ENVIRONMENT AFRICA PLAINTIFF

versus

SHAIBI MILLION DEFENDANT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare 5, 14 & 15 June 2023

N. Mugandiwa, for the plaintiff

G.R.J Sithole with *T. Makamure,* for the defendant

TRIAL CAUSE

CHIRAWU-MUGOMBA: At the close of the plaintiff's case, counsel for the defendant moved a motion of absolution from the instance. I directed the parties to file written submissions and therefore reserved judgment. The plaintiff seeks payment of the sum of US$ 65 385.00 being what it terms sums due to it by the defendant arising from patrimonial loss suffered by the plaintiff as a result of the defendant's intentional, wrongful and unlawful misappropriation of funds belonging to it. In its declaration, the plaintiff avers that the defendant was once employed by it as a finance and administration manager. That during the period 21 November 2019 and 3 February 2021, on thirty -six different occasions, the defendant unlawfully transferred a total sum of US$59 585.00 from the plaintiff's nostro account to his own account. Such transfers were not authorised. Further, that sometime in December 2020, the defendant unlawfully misappropriated cash in the sum of US$5800 meant for the purchase of solar equipment for the plaintiff. In his plea, the defendant avers that the transfers were authorised by the Chief Executive Officer (CEO) of the plaintiff since he could not withdraw money without the latter's approval. In a further amended plea, the defendant averred that he was used as a conduit by the plaintiff for black market activities wherein plaintiff's employees including him were tasked with sourcing local currency, further that the plaintiff's CEO authorised the transfers into the defendant's account for this purpose. He therefore pleaded *ex turpi cause non oritur actio.* For the US$5800, he pleaded that the

plaintiff could not have suffered patrimonial loss for money that was returned to it, placed in the safe and could not have converted it to his own use.

The law on absolution from the instance has been set out in a plethora of cases. There is a difference as stated in the cases on an application at the close of the plaintiff's case and the defendant's case. See *Danha vs Mudzongachiso and anor,* 2018(1) ZLR 74(H) and the cases cited. See also *Moyo and anor vs. Methodist Church (Greendale)* 2018(1) ZLR 375(H).

In support of its claim, the plaintiff led evidence from one Paradzai Hodzonge. He testified as follows. He is the executive director (ED). He is overall responsible for the management of the plaintiff which is a regional NGO. The defendant joined plaintiff around 2005 as a junior finance person and rose in rank to the position of finance and administration manager, the highest rank. In that role, the defendant was in charge of the overall financial management, financial reporting, procurement according to laid down procedures and banking. On the 3rd of March 2021, the defendant was suspended from work and finally his contract was terminated due to poor performance. The labour issue is still ongoing as is a criminal matter. After suspension that is when the defendant was requested to acquit funds in relation to the purchase of the solar equipment. He failed to do so. The plaintiff discovered that the defendant had purchased the solar equipment for the sum of US$5 303. 67 through a bank transfer. The plaintiff also discovered that several bank transfers were made into the defendant's account during the period February 2019 to January or February 2021. This was abnormal because only salaries or funds for specific use would be transferred into personal accounts. There is an elaborate process of requesting transfer of funds within the organisation as evidenced by the internal control manual. For the funds into the defendant's account, no such authorisation was sought or given.

Under cross examination, the following emerged. That there were two authorised signatories to the accounts of plaintiff, i.e. the ED and the defendant. This related to the internet banking system utilised by the organisation. The defendant would create payment and also authorise followed by the authorisation of the ED. The internet banking system required dual authorisation for payments to be effected. By authorising payment, the ED would also have approved the transaction. Fromm the bank a one-time- pin commonly known as OTP is received for completion of the transaction. The ED stated that there was a systems error during the time that the defendant illegally transferred money into his own account. However,

there was no report made to the bank. He however confirmed that all other payments were in order, for example one made to ZIMRA. There were more than 40 payments that went through without any hitches. The ED could not dispute that the $5800 was put in the safe by the defendant because he was not there.

The task before the court is therefore to consider whether or not the plaintiff has set out a *prima facie* case, one which the court can say, needs to be explained or rebutted by the defendant. It is trite that courts are loath to grant applications for absolution from the instance at the close of a plaintiff's case since this potentially infringes upon a litigant's constitutionally protected right to equality and right to equal protection and benefit of the law and the right to a fair hearing – see sections 56(1) and 69 of the 2013 constitution. It also infringes potentially on the right to be heard under the rules of natural justice. That is why the standard of proof is the less onerous one of a *prima facie* case. To that end, it is worth repeating the test that has stood the test of time as enunciated in *Gascoyne* v *Paul and Hunter* 1972 TPD170 at p 173, and quoted with approval in the *Danha* case (*supra)* as follows;

> "At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'Is there such evidence upon which the court…. ought to give judgment in favour of the plaintiff'."

Patrimonial loss pleaded by the plaintiff as the cause of action broadly is located in the Aquilian action. Professor Feltoe, in his ' Guide to Delict', 2017 (ed) has covered the delict extensively. I will therefore cite from his publication as follows.

Requirements for liability

The requirements for this action are:

- There must be patrimonial loss to P, a person's patrimony being his or her property and finances. There must be some quantifiable financial loss stemming from D's conduct. This financial loss usually arises out of damage or destruction of property or physical injury to a person or the causing of the death of a breadwinner. Sometimes, however, the loss is purely financial not flowing from harm to person or property. Loss includes prospective loss, e.g. loss of profits. Frequently, in an Aquilian action for personal injury, damages are also claimed for pain and suffering.

- D must have inflicted the patrimonial loss intentionally or negligently (the **fault** requirement); and
- There must have been some conduct on D's part (i.e. an act or omission) which the law of delict recognises as being **wrongful** or unlawful (the wrongfulness requirement);
- There must be a causal link between D's conduct and the loss (the **causation requirement**).

Fault requirement

It must be proved that D caused the harm either intentionally or negligently. The fault element must be specifically pleaded.

In *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H) the court pointed out that fault is requirement for the Aquilian action. The fault element must be specifically pleaded and proved in all Aquilian actions. This must be so even where P is able to establish wrongful conduct and consequential harm and then relies on the principle of *res ipsa loquitur* to prove fault on the part of D. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for P to plead some form of fault, *viz*. actual intention or negligence, in order to enable a reasonable inference of liability to be drawn from the proven facts. Even if fault can be implied from the peculiar circumstances of the case as a matter of *prima facie* evidence, D's reprehensible intention or negligence must be explicitly articulated as a matter of pleading.

In *Ndlovu v Debshan (Pvt) Ltd & Anor* HH-362-12 the court observed that in an Aquilian action, P must establish a wrongful act or omission as well as fault, in the form of intention or negligence, in addition to causation and patrimonial loss. Failure to specifically plead fault renders a declaration fatally defective as not disclosing a valid cause of action. In the present case, Ds pleaded to the claim as couched. They saw it fit not to raise any complaint pursuant to rule 140(1) of the High Court Rules to have the defect rectified. The matter proceeded through a pre-trial conference, where the parties agreed that what was being pleaded was the *lex Aquilia* and that the real issue for determination was whether D1 was vicariously liable for D2's wrongful and unlawful act of discharging a firearm at P. Where a trial is held, the defendants having pleaded without complaint and having agreed to the issues at the pre-trial stage, fault can be implied from the evidence led or to be adduced despite P not having specifically pleaded it in the declaration.

In *Rinenote Printers (Pvt) Ltd v A Adam & Co (Pvt) Ltd* 2014 (2) ZLR 314 (H) the court stressed the need for proof of both wrongfulness and fault. D had wrongfully caused the eviction of P from premises it was leasing from. D but the court was not satisfied that there had been proof of fault on the part of D because he was under a misapprehension about the law having relied upon the wrong advice of its legal practitioner. [1]

The issues identified for trial by the parties are as follows. Whether or not the plaintiff authorized defendant to transfer the sum of US$ 59 585.00 from plaintiffs to defendant's bank account, whether or not the defendant misappropriated the sum of US$5800 in cash from the plaintiff and the liability of the defendant in the sum of US$65 385?

In my view, the plaintiff failed to establish a *prima facie* case which the defendant ought to answer. The plaintiff placed documentary evidence before the court on the bank accounts but never explained how the alleged loss occurred. The internal control and finance authorisation procedures manual on how to request funds was not explained as to how it is linked to the patrimonial loss. The plaintiff's ED admitted that no payment could go through without his

[1] Pages 11-12

authorization on the internet- based payment system. He even receives an OTP for every transaction from the bank which he uses to confirm payments. He went on to claim that over

40 payments that were pointed out to him went through with his authorisation but those going into the defendant's account were affected by a systems glitch. Plaintiff closed its case without calling a bank representative to confirm this claim. How then can the plaintiff claim that the defendant acted without authority when all other payments using the same system went through? With respect to the US$5800 for the solar, the evidence was that the same system which required the ED's authorisation was used to purchase it. He did not deny that the defendant could have put the money back in the safe. Astonishingly, the plaintiff's evidence-in-chief ended without the plaintiff rebutting the defendant's defences. I am aware that the court should not go on a blow-by-blow analysis of the plaintiff's evidence. However, regard being had to the issues identified for trial, and the evidence before the court, the question still remains whether or not there is a *prima facie* case for the defendant to answer.

In answer to the test and standard enunciated above, there is no evidence placed before the court upon which a reasonable person would give judgment in favour of the plaintiff. Even if the defendant would close its case and not call witnesses, the *prima facie* evidence that is expected in a case of alleged patrimonial loss, one that requires the fault factor to come out in evidence-in-chief is simply not there. It would be therefore be an exercise in futility to hear the defendant's side of the matter.

Costs usually follow the cause and I see no reason why the defendant should not be awarded its costs.

DISPOSITION

1. Absolution from the instance is hereby granted to the defendant.
2. The plaintiff shall pay costs of suit

Kantor and Immerman, Plaintiff's Legal Practitioners
Rubaya and Chatambudza, Defendant's Legal Practitioners