

JOSEPH MARSHAL STUART

Versus

NATIONAL RAILWAYS OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 APRIL AND 24 SEPTEMBER 2015

Judgment

V. Majoko for plaintiff
A. Muchadehama for defendant

NDOU J: The defendant has applied for absolution from the instance at the close of the plaintiff's case. The brief background facts of this matter are the following. On 20 May 2004 the plaintiff caused summons and declaration to be issued out against the defendant claiming:

- 1) Z\$248 292,38 past medical expenses
- 2) Z\$1 292 460,00 for future medical expenses
- 3) Z\$6 000 000,00 for psychological injury, loss of general health and loss of amenities of life
- 4) Z\$5 000 000,00 contumelia, humiliation and defamation
- 5) Z\$115 136 000,00 for loss of pension benefit
- 6) Z\$411 300 774,00 for of earning
- 7) Interest on all the above at the prescribed rate from the date of service of summons to date of full payment.
- 8) Costs of suit.

According to the plaintiff the claims arose from an incident which had occurred in about September 2000 where it was alleged that the plaintiff, as a train conductor, had charged a passenger an incorrect and lesser figure and converted the sum of Z\$108,00 to his own use. The

plaintiff was charged with misconduct and initially dismissed. The dismissal was later reversed and plaintiff was retired on medical grounds. The plaintiff then claimed damages under the heads referred to above. The trial took a chequered route characterised by delays in prosecuting the plaintiff's claim, change of legal practitioners and attempts at amendments. On 20 April 2015 after calling two witnesses, the plaintiff closed his case prompting the above-mentioned application by the defendant. The application is premised on the provisions of Order 49 Rule 437 (1) of the High Court Rules, 1971.

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 – *Sibanda v Chikumba* HH 92-14; *Manyange v Mpofu & Ors* HH-162-11 and Herbstein and Van Winsen – *The Civil Practice of the Supreme Court of South Africa* (4th Ed) p 841

The test on whether the court will grant absolution from the instance at the close of plaintiff's case was laid down in *Gascoyne v Paul Hunter* 1917 TPD 170 and was accepted as a proper formulation of the test in our law in *Supreme Service Station (1969) (Pvt) Ltd v Goodridge* 1971 (1) RLR (A) and it thus:

“Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?” – see also *Dube v Dube* 2008 (1) ZLR (H); *Delta Beverages v Rusito* SC 42-13; *Standard Chartered Finance (Zimbabwe) Ltd v Georgias & Anor* 1998 (2) ZLR 547 and *Bailey N.O. v Trinity Engineering (Pvt) Ltd* 2002 (2) ZLR 484.

In *Supreme Service Station (1969)* case (*supra*) at pages 5 – 6 BEADLE CJ stated:

“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.”

This formulation has been accepted in *Dube* case, (*supra*), *Georgias – case (supra)*; *Delta Beverages – case (supra)* and *Bailey – case (supra)*. Though used in a different context, the observation by MALABA DCJ in *Mawarire v Mugabe & Ors* CCZ 1-13 is apposite when he said “... it is better to let people have access to the fountain of justice where they fail for reasons of their folly, than have them blame the gatekeepers.” In order to defeat an application for absolution from the instance at this stage of the trial, the threshold the plaintiff must cross is low. In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409 G- H 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.”

Explaining this in *ATW De Klerk v ABSA Bank Ltd & Ors* SCA 176-02 SCHULTZ JA said:

“This implies that a plaintiff has to make out a prima facie case ... in the sense that there is evidence relating to all the elements of the claim ...”

The defendant attacks the plaintiff’s case on the ground that the plaintiff’s claim was denominated in Zimbabwe Dollars and argues that the plaintiff has not shown the relationship between the Zimbabwe dollar and the United States dollar. Further defendant argues that a comparison of the original claims filed 20 May 2004 and the amendment granted on 23 January 2014 show that the original claims bear no relationship to the amended claims as evinced in the following table:

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ORIGINAL CLAIM		AMENDED CLAIM		
Head	Amount	Head	Amount	Ration: US\$ – Z\$
Medical expenses	Z\$248 292,38	Medical expenses	US\$2 000	US\$1 : Z\$24
Future medical expenses	Z\$1 292 460,00	Future medical expenses	US\$3 000	US\$1 : Z\$430
Psychological injury, loss of general health, loss of amenities of wife	Z\$6 000 000,00	Psychological injury, loss of general health, loss of amenities of wife	US\$1 500	US\$1 : Z\$400
Contumelia, humiliation and defamation	Z\$5 000 000,00	Contumelia, humiliation and defamation	US\$10 000	US\$1 : Z\$500
Loss of pension benefits	Z\$115 136 000,00	Loss of pension benefits	US\$90 840	US\$1 : Z\$1 267
Loss of earnings	Z\$411 300 724,00	Loss of earnings	US\$45 040	US\$1 : Z\$9 131,90

In other words, the plaintiff's latest amendment to United States dollars was not a conversion of his original claims in Zimbabwe dollars to United States dollars. The amendment was a complete substitution of the original claims by new claims, claims which bore no relationship to the original ones.

It is trite law that an application for absolution from the instance at the close of the plaintiff's case, if successful, must have the effect of terminating the case completely. The procedure is not intended for the court to determine issues piecemeal – see *Dube* case (*supra*). Further damages are either general or special, and different rules apply to general as opposed to special damages: *The Quantum of Damages in Bodily and Injury Cases* (3rd Ed) by Corbett, Buchanan and Gauntlett. At page 99 the learned authors correctly observed:

“In the case of damages which are capable of exact mathematical computation ... proper evidence establishing the loss ... must be tendered. Where, on the other hand, mathematical proof ... is in the nature of thing impossible, then provided that there is evidence that, pecuniary damages, in this regard has been suffered, the court must estimate the amount of the damages as best it can on the evidence available and the plaintiff, cannot be non-suited because the damages, cannot be exactly computed.”

In *Minister of Defence and Anor v Jackson* 1990 (2) ZLR 708 (SC), GUBBAY JA (as he then was), said the following on the daunting task confronting a judicial officer is assessing damages in personal injury cases –

“It must be recognized, that translating personal injuries into money is equating the incommensurable, money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages in personal injury, is one of the most perplexing a court has to decide.” – see also *Mbundire v Buttress* SC 13-11.

In casu, damages of psychological injury, loss of general health, loss of amenities of wife, contumelia, humiliation and defamation do not lend themselves to mathematical calculation. They are arrived at as a value of judgment and the issue of the currency does not come into it. One cannot say that those damages, if proven to have been suffered were only claimable in Zimbabwe dollars. The plaintiff led evidence that he was imputed a thief and fraudster by the defendant. Such imputations, according to plaintiff, have even been maintained after this court quashed the proceedings of the lower court and the imputations are repeated in the pleadings. The plaintiff led evidence of specialist on his mental stress. On the claim of loss of earnings, the plaintiff wanted to call the defendant’s Human Resources Manager. The testimony of this witness is necessary to determine the issue of the loss of earnings, if any. The defendant opposed the calling of this witness and indicated that it intended to call this witness as its own should this application fail. It is beyond dispute that evidence of the loss of earning is peculiarly within the knowledge of the defendant and the Human Resources Manager would readily have such information. In the *Supreme Service Station* – case (*supra*) it was stated –

“Courts 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 at his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the witness box must not be permitted to shelter behind the procedure of absolution from the instance.”

On account this fact alone, it would be difficult for the defendant to establish that plaintiff failed to prove loss of earnings. The defendant denied the plaintiff access to witness he intended to call who is in the employ of the defendant. The defendant’s conduct amounts to using rules of

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procedure to cause an injustice. I cannot, therefore, lightly deprive the plaintiff the remedy he seeks without first hearing what the defendant has to say.

Further, on general damages sought, I do not wish to make findings on the credibility of plaintiff's witnesses at this stage. What is important is that the plaintiff led evidence on the alleged wrongful conduct by the defendant. He has led evidence that he suffered damages as a result of such wrongful conduct by the defendant. As far as general damages are concerned, as alluded to above, the court will award such damages as in its estimation justified. There may be merit in the defendant's attack in so far as special damages are concerned but this procedure is not intended for the court to determine issues piecemeal – *Dube* – case (*supra*).

In light of the foregoing the application must fail.

Accordingly the defendant's application for absolution from the instance at the close of the plaintiff's case is dismissed with costs being costs in cause.

Majoko & Majoko, plaintiff's legal practitioners
Mbidzo, Muchadehama & Makoni, defendant's legal practitioners