the status of the appellant. The respondent relied on a lease agreement that he entered into with Sinoya Street Holdings (Pvt) Ltd at the time when he bought the goodwill of the shop in question from the brother of the appellant. The lease agreement in para 2, provides as follows;

“The lessor intends to lease to the lessee that portion of the property situated on the ground floor as identified in the diagram attached hereto marked A (hereinafter referred to as the premises and the leased premises”).

As is apparent from the perusal of the record the diagram was not attached and the respondent's counsel conceded the fact that they did not produce the diagram referred to in the lease agreement. The appellant's position is that he was a co-tenant to the respondent. He had his own shop, his own licence and his own terms of a lease agreement whereby he would pay rent directly to the landlord. Initially he would pay the rent through a caretaker until he realised that the caretaker was converting the money to his own use. The landlord then demanded that the appellant and the respondent put their money together and pay at the same time. He started remitting his rental to the respondent so that the respondent would then pay to the landlord. In support of his contention he produced minutes of a meeting which he held with respondent's accountant. The respondent's accountant confirmed this meeting and

produced the minutes of the meeting in evidence. Paragraph 1 of the minutes of the meeting of 19 September 2014 reads as follows;

“We see that we were owing Mr Allan the landlord since April to September 2014 but for Emeka he is owing from June to September that is to say and then it goes on to list the amounts that are owed”.

I think it is important to note the “we” in that paragraph and the fact that in the next sentence they then specify what the appellant owes. This might be an indication that they might be two separate shops with two separate lease agreements. The evidence on record is not conclusive and it was our view that this would have been an appropriate case for the court *a quo* to render an absolution from the instance. The determining factor would have been the diagram referred to in the lease agreement. It would have indicated the space that it relates to.

The appellant raised the issue that his brother, before selling the goodwill to the respondent, was paying US\$2 000-00 to the landlord. When the court raised with appellant’s counsel that this lease agreement talks about the rental of US\$2 000-00 as well, in response, the appellant’s counsel pointed out that it could be that it was a new lease agreement and the rental did not increase. The court cannot conclusively rely on this clause to determine that the lease agreement covered the entire space as suggested by the appellant.

In view of the above, it is our conclusion that the appeal should succeed and we order as follows:

1. The appellant’s appeal be and is hereby allowed and,
2. We order an absolution from the instance in this matter.
3. The respondent to pay cost of suit.

MWAYERA J: agrees:.....

T.K. Hove & Partners, respondents’ legal practitioners
Ngarava Moyo & Chikono, appellant’s legal practitioners