CLEOPAS NYAHODA
versus
FUELTEC ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 21 September 2015 & 21 October 2015

Civil Trial

E. Dondo, for the plaintiff
S. Mutema, for the defendant

CHIGUMBA J: The plaintiff issued summons against the defendant on 8 July 2014, claiming payment of USD$15 440-00, as well as 10% collection commission and interest at the prescribed rate. The issue that falls for determination is whether the plaintiff installed calibration software in the defendant's computers valued at fifteen thousand dollars, and if so whether he did so in his personal capacity in which case he is entitled to be paid, or whether he did so in his capacity as an employee and during the course of his duties, in which case he is not entitled to any payment.

The plaintiff averred that on 20 November 2012, he was engaged by the defendant to install calibration software with thirteen programmes at defendant's place of business. The software had a value of fifteen thousand United States dollars. In March 2013, the defendant re-installed the software after it had been tampered with and mishandled and deleted by the defendant's Information Technology consultant. Of the USD$500-00 installation fee charged, defendant paid USD$60-00 and left a balance of USD$440-00. The defendant filed its plea on 1 August 2014 and averred that the plaintiff was fired at the end of the three month probation period because of his failure to make the grade after having misrepresented his qualifications. The defendant denied that it used the plaintiff's software and averred that the plaintiff never

issued it with a user licence for the software. The plaintiff was challenged to show the basis on which collection commission was claimed in the summons.

The plaintiff in replication averred that only the Trade Measures Department was vested with the mandate of certifying him as a calibration technician. He stated that the software can be used without a licence. At the hearing of the matter, the plaintiff testified on his own behalf and told the court that he was employed by the defendant in November 2012 and was on probation until 31 January 2013. His duties included the calibration, repair and service of fuel tanks and bulk volume meters. He said that Mr *Ben Garwe* of the defendant approached him and asked him to supply calibration software to the defendant. He gave him a quotation for software with thirteen programmes. The parties agreed on a price. The plaintiff installed the software outside of his normal or agreed duties in terms of his contract of employment. His duties did not involve selling software. The software is not readily accessible in Zimbabwe. During cross examination, the plaintiff agreed that he made a list of everything required for him to perform his duties at the defendant's behest. He admitted that he did not charge the defendant separately for the preparation of this list. He told the court that the software he installed is now an asset which belongs to the defendant.

The witness admitted that the software that he installed assisted the defendant with volumetrics, which is part of the duties of a calibration technician. He told the court that software should be bought by a company and that his duties involved installation not purchase. He denied that the defendant gave him the money with which to purchase the software. He denied that the signature on the cash requisition forms belonged to him. The witness told the court that he bought the software for the sum of USD$12 500-00. He did not manufacture it, and he denied that its pricing was governed by the Trades Measures Act, or monitored by the Trades Measures Board. The witness admitted that he was not registered as a calibration technician at the material time but insisted that he was subsequently so registered. He was unable to produce a registration certificate. He did not certify the thirteen programmes that he installed. The software was purchased from Mr *Shepherd Munzira* using the proceeds of sale of a Toyota Corona motor vehicle sold for USD$3 500-00. The plaintiff closed its case.

The defendant applied for absolution from the instance. After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's

claim. Should the court accede to this, the judgment will be one of absolution from the instance. See Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th Ed p841. The term 'absolution from the instance' is used to describe the finding that may be made at either of two distinct phases of the trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be 'absolved from the instance, if upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. See Schwikkard Van Der Merwe *Principles of Evidence* 3rd Ed p578.

In the case of *Machewane* v *Road Accident Fund*[1], absolution from the instance was defined as follows:

> "It means that the plaintiff has not proved her case against the defendant. It is not a bar to the plaintiff re-instituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when after all the evidence the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance, in effect brings the proceedings to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim"

In LH Hoffman, DT Zeffert[2], it is stated that:

> "A decree of absolution from the instance is derived from Dutch law…It is the appropriate order when after all the evidence the plaintiff has not discharged the ordinary burden of proof. Its procedural advantage is that it enables the plaintiff to bring another action on the same facts, a privilege which is denied to the defendant if he fails in an action in which the burden of proof is on him. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution"

In *Gascoyne* v *Paul & Hunter* [3] the court stated that:

> "The question therefore is, at the close of the case…was there a *prima facie* case against the defendant…in other words, and was there such evidence before the court upon which a reasonable man might, not should give judgment against Hunter?"

In the case of *United Air Charters* v *Jarman* [4] it was held that:

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[1] 2005 (6) SA 72(T)
[2] 'The South African law of Evidence 4th ed, p 507
[3] 1917 TPD 170 @ 173
[4] 1994 (2) ZLR 341(S)

> "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 *Supreme S* v *Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd*[5]; *Lourenco* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* [6], *Keefax & Anor* v *Wedzera Petroleum & Ors*[7]

In more recent times, in the case of *Delta Beverages* v *Onismo Rutsito*,[8], an appeal against a High Court judgment dismissing with costs an application for absolution from the instance, the respondent sued the appellant for damages in the sum of US$20 051-00 and costs of suit, on the basis that he had consumed a contaminated coca-cola beverage and that further inspection of the bottle had revealed a 'rusting iron nail and brackish foreign substances'. The appellant was the manufacturer of the beverage in question and the question for determination by the court *a quo* was 'whether the appellant owed the respondent a duty of care to ensure that the product is safe, clean, healthy and fit for human consumption', or alternatively, 'whether the appellant had negligently allowed the production and selling of contaminated coke'. The court was satisfied that 'the respondent did not prove any damage such as would have founded a cause of action under the law of delict, and that, 'clearly, whatever distress or anxiety or nervous shock he may have experienced was transitory…and in the circumstances, the appellant had no case to answer, and that should have been the end of the matter and absolution from the instance ought to have been granted. See also *Mining Industry Pension Fund* v *DAB Marketing Private Limited*[9]

Could this court find for the plaintiff on the basis of the evidence which he led? The test established in terms of the numerous decided cases necessitates an analysis of the evidence led by the plaintiff before he closed his case, and a determination of whether, on the basis of that evidence, the court, could give judgment in favor of the plaintiff. In other words, was the evidence enough? Was it sufficient? Did it support the plaintiff's averments with sufficient clarity and particularity? The degree of proof required is 'proof on a preponderance of probability'. It is this court's view that the plaintiff did not adduce sufficient evidence to show that he had lawfully and legitimately purchased the software from a duly authorized software

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[5] 1971 (1) RLR 1 (A) at 5D-E
[6] 1984 (2) ZLR 151 (S) at 158B-E.
[7] HH373-13
[8] SC42-2013
[9] *SC 10-11.*

dealer who was able to pass title to him , and ultimately to issue a licence to the defendant for the use of the software. No explanation was given as to why, once the software had been installed, the defendant needed him to re-install it, if the defendant had a licence and a product key to show that it had validly acquired the software. The plaintiff was unable to show why the installation of the software did not comply with relevant statutory provisions governing trade. The plaintiff failed to establish a prima facie case against the defendant. The defendant is entitled to be absolved from the instance.

The contractual relationship between the parties was induced by an illegality. The plaintiff was precluded from performing the duties that he entered into an employment contract with the defendant for, by statute. In terms of s3(2) of the Trades Measures Regulations (Licence and Competence and registration) Regulations 1995…. no person shall install any measuring equipment for use in trade unless he holds a certificate of registration in terms of s27 of the Act'. The plaintiff admitted during cross examination that the work that he did volumetrics, involved the calculation of volumes of fuel for the plaintiff, and that, at the time that he was in the plaintiff's employ, he did not hold a valid certificate. Although he told the court that he was subsequently certified, the plaintiff did not produce the certificate to prove this assertion.

According to s17 of the *Trades Measures Act* [*Chapter 14: 23*]

> **"17 Contracts to be made by reference to authorized unit**
> (1) Subject to subsection (3), every contract made or effected in Zimbabwe for any work, article or thing, other than land or an interest in land, shall, when the same has been or is to be done, sold, delivered, carried or agreed for by length, area, volume or mass, be made or effected by reference to an authorized unit, and if not so made or effected any such contract shall be void".

It is common cause that the software installed by the plaintiff was not installed by reference to an authorized unit, in contravention of s17. The software was not authorized by the Trade Measures Board of Zimbabwe. The software was to be used in the process of measuring equipment and it fell under the provisions of s 3 (2) of the Trade Measures Regulations. The software ought to have been submitted for assizing by the Inspector, in terms of s13 (2) of the Act which provides that;

> "**13 measuring equipment used in trade to be assized or re-assized**
> (1) Subject to this Act, all measuring equipment used in trade shall be assized or re-assized in terms of this section.
> (2) Subject to subsection (5), any person who has unassized measuring equipment shall, before using it in trade; submit it to an inspector for assizing or re-assizing, as the case may be".

It is common cause that the software installed by the plaintiff was not assized by an Inspector, in order to check the standard being used in the trade. The use of unassized measuring equipment is actually a criminal offence. The plaintiff also knew that, not being a certified calibration technician, he could work under supervision in terms of s26 of the Act. It is common cause that the plaintiff did not work under supervision. No supervisor was referred to, or identified in the pleadings, or in the evidence in chief. This is a criminal offence in terms of s26 (7) of the Act. The plaintiff admitted to calibrating using unassized software when he was not certified to install, use or calibrate software without a certificate of competence or registration in form T.M.3 and T.M.4. This was contrary to s7(1) of the Regulations which stipulates that it is only after the superintendant is satisfied that an applicant has knowledge of the Act and its regulations, and is a person who is able to manufacture or repair equipment in accordance with the requirement of the Act and Regulations that he will issue a licence of competence.

The plaintiff referred the court to the case of *Dube* v *Khumalo*[10], where the court said that

> the 'maxim *in pari delicto potior est condition possidentis,* may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail'. The effect of this rule is that where something has been delivered pursuant to an illegal agreement, the loss lies where it falls. The objective of this rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases, the court will relax the par delictum rule and order restitution to be made. They will do so in order to prevent injustice on the basis that public policy 'should properly take into account the doing of simple justice between man and man'.

Unfortunately for the plaintiff, the loss must lie where it falls, in the absence of a specific plea of unjust enrichment in the pleadings. There is insufficient evidence on which this court might make a reasonable mistake and give judgment for the plaintiff. The facts do not support enough material on the basis of which the court might make a reasonable mistake in favor of the plaintiff. The court is satisfied that no injustice will be occasioned in these circumstances if absolution from the instance is granted. The plaintiff is not being lightly deprived of his remedy. Even if we were to lean in favor of this case continuing, there is no doubt that the parties entered into an illegal agreement, and that the plaintiff did not specifically plead unjust enrichment, so the loss must lie where it falls.

[10] 1986 (2) ZLR 103 @ 109

For these reasons, the application for absolution from the instance be and is hereby allowed.

Messrs Pundu & Company, plaintiff's legal practitioners
Messrs Musemburi & Muchenga, defendant's legal practitioners