

**BOSSY v CHOW**

**(2013) SLR 51**

Domah, Fernando, Msoffe JJA

3 May 2013

SCA 47/2011

S Freminot for the appellants

F Elizabeth for the respondents

**The judgment of the Court was delivered by DOMAH JA**

[1] The Chief Justice in a long-standing eviction dispute between the parties made an order for the immediate vacation of the property in lite. The plaintiffs had also claimed damages as follows: R 6,798,904 for loss of earnings from September 2007 to 30 June 2010 plus interest at 10% per annum; R 105,205 as loss of earnings for July 2010 to date plus interest at 10% per annum; R 6,575 per day for as long as the respondents remained on the property plus interest at 10% per annum; R 315,000 being unpaid rent from September 2007 to date interest at 10% per annum; R 9,000 per month from August 2010 on the first day of each month for as long as they remain on the suit property interest at 10% per annum. The judge did not allow any of the above monetary claims.

[2] The present appeal is only against the orders for dismissal of the claims for damages. The grounds are stated to be as follows:

- 1) the learned trial judge erred in not allowing losses in paragraph 10 although he specified the wrongful occupation would give rise to an action for damage in favour of the owners of the property;
- 2) the learned trial judge erred in not allowing for any loss of earnings although he had been positive about this in paragraph 12;
- 3) the learned trial judge erred in not considering a different percentage of damages in proportion to the value of the suit property as to value of suit in paragraph 13.

**Ground 1**

[3] Ground 1 refers to the comment made by the Judge in paragraph 10. He stated that the Court had decided on 31 March 2011 that the lease was revoked on 29 November 2008 in accordance with the judgment of the Court of Appeal dated 29 November 2006

and that until that decision is set aside, it would appear that the continued occupation of the suit property by the defendants from 29 November 2008 until they vacate the property would give rise to an action in damages in favour of the owners of the property.

[4] We agree with the proposition of law that an overstay following an order for eviction will give rise to a monetary claim. This monetary claim is not in terms of rent but in terms of indemnity for continuing occupation: see *Pillay v Juddoo* SCJ 316/1990; *Peerally v Ramalingum* SCJ 335/2010; *Ramkhalawon v Rambarun* SCJ 348/2012.

[5] From the evidence adduced, we note the following from which the indemnity may be assessed: R 9,000 as rent as from December 2008 on the basis that the suit property covers an area of 46,615 m<sup>2</sup> which would bring a reasonable return of 2.4,000,000 per year.

## Ground 2

[6] Ground 2 refers to the comment made by the Judge in paragraph 12. The Chief Justice stated that the plaintiffs are under a duty to prove loss or the damage that they have suffered as a result of the wrongful occupation of the suit property by the defendants; that they would have to show for instance that they have lost income they would have made by renting out the suit property to interested parties; or that they have been put to expense by being denied use and occupation of the suit property by the defendants; and, that the loss of earnings (rental income) or the incurring of such expenses would be the damage or part of the damages that they have suffered.

[7] We agree with the Chief Justice. Damages are not speculative. They are actual. They are compensation for loss sustained. They have to be proved. No evidence was adduced to show that there were tenants waiting to take a lease of the property in its state and that the longer the respondent held on to the property the more the owner was losing rental from the waiting tenant.

## Ground 3

[8] Ground 3 refers to the comment made by the Judge in paragraph 13. The Chief Justice's comment was as follows:

What the plaintiffs have done in this case is to prove the value of the suit property, that is, the price the suit property may fetch in the market place. And then claim 10% per annum of the market value of the said property as the appropriate return on the said property. I am far from sure that this equates to proof of loss and damages that they have suffered for the wrongful occupation of their property by the defendants.

[9] We agree with him as regards to that proposition of law and its application to the facts of this case, all the more so when the Judge also stated that while he found the liability for wrongful occupation established, the plaintiffs had failed to prove the damage that they have suffered as a consequence of the wrongful acts of the defendants. He also found that the claim of 10% per annum was arbitrary in the sense that it has no connection with actual loss or damage suffered by the plaintiffs or the loss or damage

caused by the defendants. Damages are compensatory in nature.

[10] Be that as it may, it is clear that the respondent had been ordered to quit, leave and vacate the property since 29 November 2008 in accordance with the Court of Appeal judgment dated 29 November 2006. While the appellant is not entitled to claim rent or damages from him, he is entitled to a sum as indemnity for the period of the overstay. We base ourselves on the figures given by the appellant as monthly rental to conclude that a sum of R 3,500 per month would be reasonable as indemnity for illegal use and occupation.

[11] In the circumstances, we allow the appeal in part and we make an order of indemnity for the material period as follows:

November 2008 to April 2013:  $(53 \times R\ 3,500) = R\ 185,000$  which sum we order the respondent to pay to the appellant with costs.