WILMING PROPERTIES & INVESTMENTS (PRIVATE) LIMITED
versus
KENDROS MUGABE

HIGH COURT OF ZIMBABAWE
ZHOU J
HARARE, 20, 22, 23, & 28 May 2013 and 23 May 2014

**Civil Trial**

Ms *L. Rufu,* for the plaintiff
*C. Chinyama,* for the defendant

ZHOU J: This is an application for absolution from the instance at the close of the plaintiff's case. The plaintiff, a company represented by Andrew Wadi, its director, instituted a claim against the defendant for payment of a sum of US$63 860, together with interest on that amount at the rate of 5%, and costs of suit.

The claim, as set out in the summons, is in respect of rentals which were collected by the defendant on behalf of the plaintiff from the latter's tenants at a place referred to as BD Compound or BD Village. According to the plaintiff, the defendant was employed as manager to manage the housing compound. His duties entailed collecting rent from the plaintiff's tenants and remitting it to the plaintiff. The defendant's defence, as set out in his plea, was that he was not an employee of the plaintiff but that he and the plaintiff jointly purchased the houses in question from the previous owner. He avers that the agreement of sale merely recorded the plaintiff as purchaser for convenience as the plaintiff's representative Andrew Wadi was councillor for the area in which the houses are located. He further denied owing the amount claimed or any other amount.

The plaintiff led evidence from two witnesses Andrew Wadi and Collin Clark Annandale, and closed its case. The defendant then made the instant application for absolution from the instance. An application for absolution from the instance is akin to and stands on much the same footing as an application for discharge of an accused person at the close of the case for the prosecution. See *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 173; *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goldridge (Pvt) Ltd* 1971 (1) RLR 1(A) at 4C; *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87(S) at 94F;

In the case of *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goldridge (Pvt) Ltd (supra)* at p. 5D the Court summed up the test in the following terms:

> "The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make; a definition which helps not at all."

See also *Dube* v *Dube* 2008 (1) ZLR 326(H) at 328D.

In *United Air Charters* v *Jarman* 1994 (2) ZLR 341(S) at 343B-C GUBBAY CJ stated:

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. 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."

See also *Walker* v *Industrial Equity Ltd (supra)* at 94C-D; *Manyange* v *Mpofu & Ors* 2011 (2) ZLR 87(H) at 93D.

Given the summary and extraordinary nature of absolution from the instance, the court will, where possible, lean in favour of continuing the case and hearing the defendant's evidence rather than dismissing the plaintiff's claim. See *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547(H) at 552H-553C; *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484(H) at 488F-G; *Nestros* v *Innscor Africa Ltd* 2007 (2) ZLR 267(H) at 268G; *Manyange* v *Mpofu & Ors (supra)* at 93E.

Three issues were referred to trial, namely:

(a) Whether or not the defendant was ever employed by (the) plaintiff;
(b) Whether or not the plaintiff and defendant jointly purchased the 91 houses; and
(c) Whether or not the defendant received any rentals for the 91 houses, if so, whether or not he used the rent towards the maintenance, renovations and equitably distributed the balance.

Andrew Wadi, the first witness for the plaintiff, testified that he was a director of the plaintiff. His evidence was that the plaintiff purchased the 91 houses known as BD

Compound from a company known as Trillion Zimbabwe in terms of a written agreement of sale, Exhibit 3. He then employed the defendant to manage the compound, including collecting rent from the tenants and remitting it to the plaintiff. In his evidence the defendant collected a total of US$63 860 from January 2009 to July 2011 which he did not account for to the plaintiff. The rentals were collected in respect of 91 residential houses and a beer hall.

In seeking to prove an employer-employee relationship between the plaintiff and the defendant, the plaintiff's witness produced some cheques which were issued payable to the defendant (Exhs 7A – 7E) as well as Exh 5 being a document headed "Job position and payment per month". Some of the cheques had the words "wages" and "Co. wages" inscribed on them. The figures on the cheques are different and totally unrelated. The cheques were issued on different dates, months and even years. Exhibit 7A, dated 2 August 2001 is for a sum of Z$13 660; Exh 7B dated 3 September 2001 is for a sum of Z$14 250; Exh 7C dated 5 November 2002 is for a sum of Z$20 500; Exh 7D dated 20 May 2003 is for a sum of Z$47 000; and Exh 7E dated 15 October 2003 is for a sum of Z$188 000. There is not a single cheque or other proof of payment of a salary to the defendant which was produced for the period to which the claim relates. Further, Andrew Wadi stated that in 2001 the defendant's salary was Z$14 000 which was increased to Z$25 000. But none of the cheques produced supports those figures. Also, one of the cheques is endorsed "wages", while another one is endorsed "Co. wages", presumably to show that it was for company wages. The witness gave no explanation as to why a cheque would be endorsed 'company wages' if it was for the defendant's salary. As for Exh 5, the witness confirmed that it did not bear the signature of the defendant but insisted that the defendant is the one who brought it to him. But Wadi clearly rejected the contents of that document as an 'imposition', as evidenced by his handwritten comments on that document. In his evidence he stated that he "accepted the imposition". But that evidence is inconsistent with the comments which show rejection of the document. Exhibit 8, a memorandum of agreement entered into by the plaintiff and defendant and one Lovemore Ngulube completely destroys the plaintiff's claim that it purchased the compound and employed the defendant as manager. That agreement is duly signed on behalf of the plaintiff and by the other two parties to it. It shows that the defendant and Lovemore Ngulube actually invited the plaintiff to participate in the management of the compound. The reasons for the invitation of the plaintiff appear in the third paragraph, which states:

> "The main idea behind bringing in Wilming Properties and Investments PVT LTD in this case as BD Village Kwekwe was to ideally meet the request of Trillion Zimbabwe PVT LTD, originally stated the seller, who felt that the tax requirements clearly stipulate that a large establishment would only pay tax using an established 'Tax Number' and it was also imperative that the individual administrators namely Lovemore Ngulube and Kandros Mugabe needed nothing less than merging with readily established companies for expert advice from visionary leaders in likes of Mr Andrew Wadi, who apart from this fact is a councillor of Ward Six in Local Authorities. This was one of the major fortunes which saw the prompt idea of inviting in Wilming Properties with the individual administrators who were selected to perform on their individual criteria by Trillion Zimbabwe prior to the date of purchase of the village."

What can be read from the inelegantly drafted agreement is that the plaintiff was invited by the defendant and Ngulube to take control of the compound jointly with them. Although there is a reference to a 'purchase', it is clear from the evidence led on behalf of the plaintiff that there was no real purchase. The purchase price of Z$1 is meaningless. Further, the very fact that Trillion Zimbabwe (Pvt) Ltd remains the owner of the property shows that there was no purchase but that the houses were surrendered to the plaintiff, defendant and Lovemore Ngulube. Indeed, under cross-examination Andrew Wadi admitted that the plaintiff had not purchased the compound. That admission contradicts the vary basis upon which the claim is founded, which was that the plaintiff had purchased the compound and employed the defendant to work for it. There are other documents in which the defendant is referred to as Managing Director of the plaintiff while Andrew Wadi is referred to as the Financial Director. Exhibit 6 as well as Exhibit 8 already referred to above use those designations.

The evidence of Collin Clark Annandale does not take the plaintiff's case any further. His testimony was that he was the "owner" of Burke Street Investments (Private) Limited t/a Baobab. His company was the first to be given the disputed compound to manage by Trillion Zimbabwe. He stated that there were problems of a political nature which impelled him to offer to return the houses to the owners. Trillion Zimbabwe were not prepared to resume responsibility for the houses. That is when, according to him, he gave the houses to Mr Wadi. He stated that his company, Burke Street Investments, had also acquired the houses from Trillion for the same amount of Z$1. The witness had no knowledge of the agreement between the plaintiff and Trillion Zimbabwe and the circumstances in which it was concluded. He also knew nothing regarding the issue of the rentals which the plaintiff is

claiming. Although in his evidence in chief he had stated that Burke Street Investments paid the Z$1 for the houses, in cross-examination he stated that he did not think that the dollar was paid.

The evidence tendered by the plaintiff fails to prove even *prima facie* that the defendant was an employee of the plaintiff. It, in fact, shows that the defendant was jointly involved with the plaintiff in the acquisition of control of the compound. The true nature of the underlying agreement is not established. It certainly does not qualify as a purchase on the evidence led.

As regards the issue of the rentals, the plaintiff did not lead any evidence of occupation of the houses by tenants who were paying rent. The amount of the rent paid by the various tenants was not proved at all. This is not a case in which the plaintiff was asking the defendant to render an account. Rather, the claim relates to a specific figure being, allegedly, in respect of rentals collected. The payment of that amount to the defendant was supposed to be established by evidence. Even the figures postulated by the plaintiff's Andrew Wadi were not supported by any evidence.

In her submissions in response to the application for absolution from the instance Ms *Rufu* for the plaintiff conceded that the plaintiff had failed to prove *prima facie* that the defendant was its employee. She, however, submitted that the plaintiff's evidence had proved the existence of a partnership between the parties, with equal shareholding. But that is not the plaintiff's case as pleaded in its summons and declaration.

At the closure of the plaintiff's case no evidence had been led upon which a court reasonably directing its mind to could or might find for the plaintiff.

Mr *Chinyama* asked that the plaintiff be ordered to pay costs on an attorney-client scale. In the case of *Nel v Waterberg Landbouwers Ko-operatieve Vereening* 1946 AD 597 at 607, cited by this Court in *Zimbabwe Online (Pvt) Ltd v Telecontract (Pvt) Ltd* 2012 (1) ZLR 197(H) at 201B-C, the court stated:

> "The true explanation for awards of attorney-client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

See also *Borrowdale Country Club* v *Murandu* 1987 (2) ZLR 77(H)

The documents which the plaintiff had in its possession, which it produced in evidence, clearly contradict the basis of its claim. Exhibit 8 and Exhibit 12B show that the parties were at all times equal partners in their acquisition of the compound. They did not purchase it. It appears to have been abandoned by its owners for whatever reason and was given to the plaintiff, defendant and Lovemore Ngulube to look after and recover rentals from the occupants. That arrangement was disguised as a sale. It was always clear to all those involved that it was not a sale, as a whole compound with 91 houses and a beer hall could not be sold for a dollar. Yet the plaintiff instituted the instant claim on the basis that it purchased the property. For those reasons, it seems to me that a punitive order of costs is warranted. See *Ndlovu* v *Murandu*1999 (2) ZLR 341(H)

In the result, IT IS ORDERED THAT:

(1) Absolution from the instance be and is hereby granted.
(2) The plaintiff shall pay the defendant's costs on an attorney-client scale.

*Dzimba Jaravaza & Associates*, plaintiff's legal practitioners
*Chinyama & Partners*, defendant's legal practitioners