

OPTIMUS AUTOMOTIVE
versus
ZESA STAFF PENSION FUND

HIGH COURT OF ZIMBABWE
TAKUVA and WAMAMBO JJ
HARARE; 2 November 2023 and 18 March 2025

Civil Appeal

F Nyamayaro, or the Appellant
G Madzoka, for the Respondents

TAKUVA J: The appellant appealed against the whole judgment of the Magistrate Court sitting in Harare. The Respondent cross appealed against parts of the same judgment.

BACKGROUND FACTS

This appeal is essentially about a tenant who wants to remain in occupation of Respondent's premises for free. The Appellant and Respondent are tenant and landlord respectively. The Respondents sued the Applicant in the Magistrate Court claiming rental arrears and the latter's ejection from 42A James Martin Drive, Lochinvar Harare.

The Appellant in turn counter claimed for specific performance and in particular it claimed for an order directing Respondent to give it full occupation of the same premises.

The court granted an order for eviction against Appellant but dismissed the claim for rental arrears and operating costs. The Appellant's counter claim was dismissed and this culminated in the notifying of this present appeal. The Respondent cross-appealed against the dismissal of the claim for rental arrears and operating costs.

On the date of the hearing the Legal Practitioners for the Appellant withdrew the appeal arguing that the appeal has been overtaken by events in that the Appellant has since moved out of the Respondent's premises. However Appellant objected to paying costs. In view of this concession, we made the following order.

1. The appeal has been withdrawn by the Appellant.
2. The Appellant to pay costs at ordinary scale.

As for the cross appeal, Mr *Madzoka* submitted that there are basically two issues. The first is whether or not the court *a quo* was correct in refusing arrear rentals. Secondly whether or not the court *a quo* was correct in refusing to award costs. On arrear rentals, the court *a quo* found that the plaintiff did not lead clear evidence. However the record shows on pp 114-116, a document showing amounts owed as arrear rentals. The court *a quo* arrived at a finding contrary to the evidence led. This is a misdirection – HAMA v NRZ 1996 (1) ZLR 664-670 C.

Further the Appellant's witness was not cross-examined on the evidence covering arrear rentals. The significance of cross-examination was stressed in PRESIDENT OF SOUTH AFRICA & ORS v SA RUGBY UNION 2000 (1) SA at 36J. In the circumstances the first ground has merit, it is hereby upheld. The reasoning that Respondent did not lead clear evidence to show how much it is owed, is devoid of logic. The second issue on costs is relatively simpler to resolve in that cost generally follow the events see MAHEMBE v MATAMBO 2003(1) ZLR 148. The court *a quo* ignored the general rule on costs. Secondly, the court *a quo* did not give reasons. This is a misdirection see S v MAKAWA 1991(1) ZLR 742. Thirdly the Respondent claimed costs in terms of the lease agreement. Clause 30 of that lease agreement provides for costs on legal practitioners and client scale.

I find the Respondent's cross appeal to be meritable.

In the circumstances, it is ordered that:

1. The cross appeal succeeds with costs on a Legal practitioner and client scale.
2. The decision of the court *a quo* be and is hereby set aside and substituted with the following:-
 - 2.1 The Defendants be and are hereby ordered to pay the Plaintiff US\$17178.14 being arrear rentals and ZWL\$1089628.17 being operating costs.
 - 2.2 The Defendants be and are hereby ordered to pay US\$2300.00 including VAT per month being holding over damages from 1 October 2022 to the date of vacation or ejection.

TAKUVA J:.....

WAMAMBO J:.....
agrees