TREDCOR ZIMBABWE (PRIVATE) LIMITED
versus
JOSHUA MARECHA

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 24 May & 23 August 2022

Civil Trial – Absolution from the instance

Mr *O Kondongwe,* for the plaintiff
Ms *M N Nyenya*, for the defendant

CHINAMORA J:

Introduction

The case came before me as a civil trial. At the close of the plaintiff's case, the defendant advised the court that it wished to make an application for absolution from the instance in terms Rule 56 (6) of the High Court Rules 2021. In this respect, the defendant asked the court to allow him to make written submissions in support of the said application, resulting in the court giving the parties timelines within which to file their respective submissions. The plaintiff opposed the application for reasons I will fully canvas in this judgement. It is imperative to give a background to the dispute before me. The plaintiff claims the sum of US$324 319.08 founded in delict. The allegation was that the defendant was negligent in the performance of his duties by failing to exercise a duty of care, thereby causing loss to the plaintiff. The defendant was employed by the plaintiff for a number of years.

The case for the plaintiff

The plaintiff opened its case by leading evidence from one of its employees, namely, Mr Jonathan Chasakwa, who worked for the company from October 2014 to April 2021. Through this witness, the plaintiff sought to prove and establish that the conduct of the defendant was the direct cause of the loss, which was suffered by the plaintiff. Mr Chisakwa testified that when he joined

the company, the defendant was an accounts clerk, who rose through the ranks until he was appointed the finance manager. Additionally, he said that the defendant was appointed a director of the company and worked for the plaintiff for 18 years until his dismissal in 2013. Mr Chisakwa told the court that, the defendant had become a senior official of the organization and, as such, had a duty and obligation to exercise due care and skill when performing his functions in the company. The witness referred the court to a letter of appointment and minutes of a visit by Mr Bronkhorst and Mr P Sherman which he stated was proof that the defendant was the finance manager. Through Mr Chisakwa, the plaintiff produced an email by Mr Bronkhorst in order to bolster the allegation that the defendant was a financial manager of the organization. The contents of the email alluded to the fact that Mr Bronkhorst needed to align his existing contract to his new office.

The witness continued and said that owing to the negligent discharge of his duties, the plaintiff incurred loss amounting to US$324 319.08. The witness asserted that the defendant breached of duty of care and, therefore, negligent in that there was a duplication of import tax claims for certain bills of entry which amounted to US$66 418.12 and US$61 168.47. In addition, Mr Chisakwa said that some employee benefits were kept outside the pay roll resulting in them not being taxed in terms of the Income Tax Act. As a result, the witness stated that the loss in relation to this was under declaring PAYE by US$63 019.97. Further to this, it was Mr Chisakwa's testimony that income tax against taxable income amounted to a total of US$84 653.66, and that there were other tax violations which resulted in the Zimbabwe Revenue Authority (ZIMRA) levying penalties worth US$27 275.04. However, he accepted under cross-examination that the claim for PAYE was not the result of an enquiry from ZIMRA but was an unsolicited exercise done at the behest of the plaintiff. When answering questions from the court, the witness confirmed that the figures produced by the plaintiff were not verified by ZIMRA and that the defendant was not asked to comment on them. No satisfactory explanation for not consulting the defendant.

Mr Chisakwa was extensively cross examined by Counsel for the defendant who sought to discredit the plaintiff's case. The defendant asked the witness why no contract had been produced to substantiate the allegation that the defendant was the finance manager. Further, he put it to Mr Chisakwa that the finance manager was actually Mr Smith Ross. The plaintiff neither gave a clear answer as to who Mr Ross Smith was nor a rebuttal of the point raised by the defendant that Mr Ross Smith was the finance manager. The letter of appointment, Exhibit 6, produced by the

plaintiff did not spell out the defendant's duties over finance. The witness testified that the company directors, John Smiley, John Edward Simms Hamish Ryan Rudland, Joshua Marecha and Ravalem Chakema. He further told the court that all directors had a fiduciary duty to the company. However, he could not answer satisfactorily the question asked by the court, namely, why the plaintiff had not sued other directors. He also accepted that there was no CR14 form produced to show that the defendant was a director of the company, more so, one responsible for finance. The witness also confirmed that the plaintiff sued its clearing agent (Estralac) for falsifying bills of entries. He also admitted that the defendant did not directly deal with ZIMRA but through Extralac. Further, Mr Chisakwa conceded under cross examination that the plaintiff did not enquire with the defendant how issues on PAYE were tackled.

As I have already stated, the defendant applied for absolution from the instance when the plaintiff closed its case. The basis of this application was that the plaintiff had failed to prove a *prima facie* case against him. Consequently, argued the defendant, there was no evidence placed before the court to warrant putting him on his defence. The plaintiff opposed the application, beginning by raising a preliminary point that the application was filed out of time and no condonation was sought for its late filing. The plaintiff, therefore, prayed that the application be dismissed on this ground. With respect to the merits of the application, the plaintiff contended it had established more than a *prima facie* case. Let me now proceed to examine the relevant law.

The Law Applicable

I start by observing that the parties are not in disagreement as to the law that is applicable to applications of this nature. It must be emphasized that in applications for absolution from the instance, the court must act cautiously. My own view is that courts must always be reticent about acting too quickly without actually hearing the full matter. This is for a good reason, I must say. As a matter of justice, if not common sense, both sides of the case must be heard before a decision is made. In this instance, a decision on this kind of application might halt but not bring to finality a matter before me. There is judicial authority for the proposition that, if in doubt courts are invariably enjoined to lean on the side of caution and allow the matter to proceed. In this context, the position of the law in this jurisdiction was stated in the case of *Supreme Service Station [1969] (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR, where BEADLE CJ observed:

> "I must stress that the rules of procedure are meant to ensue justice is done between the parties and so far as it is possible, court should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant … the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the witness box, should not be permitted to shelter behind the procedure of absolution from the instance."

In the case of *United Air Carriers (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) at 343B-C, the position was put simply by our Supreme Court as follows:

> "A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

More recently, a similar approach was taken in *Joseph Marshall Stuart* v *National Railway of Zimbabwe* HB 184/15, where NDOU J appositely stated that:

> "The requirements of granting of the absolution from the instance at the close of the plaintiff's case are now settled. The application is granted were the plaintiff's evidence is insufficient for a finding to be made against the defendant. The defendant must show that after the plaintiff has led all evidence in his case, the plaintiff's burden of proof has not been discharged. In other words the defendant must show that, there is no prospect that the plaintiff's case might succeed".

I find the wisdom of the formulations in the above two cases compelling. In fact, it has not escaped me that the test in this jurisdiction is no different from that in South Africa, as can be noticed from the case of *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 at 409 G-H, where it was set out as follows:

> "When absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff."

From the jurisprudence in this country and South Africa, it can be concluded that all that the defendant needs to show is that the evidence is insufficient to prove a *prima facie* case. Indeed, at this point the threshold is lower compared to the threshold required when the case has completed. The reasoning behind is that the evidence that has been placed before the court by the plaintiff is inadequate for the court to allow the matter to proceed. Put differently, the application falls or succeeds on a determination of whether the plaintiff has been able to prove a *prima facie* case in the sense that there is evidence relating to all elements of the claim. The purpose of this application

is to ensure that the court is not labored with the need to hear the evidence of the defendant in circumstances where it is apparent that the evidence led by the plaintiff is not enough to sustain their case. It is meant to expedite proceedings and limit reliance on the defendant's case to help establish the plaintiff case. It is a trite principle of law that he who alleges must prove. Thus, relief will not be afforded in circumstances where the evidence proffered does not prove a *prima facie* case. For this proposition of law, it is pertinent to refer to *Maranatha Ferrochrome (Private) Limited* v *RioZim Limited* HH 482/20 where MAFUSIRE J stated that:

> "An application for absolution from the instance made by one party, for instance, the defendant, at the close of the case for the other party, i.e. the plaintiff, is a procedure designed to bring a speedy end to the proceedings where there is no evidence warranting the defendant going into its own case".

I will now address the point on late filing of closing submissions before I go on to analyze the evidence before the court against the relevant law.

Failure to file closing submissions on time

In its closing submissions, the plaintiff raised the point that the defendant's submissions had been filed outside the time stipulated in my directions, namely by close of business on 7 July 2022. I must say that it is most disheartening when a legal practitioner fails to abide by a direction given by the court or a judge. However, in this instance I am prepared to condone the failure, since the submissions were done at my instance in order to guide me in my determination of the application for absolution from the instance. No useful purpose will be served by barring the defendant, as I take the view that dealing with the application can only advance the interests of justice by progress towards finality of the matter. At any rate, there is no prejudice which has been alleged and which has demonstrably been suffered by the plaintiff. For this reason, I caution the defendant's counsel and proceed to consider the submissions.

Analysis of the evidence

Given the reason behind the application before me, it is necessary to examine whether or not the evidence of the plaintiff was sufficient in the circumstances. I am of the view that in circumstances where the defendant vehemently denies having been employed as a finance manager, the best evidence that the plaintiff ought to have tendered was the contract of employment. Doing so would have left the court with no doubt about the position held by the defendant. I must add that this alone would have been sufficient to prove a *prima facie* case without

the need of putting together isolated pieces of evidence in the hope of making one simple point. Undoubtedly, the primary evidence would have been a contract of employment which, unfortunately, the plaintiff failed to produce. It is in that document that the job description of the defendant would have been specified. In addition, on the basis of that contractual relationship that the alleged negligence and breach of duty of care would have hinged. It was a point that the plaintiff ought to have taken seriously because it was the bedrock of their claim. The court cannot draw inferences and seek out the truth from emails when a contract could have been the best and immutable evidence that could have been produced to the court. The need to always place before a court primary evidence instead of making bald and unsubstantiated allegations cannot be overemphasized. See *Chamisa* v *Mnangagwa and Ors* CCZ 42-2018.

The pleadings show that the defendant averred that he was only an accounts clerk and, indeed, a contract exists to confirm this averment. I am inclined to believe this, because the plaintiff's own evidence did not establish otherwise. On the submission that the defendant was a director and had a duty of care to plaintiff over finances, two things undermine the plaintiff's case. Firstly, there is no contract or letter of appointment as director which has the set out responsibilities. Secondly, and perhaps most importantly, the question has to be asked why the other directors of the company were not sued as co-defendants in these proceedings based on the same cause of action. Under cross-examination, Mr Chisakwa stated that the other directors were non-executive directors. I find this answer to be disingenuous. I make this conclusion, because the obligations of non-executive directors have been discussed in a plethora of cases. What emerges from the case law is that it does not absolve them of their obligations to conduct themselves in utmost good faith merely because he is not an executive director. See *Howard* v *Herrigel and Anor* 1991 (2) SA 662 at p 674. In *casu*, the plaintiff sought to place the burden of utmost good faith, care and skill on only one director with no rational basis being given for singling him out.

I move on to look at the evidence of the alleged negligence by the defendant. The plaintiff's witness said that the duplication of bills of entry constituted an act of negligence. To substantiate this, the court was referred to page 1 of the plaintiff's bundle of documents. This is a summarized schedule of bills of entry for which import tax claims were duplicated. The plaintiff did not bring the actual bills of entry. Again as with the issue of the contract of employment, I come to the

conclusion that this was not the best evidence at the disposal of the plaintiff. When Mr Chisakwa was asked about the negligence of the plaintiff's customs clearing agent (Estralac), he conceded that Estralac had already been sued successfully by the plaintiff for loss arising from duplication of bills of entry. The lack of bills of entry means the plaintiff did not produce sufficient evidence to establish a *prima facie* case.

The enquiry I make now is whether evidence before me demonstrates at a *prima facie* level that the defendant acted in a negligent manner resulting in the company violating various laws and tax procedures. Let us recall that the plaintiff alleged that the defendant duplicated import tax claims for certain bills of entry which amounted to US$66 418.12 and US$61 168.47, respectively. In its evidence, the plaintiff summarized what it perceived to be the relevant bills of entry relating to double claims that it alleged were negligently filled by the defendant. In my view, it was important for the plaintiff to bring bills of entry which showed that the defendant had negligently filed entries that had already been paid. If indeed they were there they should have been brought before the court. Let me state the obvious. It is trite law that he who alleges must prove.

In its response to the application for absolution from the instance, the plaintiff stated that some employee allowances were kept out of the payroll in violation of the Income Tax Act resulting in the plaintiff under declaring PAYE by US$63 019.97 between 2009 and 2013. The plaintiff argues that this came to light while conducting its own internal audit. It was not the result of an audit or investigation by ZIMRA. The court also inquired why no pay slips were produced as evidence since they would have clarified what exactly the plaintiff was referring to vis-à-vis PAYE, but it failed to put the court into its confidence. Additionally, the plaintiff bills of entry that were not produced would have helped build their case with regards to the issue of income tax. In their application, the defendant contended that the plaintiff paid an obligation that did not exist because of its own inability to see that this had been paid already. According to the defendant ZIMRA carries out audit of companies, but it did not come across the obligation hence did not raise it. In this regard, the defendant submitted that the plaintiff paid PAYE it had itself assessed. To the extent that the payment did not arise from a demand by ZIMRA, the plaintiff paid a non-existent obligation to its own detriment it cannot found a claim in delict on that.

Lastly, the plaintiff's claim based on various tax obligations merits examination. The plaintiff has been unable to identify such obligations, leaving me to inevitably find this point

devoid of merit. The court cannot be asked to act on such a bald allegation. The plaintiff has failed to assist the court to understand the case they try to make and therefore finds no basis on which this claim is hinged. I also notice that, while the plaintiff claims interest it has not assisted the court by demonstrating how the interest has been calculated.

Conclusion

Taking into account the foregoing, I find that the plaintiff has reached the threshold for requiring the defendant to give evidence in defence of the claim. On the contrary, I am satisfied that the plaintiff has failed to establish a prima *facie case* by the close of its case. As the defendant has been successful in its application for absolution from the instance, I see no reason justifying a departure from the rule that costs follow the result.

Disposition

Accordingly, I make the following order:

1. Absolution from the instance be and is hereby granted.
2. The plaintiff shall bear the defendant's costs.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Matsika Legal Practitioners, defendant's legal practitioners