Judgment No. S.C. 203/98
Civil Appeal No. 154/97

BENNIE SITHOLE v EDWARD MATSANGURA

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
HARARE, OCTOBER 27, 1998 & JANUARY 8, 1999

A M Gijima, for the appellant

The respondent in person

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which it was ordered:

1. That the appellant deliver certain property to the respondent or pay its value of $11 510,50;

2. That, in the event of non-delivery of the property and non-payment of its value, interest at the prescribed rate shall be payable on the sum of $11 510,50;

3. That the appellant pay to the respondent the sum of $68,00 with interest at the prescribed rate;

4. That in respect of the claim for damages, the appellant be absolved from the instance;

5. That the appellant's counter-claim be dismissed; and

6. That there be no order as to costs.

The facts of this case are as follows: The appellant and the respondent entered into an agreement of lease, in terms of which the appellant let to the respondent a certain building called Primrose Store ("the premises"). The date of the commencement of the lease and its duration were in dispute.

However, in October 1995 the respondent vacated the premises. He claimed that he had been evicted from the premises by the appellant in breach of the lease agreement. This was denied by the appellant, who alleged that the respondent left the premises of his own accord.

Subsequently, the respondent issued a summons against the appellant, claiming damages in the sum of $37 960,67 and the return of certain property which the appellant had refused to release to him when he vacated the premises, or payment of its value in the sum of $11 510,50. These claims were denied by the appellant who counter-claimed payment of the sum of $54 680,00. He alleged that that sum represented storage charges in respect of the respondent's property which he kept for him from September 1988 to March 1996.

I shall first of all consider whether the respondent was evicted from the premises. The respondent and his son, Edward, gave evidence and were adamant that they had been evicted from the premises. They were believed by the learned trial judge, who commented as follows:-

> "I have already expressed my disbelief of the defendant and his witnesses. The defendant's manner in court was harsh and aggressive, and I accept the

> plaintiff's evidence and that of the plaintiff's son that he forced the plaintiff into signing Exhibit 9. The plaintiff's evidence accords with the probabilities which are that the defendant wanted to rent his premises to Mabhiza. He, therefore, forced the plaintiff to sign Exhibit 9 and to leave the premises. To ensure the plaintiff did leave, the defendant embarked on a scheme of harassment of the plaintiff, i.e. forcing him to sign Exhibit 9, allowing Mabhiza to enter the shop to view it; breaking walls while the plaintiff's goods were still there; clearing the exterior - virtually taking over the shop, in effect, while the plaintiff was still operating it. The last act of harassment was the confiscation of the keys on 21 October so that the plaintiff's son had to request the keys to take his goods away. The defendant is a tall and robust man who displayed an aggressive attitude in court and who had to be often admonished by the court. The evidence of the plaintiff and his son had a ring of truth. I have no hesitation in rejecting the defendant's version of the events where it conflicts with that of the plaintiff and his son."

In my view, those comments were completely justified, and the learned trial judge was correct in finding that the respondent had been evicted from the premises. Quite clearly, the probabilities favour the respondent's version of the events. If he had left the premises of his own volition, why would he make the allegations which he made? It seems to me that the details of the harassment to which he said he was subjected make it probable that the allegations are true.

The second issue which I would like to comment on is the respondent's claim for damages in the sum of $37 960,67. The respondent alleged that that sum represented business profits lost as a direct consequence of the breach of the lease agreement. However, the learned trial judge found that the respondent had not placed before the court sufficient evidence to establish the *quantum* of the profits and, accordingly, the appellant was granted absolution from the instance. In my view, that conclusion cannot be faulted. In any event, it was not challenged on appeal.

The third issue which I must consider is that of the respondent's property which remained in the appellant's possession after the respondent's eviction.

In his evidence the respondent stated that after the eviction, he sent his son, Edward, with a truck and driver to go and collect his property which was at the appellant's residence. However, Edward was not allowed by the appellant to collect the goods in question because the appellant was then alleging that the respondent owed him storage charges in the sum of $51 100,00 for the period extending from 1988 to 1995. The respondent produced a list of the goods in question and their estimated values. The goods included asbestos sheets, window frames, door frames, drums, a landrover engine and many other items. Their estimated total value was $11 510,50.

The appellant denied that he was in possession of all the goods appearing on the list compiled by the respondent. He alleged that he did not have most of them. He was, however, disbelieved by the trial judge, who ordered him to deliver the goods in question to the respondent or pay their total value of $11 510,50. In my view, there is ample evidence on the record to justify that conclusion. The appellant prevented the respondent's son from collecting the goods from the premises and, above all, the trial judge found the appellant and his witnesses to be untruthful.

The fourth issue which I wish to deal with is the decision by the trial judge that the appellant should pay to the respondent the sum of $68,00. Paragraph 3 of the order of the court *a quo* reads as follows:-

> "The defendant shall pay to the plaintiff $518,00 less the sum of $450,00, i.e. $68,00 with interest at the prescribed rate …".

The sum of $518,00 mentioned in that paragraph is made up of the sum of $218,00 and the sum of $300,00. At the trial there was no dispute with regard to the sum of

$218,00. The appellant admitted that he owed the respondent that sum. Therefore, the order for him to pay that sum to the respondent was correct.

However, with regard to the sum of $300,00, the appellant made no admission. In fact he denied that he owed the respondent that sum. As far as that sum was concerned, the respondent's evidence was as follows: After he had been evicted from the premises, he sold a cash register to Mabhiza for $1 000,00. When he sent his son, Edward, to go and collect that sum from Mabhiza, the latter told him to go and collect it from the appellant. When Edward approached the appellant he was given only $700,00. When he asked the appellant for the balance of $300,00 the appellant told him that he was withholding that sum because when the respondent vacated the premises he left them dirty. In the circumstances, the respondent decided to claim the sum of $300,00 from the appellant because he believed that Mabhiza had paid the full purchase price of $1 000,00 to the appellant with the instruction that it be passed on to him (i.e. the respondent).

However, Mabhiza denied the allegation that he had given the sum of $300,00 to the appellant. He said that he himself withheld that sum because when he took over the premises the shop had not been painted and the electrical plugs in the wall were not functioning. He added that his intention was to use the sum of $300,00 in painting the shop and repairing the plugs. That evidence might very well be true.

In view of the conflict in the evidence, I do not think that it was established that the money was passed on to the appellant. In the circumstances, the

learned trial judge erred in ordering that the appellant should pay the sum of $300,00 to the respondent.

As far as the sum of $450,00 mentioned in para 3 of the order was concerned, it was common cause at the trial that the respondent owed the appellant that sum.

Thus, the appellant owed the respondent the sum of $218,00, whilst the respondent owed the appellant the sum of $450,00. Applying the principles of set-off, the result is that the respondent owed the appellant the sum of $232,00. In the circumstances, the learned trial judge should have ordered the respondent to pay that sum to the appellant.

Finally, I shall deal with the issue of the appellant's counter-claim. As already indicated, the appellant counter-claimed storage charges in the sum of $54 680,00. He alleged that the respondent had agreed to pay storage charges at the rate of $20,00 per day from 4 September 1988 until he collected his goods. He produced a handwritten document purporting to be an agreement to that effect.

However, the learned trial judge found the document rather suspicious and lacking the appearance of a genuine document. Accordingly, it was rejected. I can find no fault with that decision. In any event, it is highly improbable that the respondent would have agreed to pay storage charges of $20,00 per day for more than seven years. As he stated in his evidence, he would never have agreed to such an

arrangement and would have taken the goods to his home in the communal lands instead.

Furthermore, it is significant that for more than seven years the appellant did not claim from the respondent payment of the storage charges. One wonders what he was waiting for, if his evidence is true. In my view, the only reasonable conclusion to draw is that there was no agreement to pay the alleged storage charges. The learned trial judge was undoubtedly correct in concluding that no such agreement had been entered into. The counter-claim did not, therefore, have any merit.

As far as the costs of the appeal are concerned, my view is that the appellant should pay the respondent's costs. He has, after all, succeeded only in a very small way involving payment to him of the sum of $232,00.

In the circumstances it is ordered as follows:

1. That paragraph 3 of the order of the court *a quo* is deleted and the following is substituted -

> "3. The plaintiff shall pay to the defendant the sum of $232,00 together with interest at the prescribed rate from the date of judgment to the date of payment in full."

2. That, subject to paragraph 1 above, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners