BAREND VAN WYK
and
TARCON (PVT) LTD

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE 27 NOVEMBER, 2012, 8 JANUARY & 27 MAY 2015

Civil Action

P. C. Paul for the plaintiff
R. Chingwena for the defendant

MUTEMA J: The plaintiff's claim against the defendant is for US$62 767,12 being the balance of monies he alleges the defendant owes him arising out of his employment by defendant representing salaries and allowances and charges for the use of his Ohoskosh Low Loader for the period 2002 to 2008. The plaintiff's declaration reads:

> "1. The plaintiff's claim is for payment of the balance owing in respect of a running account for various transactions.
> 2. On or about 7 November 2008, Mr Nhemachena who was the financial advisor of the defendant drew up two reconciliation (*sic*) which are annexed hereto marked "A" and "B".
> 3. That the reconciliations so prepared were agreed between the plaintiff and the defendant.
> 4. In respect of annexure "A" the balance of $32 074,13 was reduced by a payment of $8 000,00 and in respect of annexure "B" the amount of $30 360,26 was reduced by a payment of $9 277,27.
> 5. After taking into account the payments made, the total balance owing to the plaintiff was $62 767,12 which amount despite demand the defendant has failed or refused to pay."

The defendant denies owing the plaintiff anything or that any reconciliation was done on its behalf.

The plaintiff gave evidence to this effect:

During the period in question he was employed by defendant, first as its plant manager constructing the Zimplats road at Ngezi in Zimbabwe and later as the external plant manager in Zambia and Mozambique. He denied ever signing any contract of employ with Tarcon Limitada

– a Mozambican based company. While in Zambia he had a Zimbabwe-based salary but for accommodation and travel he was given travellers' cheques in US dollars. While in Mozambique he was remunerated in US dollars in cash or via travellers' cheques. Since the money would be drawn from the bank he presumed the defendant had the necessary exchange control authority to pay in that foreign currency.

The defendant, due to unavailability of funds failed to pay him all that was due to him while he was working in Zambia and Mozambique. He produced exhibit 1 – a letter dated 17 March, 2006 written to him by T. Mugwiji, defendant's then financial director. The letter reads:

"RE: CONFIRMATION OF STAFF LIABILITIES FOR AUDIT PURPOSES

For audit purposes with Gwatidzo and Company Chartered Accountants would you kindly confirm the balance that was owed to you by Tarcon Civil Contractors as at 31 December 2005 as follows:

Balance owed as at 31 December 2005: USD32 022,50"

He said he was in agreement with the amount.
He produced exhibit 2 – a reconciliation done by the two parties showing:

- Opening balance December 2005
- Days allowances due
- Less payments made
- Assets from plaintiff's company
- Invoices for Hoskosh hire

This document was signed by D. Nhemachena and plaintiff on 4 October, 2007. Nhemachena was the defendant's financial manager. He explained that the letters FCA and the accompanying numbers relate to the travellers' cheques. The total owed to him is $64 297,32. It includes tools sold to defendant by his company Earthquip (Pvt) Ltd and invoices for hiring of his company's Hoskosh by defendant.

He then produced exhibit 3 – a reconciliation done by defendant's D. Nhemachena and himself for a total of $32 074,13 owed to him by defendant and Nhemachena signed it at the bottom on 7 November, 2008. At the bottom of this document Nhemachena wrote:

"Pending Approval by the chairman, the above amount will be paid out at the agreed

payment attached."

That attached payment plan shows that from November, 2008 to April, 2009 $5 345,69 would be paid to plaintiff monthly till the total owed of $32 074,13 was liquidated.

He went on to produce exhibit 4 which he called the second reconciliation, exhibit 3 being the first. He said the first reconciliation related to Mozambique while the second to Zimbabwe. Basically this exhibit 4 falls on all fours with the preceding exhibit. He said in respect of both exhibit 3 and 4 what the chairman was to approve was the payment plan reflected on the page overleaf and not the liability owed. To date only $8 000,00 was paid. According to him the defendant owes him $21 132,99 on Mozambican reconciliation and $41 574,13 on the Zimbabwean reconciliation thereby making a total of $62 707,12 as reflected on the summons. After his evidence he closed his case.

The defendant led evidence from its Group Finance Manager Desmond Nhemachena. He told the court that plaintiff came to him highlighting that he was not getting finality in terms of outstanding monies in Zimbabwe and Mozambique as well as other transactions. The two of them sat down and tried to put all the figures together. They put together what plaintiff believed was owed by defendant. Plaintiff wanted his claims sent to the relevant people for finalization. These were salaries he was owed. Were also other amounts for plant hire e.g. Oshkosh, due to his company which transaction was concluded without prior board approval and therefore not allowed. Were also issues such as leave days, outstanding salaries and other expenses which plaintiff incurred that required management on site to approve. On the reconciliation done by plaintiff and him these figures were supposed to be approved by management on site.

He commented on exhibit 3 saying the opening balance of $32 022,55 related to assets belonging to plaintiff taken over by defendant. The leave days were plaintiff's days in Sofala in Mozambique. The $32 074,13 is the total plaintiff claimed to be due to him. The trips were by plaintiff on defendant's behalf and were paid. The amount in brackets were deductions from plaintiff's claims representing payments made by defendant on his behalf for spare parts taken from defendant by plaintiff.

The reconciliation was not approved by the chairman because plaintiff failed to provide a breakdown of what the opening balance entailed. Of that amount only $8 000 was verified and

paid. He ended his testimony by averring that what he wrote and signed for at the bottom of the reconciliation was not an admission of liability; he could not compile a reconciliation on behalf of defendant but he was simply trying to lobby for or assist the plaintiff who came to him for assistance because they were close. Since the chairman did not approve the amount alleged to be outstanding, plaintiff's request could not be fulfilled.

After all has been said and done, what is distilled from the dispute is the following:

1. the plaintiff was an employee of the defendant. He worked for the defendant as contract plant manager in Zimbabwe, Zambia and Mozambique. This is a fact inspite of defendant's denial in its plea that it was plaintiff's employer. Payments reflected on exhibits 5 and 8 show that the defendant was plaintiff's employer.
2. the defence that part of the claim is unenforceable on account of flouting exchange control regulations when external payments were made or became due was a red herring by the defendant. Plaintiff said payments by way of travellers' cheques were made through the bank and Nhemachena confirmed that exchange control authority was duly sought and obtained.
3. regarding the claim for payment of plaintiff's company Earthquip (Pvt) Ltd's equipment hire and sale, this was not only not made in the summons but in paragraph 23 of his closing submissions the claim was abandoned.

At the end of the day, what remains for the court's resolution is whether the dispute is a labour matter or a claim on a stated account.

Plaintiff's contention is this: he concluded two reconciliations –

- exhibits 3 and 4 – with Nhemachena who was representing defendant and defendant's liability was agreed upon in the amounts therein stated. The two amounts constitute a stated account representing the money defendant owes him. The handwritten endorsement by Nhemachena at bottom right corner of each exhibit: "Pending approval by the chairman, the above amount will be paid out at the agreed payment plan attached", according to plaintiff's interpretation, means that all that was required was the chairman's approval of the payment plan or method of discharging the agreed liability.

Defendant's argument on the other hand is that since plaintiff's claim is founded on "a running account", the facts in the matter do not fit into the claim let alone the definition of a stated account. The plaintiff's claim remains one of a labour dispute which was brought to a wrong forum for want of jurisdiction.

The plaintiff's contention that the two reconciliations – exhibit 3 and 4 – upon which his claim is based, were accepted by the parties has not been proven. Given the long history of the dispute pertaining to the alleged outstanding salaries and allowances between the parties, the time frame between the drafting of exhibit 2 on one hand and exhibits 3 and 4 on the other, the court accepts Nhemachena's evidence which was not controverted, that when he sat down with plaintiff to draft the so-called reconciliations he was not acting on behalf of the defendant. He said plaintiff was a friend who approached him to enlist his help in having the long running issue brought to finality. He only did what he did to help a friend and what the plaintiff and himself agreed upon was subject to approval by the chairman. Indeed no evidence was adduced establishing that Nhemachena was mandated by defendant to resolve the dispute. What he resolved with plaintiff can therefore not bind defendant in the absence of ratification or approval by the chairman.

The plaintiff's claim is founded on "a running account for various transactions." A running account, in contradistinction to a stated account or liquidated account, is an open unsettled account. The question the plaintiff failed to answer is when his running account transformed into a stated account. Since defendant did not mandate Nhemachena to negotiate with plaintiff on its behalf, it cannot be said that what the two came up with in exhibits 2, 3 and 4 amounts to defendant's acceptance of liability thereby transforming the running account into a stated account.

Nhemachena's evidence that he got involved in the dispute purely as a good Samaritan rather than as defendant's representative is further corroborated by the endorsement he wrote on exhibits 3 and 4, *viz* "pending approval by the chairman, the above amount will be paid out at the agreed payment plan attached." The plaintiff urged the court to interpret these words to mean that the chairman's approval was only limited to the payment plan or method of discharging an "agreed" liability. This smacks of simplicity. Even the literal rule of interpretation does not

allow words of a statute to be truncated or severed but rather the statute must be read as a whole and contextually. Given the history of the dispute coupled with the status and purpose of Nhemachena's involvement in drafting exhibits 2, 3 and 4, the intention or meaning of the words in contention can only be gleaned from his evidence and the context in which he wrote them. Devenish G in *Interpretation of Statutes* (Juta 1992) @ 33 – 39 commenting on the *Purposive Rule of Interpretation* says:

> "The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis … The interpreter must endeavour to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources … words should only be given, ordinary grammatical meaning if such meaning is compatible with their complete context."

Nhemachena *ipsissima verba* is that both the amount reflected on exhibits 3 and 4 as well as the payment plan attached were subject to approval by the chairman. It is from his evidence and context that the intention and purpose of the words should be gleaned. It would wreak absurdity to truncate the words and place the meaning ascribed to them by the plaintiff for it cannot make any sense to contemplate that defendant would assume liability negotiated by Nhemachena without the chairman's approval but need the chairman's approval for the payment plan. I find the plaintiff's interpretation of the words self-servingly too simplistic and incorrect.

In the result I find that the plaintiff's claim is not founded on a stated account but on a purely employment dispute and this court pursuant to section 89 (6) of the Labour Act [Chapter 28:01] has no jurisdiction to entertain it at first instance. Accordingly the plaintiff's claim is dismissed with costs.

Wintertons, plaintiff's legal practitioners
Ziumbe & Mutambanengwe, defendant's legal practitioners