NAL PROPERTIES
versus
N- SHOW TECHNOLOGIES (PVT) LTD

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 14 July 2022 & 28 February 2023

Civil Appeal

T M Mutema, for the appellant
E Dondo, for the respondent

WAMAMBO J: This is an appeal against a judgment of the Magistrate sitting at Harare Magistrates Court.

The appellant was the plaintiff while respondent was the defendant in the court *a quo*. Plaintiff sued defendant seeking an order of eviction from No 44 Greengrove Greendale, Harare, payment of US $ 10 000 arrear rentals, payments of holding over damages, at the rate of US $ 20 per day from the date of service of the summons to date of eviction, interest and costs of suit.

The particulars of claim reflect the following brief background to the matter as follows:

> " 3. On the 15 Apil 2016 the parties concluded a written lease agreement in terms of which plaintiff let and defendant hired premises known as no 44 Greengrove, Greendale Harare for a one year period which the parties subsequently extended by consent resulting into (sic) defendant being a statutory tenant on the same terms and conditions stipulated in the lease. Defendant is still in occupation.
> 4. In terms of clause 5 of the parties lease agreement, defendant was to pay the sum of US $ 600.00 per each month in advance as rentals.
> 5. In terms of clause 6 of the lease agreement defendant was also liable to pay rates and taxes due to local authority.
> 6. Defendant has breached terms of the lease agreement by failing, refusing and or neglecting to pay rentals as agreed by the parties."

A trial was held before the court a *quo*. Plaintiff called Nathan Chimombe as a sole witness while, the defendant called Chrispen Benjamin as its sole witness. The court a *quo* found that it could not give judgement in favour of either party and granted absolution from the instance.

It is this ruling that the appellant is appealing against. The appellant raised five grounds of appeal as follows:

> "1. The court a *quo* erred and misdirected itself in making a finding and concluding that the lease agreement had expired, when in fact all indicators pointed to a tacit renewal of the lease by the parties and alternatively the respondent's occupation is by virtue of statutory tenant (sic).
> 2. The court *a quo* erred in holding that the commercial premises (rent) regulations S.l. 176/83 were applicable in a case involving a breach of contract.
> 3. The court *a quo* misdirected itself in holding that the lease agreement related to commercial premises when in fact it related to residential premises.
> 4. The court *a quo* erred in concluding that appellant had failed to prove its caseon a balance of probabilities yet at the same time accepting that respondent had last paid rentals in 2017.
> 5. The court *a quo* misdirected itself in holding that appellant persisted with a claim for payment of arrear rentals and holding over damages in united states dollars when appellant had amended its claim in linc with changes in law and or in any event had abandoned the monetary claim and persisted with eviction."

Before us a sole preliminary point was raised. Respondent's counsel who raised it was of the firm view that it can dispose of the matter. It was the only issue argued before us. The preliminary point raised is that a ruling of absolution from the instance raised at the end of a trial is unappealable.

Reference was made to s 40(2 (b) of the Magistrates Courts Act and Order 34 R 5 (1) of the Magistrates Court Rules 2018. Reliance was also placed on the South African case of *Phutuma Networks* (Pvt) Ltd v *Telkom* SA Ltd [2017] I ALL SA 265 GP *Zweni* v *Minister of Law & Order* 1993 (1) SA 523 (A).

Appellant's counsel was of the view that the cases relied on by respondent's counsel deal with absolution from the instance granted in default of a party. He submitted that in the instant case a full trial ensued and the order granted is final and definitive. Appellant's counsel submitted however that he was unable to find a case from our jurisdiction that would assist the court to resolve the issue at hand.

For the appellant it was further submitted that s 18 & 40 of the Magistrates Court Act are to the effect that any ruling is appealable. I should note at this stage that this appeal was previously heard before TSANGA J and CHINAMORA J and there is a cyclostyled judgment HH 127 -20. This judgment however was appealed against to the Supreme Court. The Supreme Court under SC 55/21 remitted the matter back to this court ostensibly for the resolution of the preliminary point raised.

I note here that under HH 127-20 note was taken of the preliminary point. It was however inadvertently not resolved in the judgment.

Both counsel did not refer us to a case on all fours with the issue raised in this case that emanates from this jurisdiction. Having read the persuasive authorities referred to I do not find their direct application to this case. They seem to speak to specific South African legislation which does not mirror the relevant Zimbabwean legislation.

I will consider the legislative provisions referred to by counsel. Section 40 (2) of the Magistrates court Act *[Chapter 07:10*] reads as follows:

"2. Subject to subsection (1) an appeal to the High Court shall lie against.
a) any judgments of the nature described in s 18 or 39
b) any rule or order made in a suit or proceeding referred to in s 18 or 39 and having the effect of a final and definitive judgment, including any order as to costs."

Section 39 of the Magistrates Court Act [*Chapter 07:10*] speaks to rescission or alteration of judgment which is clearly not relevant to this case. Section 18 of the Magistrates Court Act reads as follows:

"The Court may, as the result of the trial of an action grant.:
a) Judgment for the plaintiff in respect of his claim in so far as he has proved the same.
b) Judgment for the defendant in respect of his defence in so far as he has proved the same.
c) absolution from the instance if it appears to the court that the evidence does not justify the Court in giving judgment for either party.
d) Such judgment as to costs as may be just, including an order that one party pay the costs of the other party on a legal practitioner and client basis."

Order 34 R (5) (1) of the Magistrates Court Rules 2018 provides as follows:

" (1) The withdrawal or dismissal of an action (on technicalities) or a decree of absolution from the instance shall not be a defence to any subsequent action".

Having regard to the provisions of s 40 (2) (a) and s 18 of the Magistrates Court Act it becomes clear that a judgment of absolution from the instance can be appealed against.

Section 40 (2) (a) specifically enumerates judgments of the nature described in s 18 and 39 of the Magistrates Court as being appealable. Section 18 provides among others for a judgment of absolution from the instance.

I am further fortified in this regard by the fact that the test for a judgment of absolution from the instance at the close of the plaintiff's case and that granted after a full trial are different. The tests are different in that the threshold of proof is higher when judgment is granted after a full trial.

In *Zuva Petroleum Limited* v *S. Chirenje* HH 166/16 at p4 MUNANGATI MANONGWA J said:

> "The leading case on the question of absolution from the instance is *Supreme Service Station* (969) *Private Limited* v *Goodridge Private Limited* 1971(1) RLR 1. In this case
> BEADLE CJ clearly stated that it is perfectly competent for a court to refuse an application for absolution from the instance when an 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 his 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"

I find further support that a ruling of absolution from the instance rendered after a full trial is appealable in the case of *Stytler N.O* v *Fitzgerald* SA 1911AD 295 At p 304 Lord De *VILLIERS* CJ said the following:

> "Take the case of a judgment of absolution from the instance. It is classed by Voet (42.1.5) among interlocutory sentences but it has the force of a definitive sentence in as much as by our practice the particular suit in which it has been I pronounced is ended and a fresh suit is necessary to enable the plaintiff again to proceed against the same defendant. It has accordingly been frequently held in our courts that a judgment of absolution from the instance may be appealed against and as such appeals have been brought from the Cape Supreme Court to the Privy Council . It would be different, however where a court refuses to grant absolution from the instance on the application of the defendant such a refusal is purely interlocutory and has not the effect of a definitive sentence in as much as the final word in that suit has still to be spoken".

In the case of *Liberty Group LTd* v *K & D Marketing* (Case no 1290/18 [2020] ZASCA 41 20 April 2020 (neutral citation LEDWABA AJA writing for the court interrogated the above cited case of Steytler (supra) and observed as follows at para 14 The dictum from Steytler cited above makes it clear that it is established practise that a decision of absolution from the instance in a trial (has the effect of a definitive sentence. Simply put, a decision on the sufficiency of evidence led in that suit by way of an order of absolution from the instance has a definitive effect and is susceptible to appeal."

IT IS ORDERED AS FOLLOWS:

The point *in limine* raised that a ruling of absolution from the instance is unappealable be and is hereby dismissed with costs.

MUCHAWA J agrees …….

Mavhunga & Associates, applicant's legal practitioners
Saunyana Dondo, respondent's legal practitioners