

RUM FOTOS (PVT) LTD
versus
TICHAFA CHIREVO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 12 July, 17, 18, October 2017, 14, 15 February 2018 & 21 March 2018

Civil Trial-Application for absolution

J J Chirambwe, for the plaintiff

S Murambasvina, for the defendant

TAGU J: The defendant applied for absolution from the instance and dismissal of the plaintiff's case with costs at the close of the plaintiff's case. The plaintiff had issued summons claiming payment of the sum of US\$30 862.00, ZAR 75 772.00 and BW Pula 2190.00 being damages arising from plaintiff's funds collected and fraudulently/negligently converted to personal use by the defendant after he had misrepresented to the plaintiff that he was banking the funds in the plaintiff's account and that he was implementing all Accounting systems as he has been contracted to do.

PLAINTIFF'S EVIDENCE

Rutendo Mwenye testified first. In brief his evidence was that he was the Director and founder of the plaintiff. When he fell ill he left the defendant in charge of all the management and financial affairs of the plaintiff. Upon his recovery he discovered that some company money had disappeared and a number of services including phone and medical bills had not been paid for. In particular the phone lines had been cut off for none payment of bills, defendant had taken over some tuck shops, some company records were missing and some were not up to date. Money was never banked in the company account as per procedures. He called for some company records for inspection but defendant failed and or refused to avail them. He asked for explanations and

defendant failed to give satisfactory explanations on the discrepancies. Suspecting that some money had been misappropriated he reported the matter to the police. Audits were carried out and they confirmed fraudulent activities by the defendant. At one point defendant admitted to misappropriating the funds but later backtracked.

Locadia Mwenye, the wife of Rutendo Mwenye, and a co-director of the plaintiff confirmed that when they decided to take Rutendo Mwenye to Hospital, they asked for some money but the defendant who was the sole custodian of the plaintiff's financial affairs indicated that there was no money. That is when she suspected company money to have been fraudulently used by the defendant. She confirmed Auditors were engaged and some fraudulent activities by the defendant were unearthed. She corroborated the first witness's evidence that defendant refused to produce some of the vital documents for examination. However, at one stage defendant apologized for having misappropriated the funds but failed to reimburse.

That all the money generated from some of the plaintiff's activities were being handed over to the defendant on a daily basis during the time Rutendo Mwenye was hospitalized was confirmed by one Mugove Magiji who worked with the defendant. The other witness to corroborate the fact that defendant at one time admitted to misappropriating company funds was given by Tichaona Magiji, and the fact that the money that was in the hands of the defendant could not be accounted for.

The basis upon which this application for absolution from the instance was made was basically that –

- “1. The plaintiff's claim prescribed well before the time summons and the declaration were issued and served on defendant,
2. The court is being asked to enforce illegalities.
3. There is no prima facie evidence of the plaintiff's case given that all the evidence placed is basically hearsay evidence which is not admissible.
4. The whole proceedings are irregular in that the resolution does not state the amount plaintiff must sue defendant for neither does it give the present legal counsels mandate to act on behalf of the plaintiff company.”

The application is opposed by the plaintiff.

With the greatest of respect the counsel for the defendant seems not to appreciate fully the law relating to an application of this nature.

In *Gordon Lyod Page & Associates v Rivera & Another* 2001 (1) SA 88 (SCA) at p 92 para [2] the Court said that:

“[2] The test for absolution to be applied by a trial court at the end of the plaintiff’s case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

‘...(W)hen 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 finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. *Gascoyne and Hunter* 1971 (TPD) 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (40 SA 307 (T).)’

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 – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v van der Schyff* 1972 (10 SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4 ed at 91-2).”

At this stage I need not concern my-self with the credibility or otherwise of the evidence of the plaintiff, unless, of course, it is demonstrably clear that the plaintiff and or witnesses, palpably broke down under cross examination. See *The South African Law of Evidence* by DT Zeffertt p 165 quoting Solomon in *Siko v Zonsa* 1908 TS 1013.

In *casu* the plaintiff’s evidence was clear that Rutendo Mwenye as the Director and founder of the plaintiff employed the defendant. When he fell ill he appointed the defendant to manage the administration and financial affairs of the plaintiff. It is not in dispute that when Locadia Mwenye the wife of Rutendo Mwenye and also a co-director of the plaintiff failed to get money from the defendant to send Rutendo Mwenye to hospital. It is not in dispute that the defendant was the sole custodian and manager of all the money generated by the employees of the plaintiff. It is not in dispute that the defendant even changed the money into foreign currency on black market. It is not in dispute that the defendant had taken over and was now managing some of the tuck shops in dispute. It is not in dispute that some of the money was not banked into the company account. If indeed it was banked then money should have been found to send Rutendo Mwenye to hospital when it was needed. If indeed it had all been used up on company business it is the defendant who

must explain what happened to the money. He must also explain how he ended up owning the tuck shops in dispute and how he was funding them.

In my view this application for absolution from the instance was made as a matter of course and has no merit at all since the defendant has a lot of explanations to make. He can only do so once he has been placed on his defence. For these reasons I will dismiss the application for absolution at the close of the plaintiff's case because the plaintiff managed to establish a prima facie case against the defendant.

IT IS ORDERED THAT

1. The application for absolution from the instance be and is hereby dismissed.
2. The defendant to pay plaintiff's wasted cost.

Lawman Chimuriwo Attorneys at Law, plaintiff's legal practitioners
Messrs Jarvis Palframan, defendant's legal practitioners