KIM BIRKETOFT
versus
THOMAS VALLANCE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 13, 15 July, 17 November 2016 and 6 September, 2017

Civil Trial

F Chimwamurombe, for the plaintiff
Defendant *in person*

CHITAKUNYE J: On the 23 April 2015, the plaintiff sued the defendant for damages in the sum of US$11 700.00 and costs of suit.

In the suit, the plaintiff alleged that sometime in February 2014, he engaged the services of the defendant to represent him in a labour dispute that had arisen between him and his three domestic workers.

The defendant had presented himself as a specialist practitioner in the field of labour law having the relevant expertise, knowledge and skill in that field of practice.

The defendant upon being briefed by the plaintiff undertook in writing that:

1. The plaintiff would not have to pay any money at all to any of the three former workers;
2. That he would attend to any deliberations and proceedings relating to the matter at the Ministry of Labour;
3. That he would prepare an application for review to the labour Court should it have become necessary.

In breach of his mandate, the defendant failed to exercise the requisite skill and diligence by failing to attend to the proceedings at the Ministry of Labour and the High Court. The defendant also failed to respond to pleadings filed in the matter. He also neglected to advise the plaintiff of further developments in the proceedings regarding the Labour dispute resulting in an arbitral award being granted in default against the plaintiff whereas the plaintiff had a valid defence to the claim.

As a consequence of the defendant's breach, the plaintiff alleged that he suffered damages in a total sum of US$11 700.00 broken down as follows:

a) US$ 8 000.00 being the final settlement made to the former employees;
b) US$ 400.00 being the legal fees paid to Danziger & Partners for rescission of judgment of the arbitral award;
c) US$ 1 400.00 being the legal fees paid to Danziger & Partners for an urgent application to the Labour Court for stay of execution of the arbitral award;
d) US$ 500.00 being the legal fees for interpleader proceedings;
e) US$ 400.00 being the Arbitrator's fees; and
f) US$ 1 000.00 being a refund of the fees paid to the defendant.

The defendant, in his plea, denied that he had accepted any mandate from the plaintiff. He indicated that he did not hold himself out to be a specialist practitioner in labour law. He, however, acknowledged to have been engaged by the plaintiff in a labour dispute and that he had undertaken to represent the plaintiff. He contended that he did attend to the proceedings at the Ministry of labour as per his undertaking. He however did not attend to the High Court proceedings as he had no authority to appear at the High Court. He thus contended that he was not in breach of his undertaking and so he was not liable for the plaintiff's claim.

At a pre-trial conference held on the 29th September 2015, the following issues were referred to trial:

1. What were the terms and conditions of the parties' engagement on the labour dispute?
2. Whether or not the defendant breached his mandate by failing to exercise the requisite skill and diligence as professed by failing to attend proceedings at the Ministry of Labour and the High Court;
3. Whether or not the plaintiff suffered damages in the amount of US$ 11 700.00.

The plaintiff gave evidence after which the defendant also gave evidence. It was common cause that the plaintiff engaged the defendant for the purposes of defending his former employees' claims. In that regard the defendant portrayed himself as someone well versed in labour disputes. It was not disputed that the terms of the engagement were as per exhibit 1, which is a document by the defendant addressed to the plaintiff dated February 28, 2014.

A perusal of exh 1 shows that the defendant upon being briefed about the labour dispute assured the plaintiff that the employees' claims will come to naught as he will employ a number of strategies and tactics. He outlined the procedure he will employ which was basically of frustrating the former employees and the system.

In terms of his service, which he termed professional services, the defendant stated in para E of exh 1 that:

> "1.My professional services incorporate competently dealing with the matter as the situation demands and as I deem appropriate.
> 2. My experience has proved that with 'false claims', I have to date, every instance, caused the matters to come to naught.
> 3. However, should it not be possible through the numerous strategies and tactics I will adopt and implement, to avoid the matter going to arbitration, and an Award is handed down against yourself, I will prepare an "Application For Review of Arbitral Award" to the labour Court."

After stating the above as the professional services he will render, the defendant proceeded in paragraph F to state his undertaking in these terms:

> "1. I confidently undertake to handle the matter on your behalf.
> 2. I hereby give you a guarantee that this matter will in due time come to naught, and that you will not have to pay out any moneys to any of the three former employees.
> 3. However, I cannot predict how long it will take before it is brought to finality.
> 4. As elaborated in our verbal discussions, the employees' claims will be portrayed as being false and as having no substance.
> 5. My involvement and advises and services incorporate attending to any and all deliberations and proceedings relating to the matter, at the Department of Labour, arbitration, and, should it become necessary, the preparation of an "Application For Review" to the Labour Court.
> 6. As discussed with yourself, and agreed, I will do everything possible to frustrate the arbitration process so causing it to drag out for as long as possible, and in due course to dissipate and so come to naught."

Having made the above undertaking the defendant demanded of the plaintiff not to talk to the employees or other persons purporting to represent the employees or labour officials, arbitrator or unions but to refer them to him.

It is in these circumstances that the plaintiff left his labour dispute in the professional hands of the defendant.

Though, in his pleadings, the defendant denied that he had portrayed himself as a specialist in labour disputes, exhibit 1 shows that he clearly held himself as such.

Further, he is cited as:

> "Thomas Vallance Esq ACIArb,
> Executive Director, Arbitrator, mediator, Dispute Resolution Practitioner.
> As director of Dispute Resolution Services pbc."

In his evidence the defendant confirmed as much that he is a specialist in labour matters. He confirmed that he has been a consultant in labour matters since 1994. He thus has been a labour dispute practitioner for over 20 years. It is those 20 years of practice and the qualifications he purported to hold that tended to confirm his status as a professional in labour disputes.

It is thus true that the plaintiff engaged him in his capacity as a specialist or professional in labour disputes. The defendant was expected to exhibit the skill and diligence expected of an expert in handling labour disputes.

The plaintiff testified that in terms of their engagement, the defendant was supposed to attend to his labour dispute without fail. However, in breach of his undertaking the defendant failed to attend proceedings at the Ministry of Labour and at the High Court resulting in an award being made against him in default and that award was registered at the High Court to his prejudice. Besides failing to attend the proceedings at the Ministry of labour and at the High Court, the plaintiff alleged that the defendant did not inform him of further developments in the labour dispute.

As a result of the negligent conduct by the defendant the plaintiff said that an award was granted against him in default whereas he had a valid defence to the claim by the former employees.

The plaintiff further testified that as a consequence of the defendant's negligence or failure to perform as expected, he suffered patrimonial loss. He outlined the loss as including:-

a) costs in having to engage legal practitioners to apply for the rescission of the arbitral award granted in default;
b) costs for the urgent application at the Labour Court for a stay of execution of the arbitral award;
c) legal fees that he paid for interpleader proceedings he instituted to stem execution of the award;
d) fees that he paid to the Arbitrator; and
e) the fees he had paid to the defendant for services to be rendered. He had paid the defendant a sum of US$ 1000.00.

The plaintiff also claimed the sum of US$8 000.00 he had paid to the former employees in a final settlement of the dispute.

The defendant, on his part, testified that he attended proceedings at the Ministry of Labour. The occasion that he did not attend, which led to the award being granted in default, he had not received the notice of the hearing and so he was not to blame.

As regards the registration of the award at the High Court, the defendant testified that he never undertook to represent the plaintiff at the High Court as he had no right of audience at that court. He blamed the plaintiff for not having opposed the registration of the award in the High Court.

It is, however, pertinent to note that the defendant did not deny that the plaintiff incurred the costs outlined above as a direct consequence of the orders granted in default which had to be stayed and set aside through the applications alluded to above.

A careful analysis of the evidence confirms that the defendant portrayed himself as an expert in labour disputes of not less than 20 years dealing with similar disputes. Not only was he introduced as such to the plaintiff by plaintiff's friend, but the defendant had confirmed this as well both verbally and by virtue of exh 1. The defendant further confirmed that he had presented papers as resource person on such labour matters at conferences of the Commercial Farmers Union (CFU). The defendant's assertion that he was an expert could not be taken simply as bragging by an exited novice at the sight of money. He clearly knew and appreciated what was involved and from his many years of experience he can be considered as an expert in labour matters. As a professed expert in labour matters he was expected to exhibit the standard of skill, knowledge and diligence expected of a reasonable expert in labour disputes.

In Law of Delict, seventh Edition, 2014 at 145, the authors, Neethling Potgieter stated the legal position in this manner:

> "Thus in the case of an expert such as a dentist, surgeon, attorney, electrician, etc the test for negligence in respect of the exercise of the experty activity is the test of the so-called reasonable expert. .."

In *Honey & Blanckenberg* v *Law Society* 1966 (2) SA 43 @46E-F GOLDIN J stated therein that:

> "In the performance of his duty or mandate, an attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. If, therefore, he causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client."

Though the above case pertained to the legal profession I am of the view it can apply with appropriate modification to an expert in labour matters. Such an expert holds himself out as possessed of the skill, knowledge and diligence expected of one handling labour disputes. *In casu*, the defendant clearly confessed to that.

The test that should apply was reiterated in *Mapingure* v *Minister of Home Affairs & Others* SC22/14 in these terms:

> "The test for professional negligence was expounded by the learned judge of Appeal, at 1077D-I as follows:
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> 'For the purposes of liability culpa arises if-
>
> (a) A reasonable person in the position of the defendant- (i) would have foreseen harm of the general kind that actually occurred;
> (ii) would have foreseen the general kind of causal consequence by which that harm occurred;
> (iii) would have taken steps o guard against it; and
> (b) The defendant failed to take those steps."

In casu, the defendant was well aware of the consequences of failure to attend any of the hearings called at the Ministry of Labour hence he undertook to attend the hearings without fail. As it turned out he did not attend the hearing of the 6th November 2014 before the Arbitrator.

Whilst the defendant testified that he did not attend the meeting of the 6th November 2014 because he had not been notified of the same, and so he could not be held to have been negligent, this contention was improbable.

It is evident that whilst the plaintiff and the defendant were not agreed as to whether defendant was notified of the hearing or not, the events leading to the issuance of a default order as chronicled by the Arbitrator was as follows:

a) On 6th June 2014 the arbitrator issued an award for the reinstatement of the employees
b) On 17th and 19th July 2014 the employees representative applied for quantification of damages as the plaintiff had refused to reinstate them;
c) The hearing was set down for 15th August 2014. On that day the matter was postponed as the plaintiff had not been properly served;
d) The hearing was rescheduled for 23 October 2014. On the 5th September the arbitrator received a notice from Mr T Vallance advising him he was representing the plaintiff and that all correspondence be served at his address;
e) On 16th October 2014 the plaintiff's representative (T. Vallance) was served with a notice for hearing and dully acknowledged it. However, on 22 October 2014 the plaintiff's representative filed a notice of postponement of the hearing to enable him

to attend his health tests and observations. The postponement was granted despite the employees' contestation.

f) Another notice was issued on the same day for the hearing on the 6th November 2014. The notice was duly served on the plaintiff's representative.
g) On the 6th November 2014, the plaintiff's representative did not attend the hearing and the arbitrator proceeded to hear submissions from the employees' representative and duly quantified the damages in respect of each of the three employees.

As far as the chronology of events is concerned the defendant did not have much to dispute serve to contend that he did not receive the notice of the hearing of the 6th November 2014. I however did not hear him to deny that he had been served with previous notices and that he had sought a postponement of the hearing on health grounds. The postponement to the 6th November 2014 was at his instance and, in my view, the arbitrator had no cause to misrepresent that defendant had been served with the notice for that date.

It was apparent to me that the defendant's conduct towards the arbitration proceedings was in keeping with his modus operandi as alluded to in exhibit 1. The impediment to the arbitration process was as per his strategy.

It is pertinent to note that as early as the conciliation stage the plan had begun to be implemented. In this regard in clause A 5-7 of that exhibit the defendant stated that:

> "5. Notwithstanding, to date one conciliation hearing 'been set down, to which, intentionally, neither yourself nor myself attended.
> 6. Said "conciliation hearing" had to be postponed by the labour officer:
> 7. We verbally advised the labour officer to set another date, for which we have not yet received a Notification."

The strategy of intentionally not attending proceedings under whatever pretext had started being implemented.

Further, in clause F 6 he categorically stated that:

> "As discussed with yourself, and agreed, I will do everything possible to frustrate the arbitration process so causing it to drag out for as long as possible, and in due course to dissipate and so come to naught."

It was clear that despite the acknowledgment that an award will most likely be granted, the defendant set upon a course of frustrating the process in such a manner that he expected the employees to throw in the towel. The plaintiff was made to place his faith in the defendant and he was expected to be patient as the defendant put his strategy into effect. I am of the view that the defendant was misleading the plaintiff in making him believe that by failing to attend to the merits of the matter, the case would dissipate. As a person who had been

engaged in labour disputes for so many years the defendant ought to have known that dilatory tactics have their own limits. It is not every claimant who would easily give up on their claim just because a defendant is employing such strategy. The strategy portrayed a lack of diligence on the part of the defendant as clearly he risked having a judgement granted against his client.

In the circumstances can it be said by taking such a gamble the defendant was negligent. Negligence implies that one fails or neglects to conduct themselves in a particular way expected of a reasonable expert in the particular practice. *In casu,* when the former employees' representative noted that the plaintiff's representative had absented himself despite knowledge of the date of the hearing for the quantification he properly asked for the hearing to proceed. The arbitrator, upon accepting that the defendant was aware of the date of hearing, duly proceeded to quantify the award.

Despite knowledge of his default, the defendant took no steps to ascertain the results of the hearing and was only alerted to the process when the plaintiff advised him of the application for registration of the award.

Upon being served with the application the defendant did nothing outside a mere promise to act hence the award was registered and a writ for its enforcement issued. It was only in January 2015, that he belatedly filed a fatally defective application for review of the 6 November 2014 proceedings at the Labour Court.

The defendant was thus negligent in failing to do that which he was expected to do, that is to attend the hearing and to take appropriate steps to prevent prejudice to the plaintiff. His strategy did not enable him to provide the service he had been paid to; that is to appear at the hearing and argue plaintiff's case on the question of quantification of the award.

The other aspect that the plaintiff alluded to as evidence of negligence was that when the employees applied for registration of the award at the High Court, he, as per defendant's instructions, gave the court papers to the defendant who promised to attend to it but never did so hence the award was registered without any contestation. The defendant's simple response to this was that he had no right of audience before the High Court and that in terms of exhibit 1 the High Court was not one of the fora he had undertaken to represent the plaintiff.

Whilst this may seem a good answer, the defendant did not clearly refute the allegation that he was handed over the court papers and that he had promised to attend to the matter. It is most probable that he made the promise as stated. The plaintiff had placed his faith in the defendant due to the defendant's representation albeit misplaced.

I am of the view that the impression from the evidence as a whole and the manner the two parties testified, the plaintiff was a much more credible witness than the defendant. The defendant impressed me as 'a professional' who was not candid with court.

It was clear that as a result of his conduct the plaintiff had to incur costs in having to engage legal practitioners to attend to the same labour matter that defendant had undertaken to attend to. The legal practitioner had to firstly apply for the rescission of the orders granted in default before settling the dispute on the merits. The applications the plaintiff incurred costs on were all because of the defendant's negligence. It is only proper that the defendant be held liable for that.

As regards the sum that the plaintiff paid as a final settlement to his former employees, I am of the view that that may not be refunded. It was not shown that the plaintiff was not legally or lawfully indebted to the workers or that on the merits plaintiff would not have paid the sums. If anything the fact that after engaging the services of legal practitioners, he still paid the sum tended to show that he acknowledged that there was merit in the award serve for disagreements on the quantum. In any case it is pertinent to note that the award against the plaintiff was made on the 6th June 2014 and had not been challenged. The quantification of the award was necessitated by the fact that the plaintiff had refused to re-instate the workers hence the request for quantification. The decisions granted in default pertained to that quantification and not the issue of liability. If the plaintiff had a valid defence to the issue of liability the legal practitioners would surely have challenged the issue of liability and not negotiated a settlement as they did.

The damages that plaintiff suffered will thus be assessed at the costs he would not have paid had the defendant performed his duty properly despite the quantum that would have been determined.

I thus conclude that the claim for a refund of US$ 8 000.00 paid to plaintiff's former employees should not be allowed. The defendant is liable for all the other costs incurred by the plaintiff as a consequence of his negligence.

Accordingly judgement is hereby granted for the plaintiff in the sum of US$3 700.00 comprising:

a) US$ 400.00 being the legal fees paid to Danziger & Partners for the Application for rescission of the judgement of the arbitral Award:
b) US$ 1 400.00 being the legal fees paid to Danziger & Partners for an urgent application to the Labour Court for Stay of Execution of the Arbitral Award;
c) US$500.00 being fees for interpleader proceedings

d) US$ 400.00 being the Arbitrator's fees.
e) US$ 1 000.00 being a refund of the fees paid to the defendant; and
f) Costs of suit.

Mberi Chimwamurombe Legal Practice, plaintiff's legal practitioners.

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