CHAMPION CONSTRUCTORS (PVT) LTD
and
ELIZABETH CHIDAVAENZI
and
KERONI TEVERA
versus
OLSHEVIC INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA AND MANZUNZU JJ
HARARE, 8 October 2020 & 18 February 2021

Civil Appeal

J. Dondo, for the appellants
R. Gasa, for the respondents

MUREMBA J: On 8 October 2020 we heard this appeal and dismissed it with costs. We have been asked for the written reasons and these are they.

This was an appeal against the dismissal of an application for rescission of a default judgment by the Magistrates Court. Two grounds of appeal were raised in the notice of appeal. However, at the hearing of the matter, *Mr Dondo* for the appellants made a concession that the first ground was not one of the reasons the *court a quo* dismissed the application for rescission of judgment. He consequently abandoned it. The second ground of appeal that remained was couched as follows:-

> "The learned magistrate erred and misdirected himself in dismissing the application for rescission of default judgment notwithstanding the reasonable explanation given by the appellants that they were not in wilful default together with the explanation given that they had a *bona fide* defence on the merits".

After hearing submissions and arguments in the matter we were not satisfied that the magistrate erred in finding that the appellants were in wilful default and that they did not have a *bona fide* defence to the merits.

On 19 September 2018 the respondent issued summons against the appellants for arrear rentals, cancellation of the lease agreement, eviction and holding over damages. It is not disputed that the matter was set down for trial on 22 July 2019 at the instance of the appellants. The first appellant is renting the respondent's property. The second appellant is the director of the first appellant. Both the second and the third appellants signed as co-sureties and co-principal debtors of the first appellant. The first appellant and the respondent entered into a written lease agreement which upon its expiry was not renewed. However, the first appellant remained in occupation. So, it became a statutory tenant and the second and third respondents remained bound as sureties and co-principal debtors.

Wilful default

The court *a quo* in its judgment referred to the case of *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400 wherein it was said that wilful default occurs when a party with the full knowledge of the service or set down of the matter and risks attendant upon default, freely takes the decision to refrain from appearing. The court *a quo* ruled that the appellants who were well aware of the hearing date and time did not attend court and as such were in wilful default. The court *a quo* also referred to the case of *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) wherein McNALLY J said that there should be finality in litigation. He said,

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.
> The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard."

The learned magistrate went on to say that the present matter had been going on in circles without finality. The matter had been postponed six times at the instance of the appellants who were always changing lawyers and would request that the lawyers be given time to familiarize with the matter thereby clearly showing that the appellants were not keen on having the matter finalized.

The explanation that was given by the appellants for failure to attend court on the day in question was that they were double booked. They had an opposed matter in the High

Court at 9 am. The second appellant explained that she had to go through the offices of the legal practitioner who was representing them in the High Court matter, Mr *Chikono* of Ngarava Moyo and Chikono in order to make alternative arrangements with regards to the High Court matter. Mr *Chikono* had phoned that morning saying that he was not going to attend to the matter because he had another matter in Masvingo. A supporting affidavit by Mr *Chikono* to that effect was attached. The second appellant averred that when she got to the Magistrates Court around 8:39 am a default judgment had been granted against them. In dismissing the application for rescission, the magistrate queried why the appellants' legal practitioner Mr *Dondo* had not attended court seeing that the appellants were in this matter, legally represented by a different legal practitioner from the one who was representing them in the High Court matter.

We did not find fault with the learned magistrate's reasoning for the following reasons. That the matter which was at trial stage had been postponed six times at the instance of the appellants was not disputed. That the appellants were always changing lawyers and asking for postponements for their lawyers to familiarize with the matter was also not disputed. That the date of 22 July 2019 to which the matter was postponed was chosen by the appellants. On 11 July 2019 the appellants specifically asked for the matter to be postponed to 22 July 2019 to enable their new legal practitioner Mr *Dondo* to familiarize with the matter. Yet on that day, the 22nd of July 2019 at 8:30 a.m. neither the appellants nor their new legal practitioner attended court. They knew that the matter was for continuation of trial and that it was continuing at 8:30 a.m. Whilst the record of proceedings shows that it was the second appellant who went to Mr *Chikono*'s offices at 8am, the appellants proffered no explanation why the third appellant did not go to the Magistrates Court to attend to the present matter. Better still, the appellants' new legal practitioner in the matter could have attended, but he did not. Again no explanation was given for his non-attendance. The matter had been postponed from 11 July 2019 to 22 July 2019 specifically for him to familiarize with it. It does not make sense that on 22 July 2019 he did not attend court and no explanation for his non-attendance was given. It was even surprising that he was the same legal practitioner who was now representing the appellants in this appeal.

The second appellant explained that she got to the Magistrates Court at 8:39 a.m. and found the default judgment having been granted. The question is why didn't the appellants or their legal practitioner communicate with the respondent's legal practitioner or the Clerk of

Court about their possible delay in arriving at the Magistrates Court for trial so that the matter could be stood down? A simple phone call would have saved the day. There was no explanation whatsoever about the efforts that were made by the appellants in order to make the respondent or the court aware that they would be arriving late for the trial.

What makes the matter worse is the supporting affidavit by Mr *Chikono* whose averments leave a lot to be desired. He said that he was representing the appellants in the High Court matter which was set down for hearing at 9 a.m. on 22 July 2019. He said that unfortunately he had to appear in another matter at Masvingo High Court which prompted him to ask the second appellant to call at his office at 8 a.m. in order to make alternative arrangements for their High Court matter. He averred that she left his office at around 0825 hours for the Magistrates Court before proceeding to the High Court. If Mr *Chikono* had another matter to attend to at the High Court in Masvingo on that day it does not make sense that he was still in Harare at 8.25 a.m. making alternative arrangements for the Harare High Court matter which was due to be heard at 9.00 a.m. He might as well have attended to that matter. It is illogical that he was giving preference to a Masvingo matter instead of dealing with a local matter which was only 35 minutes away. One is left wondering if Mr *Chikono* truly had a matter in Masvingo on the day in question or if this whole story about the second appellant going to see Mr *Chikono* was true.

The past conduct of the appellants in the matter showed that they were dragging their feet whenever the trial was due to continue. They did not want the matter to come to finality. They were changing lawyers at every turn. Clearly, they were not in a hurry to have the matter finalised. The first appellant was a tenant at the respondent's premises. Every delay was working to its advantage as it remained in occupation. At the same time, it continued to accumulate arrear rentals. For the foregoing we found that the appellants had been correctly found to have been in wilful default. They had deliberately refrained from attending trial at 8.30 am the consequences of which they were aware of . In the absence of the second appellant, the third appellant or the legal practitioner could have attended. Mr *Dondo* even conceded that there was no explanation for the non-appearance of the third appellant or the lawyer in the Magistrates Court for the trial when the first appellant went to see Mr *Chikono* about the High Court matter. Alternatively, communication to the respondent or to court could have been made for the matter to be stood down.

Bona fide defence

In their plea to the respondent's claim the appellants pleaded that there was no agreed lease agreement between the first appellant and the respondent as the one that was in place had expired. However, they did not dispute that the first appellant was still in occupation of the respondent's premises. They averred that the suretyship by the second and third appellants expired when the lease agreement expired. It was the court *a quo*'s finding that even though the lease agreement expired, the first appellant who had remained in occupation of the property, was now a statutory tenant and was still bound by the terms of the expired lease agreement. The learned magistrate said that there was therefore a binding lease agreement in place otherwise the first appellant would be in illegal occupation. We were in agreement with the court *a quo*'s reasoning. When a lease agreement expires and the tenant remains in occupation, he or she becomes a statutory tenant. The terms and conditions of the expired lease agreement continue to bind the parties. Therefore despite the expired lease agreement, there will still be a valid lease agreement between the parties. Even the sureties remain bound in terms of the expired lease agreement if the terms thereof do not say that the suretyship will terminate at the expiry of the lease agreement. In *casu* the relevant clause does not speak to the expiration of the suretyship at the expiration of the lease agreement. It reads;

> "We agree that our liability in terms hereof will remain in full force and effect as a continuing covering security notwithstanding any compromise or other arrangement of whatsoever that may be entered into between the tenant and the landlord or any fluctuations in the indebtedness of the tenant to the landlord until such time as the landlord has agreed in writing to the cancellation of this deed.
> All admissions and acknowledgments of indebtedness by the tenant shall be binding on us."

So, the second and third appellants continued to be bound as sureties and co-principal debtors after the expiration of the lease agreement as the first appellant proceeded to be a statutory tenant.

The court *a quo* also made a finding that whereas the appellants were denying the rentals of US$400.00 per month resulting in arrear rentals of US$9660.00 from September 2010 to September 2018 when the summons was issued, the appellants did not say how much they were owing. It was submitted by the respondent that it was the appellants who had approached the Rent Board for determination of fair rental. The Rent Board determined it to be US$2.70 per square metres thereby amounting to US$400 for 148.2 square metres. On this basis the court *a quo* made a finding that the appellants had no *bona fide* defence to the

respondent's claim. We were in agreement with the court *a quo.* In para 9 of their heads of argument the appellants admitted that in 2009 the first appellant applied to the Rent Board for a determination of fair rent. They however went on to say that they got no response only for it to emerge during trial in 2019 that a determination of US$400 *per* month had been made by the Rent Board in 2009. They averred that notification had not been given to them. The appellants said that they consequently wrote to the Rent Board for an explanation. That being the case, the respondent was only claiming rentals that had been determined by the Rent Board at the behest of the appellants. With that we did not see how then the court *a quo* erred in making a finding that the appellants had no *bona fide* defence to the respondent's claim. Mr *Dondo* for the appellants even conceded that the appellants had no *bona fide* defence to the respondent's claim.

Disposition

In view of the foregoing, we were satisfied that the appellants were in wilful default and that they had no *bona fide* defence to the respondent's claim. The court *a quo* did not err in its findings. In the result, we dismissed the appeal with costs.

Dondo & Partners, appellants' legal practitioners
Gasa Nyamadzawo & Associates, respondent's legal practitioners