

FIDELITY PRINTERS AND REFINERS (PVT) LTD
versus
LAZARUS S.C. MWALE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 4 November 2014 and 14 January 2015

Opposed matter

W. Magaya, for the plaintiff
Ms P. Ncube, for the defendant

NDEWERE J: On 9 January, 2014 the plaintiff issued summons for Provisional Sentence against the defendant for US\$30 000.00 with interest on that amount at the rate of 1.5 % per annum from December, 2012 to the date of payment in full.

The plaintiff's claim is based on a mortgage bond number 0004917/2012 which was executed on 20 December, 2012 by the defendant in favour of the plaintiff over the following property: Certain piece of land situate in the District of Salisbury being Stand 263 Salisbury Township of Salisbury Township Lands measuring 342 square metres, held under Deed of Transfer No. 4109/2009.

In addition to the mortgage bond registered over the property, the defendant signed an acknowledgement of debt for the US\$30 000.00.

On 19 March, 2014, the defendant filed opposition papers. He started by raising a point *in limine* on jurisdiction. He said the debt arose out of the employer employee relationship between the parties and consequently the dispute must be handled by the Labour Court, since the High Court has no jurisdiction in labour matters. He said the mortgage bond was just security for a staff loan. On the merits, his defence was that the plaintiff has not fully paid him his severance package; he will pay the mortgage loan when the plaintiff has paid him all his dues.

The background is that the defendant was previously employed by the plaintiff. Following a restructuring exercise, the defendant's post became redundant and on 10 October, 2012, the plaintiff and the defendant concluded a termination contract.

According to the agreement of 10 October, 2012, the applicant would be paid US\$227 318.45 in terms of calculations on an attached schedule. There were other non-monetary benefits. One of such benefits itemised on the schedule was that the plaintiff would pay the cost of drilling and installing a borehole on presentation of quotations by the defendant. The defendant's official motor vehicles, a Toyota Prado and a utility double cab were also to be transferred to the defendant. The modalities of the transfers were detailed in the schedule.

The defendant accepted the package as itemised in the schedule "in full and final settlement of all monies due and owing to him." He further accepted that in terms of the agreement, his last working day shall be on the day he received his package, "provided that such date shall be no later than 30 November, 2012".

In his opposition, the defendant said the following matters were still outstanding;

- a) The retrenchment authorisation from the Ministry.
- b) Copies of the retrenchment submissions to Zimra and the tax clearance certificate.
- c) Final payslip showing the sums payable to him, less advances paid.

He also said the issue of the borehole and motor vehicles had not been finalised.

The defendant's conclusion was that because of the outstanding matters itemised above, he was still an employee of the plaintiff and owed salaries in excess of the \$30 000.00 being claimed on the mortgage.

I now proceed to determine the matter.

Firstly, this is not a labour matter. It is a matter of foreclosure on a mortgage bond. The defendant was an employee of the plaintiff up to "no later than 30 November, 2012" in terms of the termination agreement. The termination agreement was concluded on 10 October, 2012 and Clause 2 said the last working day would be the day he received his termination package "provided that such date shall be no later than 30 November, 2012". The agreement which was signed by the parties, was to the effect that if there was a delay in paying the retrenchment package, the defendant would remain an employee, but 30 November, 2012 was agreed to be the final deadline. Indeed the plaintiff argued that after 30 November, 2012, the defendant never reported for duty. This is because he knew he was no longer an employee. So how can he be paid a salary when he had stopped working? This means that by 1 December, 2012, the defendant was no longer an employee. If there was anything still outstanding; he could claim it and sue for it; but his status as an employee changed forever at the end of November, 2012.

In terms of the termination agreement, the defendant ceased to be an employee after 30 November, 2012.

However, due to the plaintiff's benevolence, the defendant was allowed to enjoy the benefits of a concessionary housing loan reserved for its staff. In December, 2012 a mortgage bond was registered over that property. In my view, this was a commercial transaction for the purchase of immovable property between two individuals of full contracting capacity. The terms of the mortgage bond were very clear and they included foreclosure in the event of failure to pay.

In addition, the defendant signed an acknowledgement of debt on 20 December, 2012. In paragraph 3 of that acknowledgement of debt, the defendant acknowledges that he is aware that if he fails to pay, there will be foreclosure on the security pledged. Consequently, the point *in limine* that the High Court has no jurisdiction cannot succeed in view of the above factors. It must be borne in mind that even where parties are employer and employee; it does not mean that all their contractual relationships are labour matters. The High Court's jurisdiction is ousted on labour matters only. In this instance, there is a mortgage bond between an ex-employee and its former employer and there is nothing in that mortgage contract which makes it a labour matter. The point *in limine* is therefore dismissed.

On the merits, it is common cause that the defendant received a major component of his retrenchment package which was the US\$227 318.45. It is also common cause that up to the time of the hearing of this matter, the defendant had not paid even a cent of the instalments he was supposed to pay on the mortgage bond. In my view, this shows that the defendant is not seriously interested in the mortgaged property. It is shocking that an ex - employee who has been given such a handsome retrenchment package by his previous employer will fail to honour nominal repayments on a US\$30 000.00 loan. It is even more shocking that when the previous employer wants to foreclose, the defendant then cries foul and claims that he is still an employee when he signed a termination contract which gave a specific date of 30 November, 2012 as the final termination deadline. For the reasons already outlined earlier in this judgment, the defendant is no longer an employee and he is not owed any salary by the plaintiff.

Furthermore, the outstanding issues which defendant is raising have nothing to do with the Mortgage Bond agreement. The Bond is a separate agreement concluded by two parties with full capacity and it is not subject to an employment contract or any other

agreement. There is therefore merit in the plaintiff's case. Provisional sentence is therefore granted as follows:

1. Defendant shall pay US\$30 000.00, plus interest at the rate of 1.5 % per annum from 20 December, 2012 to date of final payment.
2. Stand number 9263 Salisbury Township of Salisbury Township Lands in Salisbury District measuring 342 square metres registered under title number 4109/2009 is hereby declared executable.
3. Defendant shall pay collection commission in terms of the Law Society Bye – Laws plus costs on a legal practitioners and client scale.

Coghlan Welsh & Guest, plaintiff's legal practitioners
Mawere & Sibanda, defendant's legal practitioners