GLORIA CHIKUTU
versus
COLLEGE PRESS PUBLISHERS (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 13 October and 8 November 2017

Application for absolution from the instance

NB Munyuru with P Matsanura, for plaintiff
S Bhebhe with T Kativhu, for defendant

TAGU J: The plaintiff issued summons against the defendant claiming payment of the sum of USD42 284.00 and ZAR 40 000.00 which is the total of outstanding school fees benefits and performance bonuses for the years 2011 and 2012, interest on the sums at the rate of 5% per annum from date of summons to date of full payment, a 2008 Volvo S80 or the equivalent value of the car and costs of suit on a legal practitioner and client scale.

The plaintiff was the sole witness. At the close of the plaintiff's case the defendant applied for absolution from the instance. The application for absolution from the instance was opposed by the plaintiff.

All the counsels seemed to agree on the principles applicable in an application for absolution from the instance. 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 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, or ought to) find for the plaintiff. See *Gascoyne and Hunter* 1971 (TPD) 170 at 173; *Ruto Flour Mills (Pty) Ltd* v *Adelson* (2) 1958 (4) SA 307 (T). In short 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* 19972 (1) SA 26 (A) at 37G-38A, *Schmidt Bewysreg 4th ed* at 91-2. See also *Tsoanyane*: *MPHO* v *University of South Africa* Case No: 12677/08, North Gauteng High Court, Pretoria, South Africa.

In casu the plaintiff has to show that she was entitled to USD 42 284.00, ZAR 40 000.00 as school fees and outstanding performance bonuses and a 2008 Volvo S80 or equivalent value of the car. In her evidence the plaintiff managed to prove that she was employed by the defendant as Finance Manager and Company Secretary on the 16th July 2007. She produced a letter of appointment as exh 1. Under cross examination by the counsel for the defendant she said she was appointed on both positions of Finance Manager and Finance Director on the same day. However, this letter does not contain anything on her appointment as Finance Director, on school fees and performance bonuses. It does not talk of a Volvo S80 but that she was entitled to the provision of a suitable Company car for her daily use for which maintenance and upkeep were paid for by the Company as well as reasonable fuel usage per month. The plaintiff told the court that she however, ceased to be a finance manager in April 2011. She further told the court that she was later appointed a Finance Director which came with the benefits she is claiming on the 16th July 2007. To prove her claim she produced exh 2, the C.R. 14 which confirmed her appointment. However, the C.R. 14 is headed "Particulars of Directors and secretaries/principal officer and any changes therein". Just above her names are headings in bald letter saying "Secretaries (d) and Principal Officer (e). What is important to note is that the C.R.14 Form is silent about the benefits the plaintiff is claiming. She therefore did not produce her letter of appointment as Finance Director and her explanation was that from 2007 to 2011 when she was stopped as Finance Manager she did not receive any communication confirming her new appointment. The reason being that the contract of Finance Director was supposed to have been done by the Chairman of the Company who was then based in the United Kingdom but left before doing it and the one who took over never presented it to her for reasons she does not know. She conceded that she has not been reporting nor performing any duties at the defendant's company since April 2014 despite the fact that her name still appears on the list of Directors.

In its application for absolution from the instance the defendant submitted that the plaintiff failed to prove her case and in particular she-

1. failed to show that she was employed as Finance Director;
2. failed to show that as such finance director she was entitled to performance bonuses; and
3. admitted that she neither owned the motor vehicle nor purchased nor that it was due to her.

In her opposition to the application the plaintiff submitted that she managed to provide evidence of an instruction from the defendant's Managing Director authorising the defendant's bank to effect payment of fees to Rhodes University for the plaintiff's son. That she led unrefuted evidence showing that all the other Executive Directors were entitled to cars during their tenure of office and such cars were not reposed from them upon retirement. She therefore prayed that the defendant at the very least be put to its defence in order to answer the claims made against it.

With the greatest of respect the plaintiff only managed to prove her appointment as a Finance Manager a position she has since been fired from. As regards her appointment as Finance Director and the attendant conditions and benefits she virtually presented no evidence other than her viva voce evidence. A close scrutiny of the C.R. 14 shows that at least she was appointed under the categories of either secretary grade (d) or Principal Officer grade (e). In my view it would not make sense that she was appointed on the same day to two grades of Finance Manager and then Finance Director and was given one letter of appointment at the exclusion of the other. There is just insufficient evidence placed before the court warranting the placing of the defendant on its defence.

As was stated by the Appellate Court in the case of *Oosthuizen* v *Standard General Versekeringsmaatsakappy* Bpk 1981 (A) at 1035H-36A "If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution." Where there is only one defendant, as *in casu*, at the close of the case for the plaintiff, "it can be fairly inferred that the Court has heard all the evidence which is available against the defendant, any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. That being so it is considered unnecessary in the interest of justice to allow the case to continue any longer if, the plaintiff has closed his case, there is no *prima facie* case against the defendant"; *Vide Putter* v *Provincial Insurance Co Ltd and Another* 1963 (4) SA 771 9WLD) at 772F-G.

For the above reasons to put defendant on its defence would be tantamount to bolstering the otherwise weak case for the plaintiff. In the result I will grant the application for absolution from the instance.

IT IS ORDERED THAT

1. The application for absolution from the instance is hereby granted with costs.

Muvingi & Mugadza, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners