

LUCKBOY VUDZI  
versus  
DOCTOR S ZEIDAN

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 2 & 3 February 2016

### **Judgment on Absolution from the instance**

*Ms M Chigwaza*, for the plaintiff  
*D Drury*, for the defendant

ZHOU J: The plaintiff issued summons in terms of which he is claiming against the defendant payment of a sum of US\$23 925-00 together with interest thereon at the prescribed rate, and costs of suit. The claim, as set out in the declaration, is in respect of services rendered to the defendant at the latter's special instance and request. The plaintiff's case is that the services related to the setting up of computers and other equipment for the purposes of establishing the business of an internet café. The various charges upon which the total amount claimed is based appear in the declaration in para 8 thereof.

The defendant filed a plea and a counterclaim. In the plea, the defendant denies the alleged agreement and pleads that, in fact, the plaintiff is the one who approached him for a loan to purchase computers and other equipment to set up the business of an internet café. In the counterclaim the defendant is seeking to recover the amount which he says was loaned and advanced to the plaintiff pursuant to the loan agreement.

The plaintiff gave evidence himself and called no other witness. After the closure of the plaintiff's case the defendant applied to be absolved from the instance.

The law in respect of applications for absolution from the instance at the close of the plaintiff's case is settled in this jurisdiction. The *locus classicus* on that matter is the celebrated case of *Gascoyne v Paul & Hunter* 1917 RPD 170 at 173, where the court said:

“At the close of the plaintiff’s case, therefore, the question which arises for consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, is there such evidence upon which the court ought to give judgment in favour of the plaintiff.”

In the case of *Supreme Service Station (1969 (Pvt) Ltd v Fox and Gooldridge (Pvt) Ltd* 1971 (1) RLR 1 (A), to which Miss *Chigwaza* referred the court, BEADLE CJ put the test as follows;

“The test, therefore, boils down to this : Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make....”

More recently, in the case of *United Air Carriers (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343 B – C it was held:

“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 also *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94 F – G.

What emerges from the above authorities which is a principle explicitly stated in the case of *Supreme Service Station (supra)* and the *Gascoyne case* is that an application for absolution from the instance at the close of the plaintiff’s case is akin to and stands on the same footing as an application for the discharge of an accused person at the close of the case for the prosecution in criminal proceedings.

Relating the above principles to the evidence in this case the following can be said. The plaintiff’s evidence was that he was engaged by the defendant to set up computers and other equipment for the purposes of establishing the business of an internet café. All the equipment purchased was paid for by the defendant. There was no agreement on the fee to be charged by him for his services, save for the alleged advice by the defendant that he could present his invoice in respect of the fees for the services. The date when such fees were due was not agreed upon.

The plaintiff’s evidence is contradicted by all the documents which were produced during the plaintiff’s case. Firstly, all the documents other than the letter of demand show that the internet café business bore the plaintiff’s name. It was known as Lucky’s Internet café, the name

being derived from his first name. His explanation is that the defendant requested that his (the plaintiff's) name be used because he was well – known in that sector and had a brand name. Quite apart from the fact that no evidence was led of the alleged brand of the plaintiff, the evidence simply cannot stand scrutiny when considered in the light of the other documents. The statement by the plaintiff that the other reason for using his name was to confound a tenant who had been evicted from the premises owned by the defendant and left part of his equipment for an internet café business was not supported by anything and is equally inconsistent with the other documents produced.

All the purchases for the Lucky's Internet Café business were made in the name of the plaintiff's company known as Printers & Printers. That is the company which the plaintiff said was his alter ego, and in which he was the Chief Engineer and Sole proprietor. He clearly was the only beneficiary of that company in terms of business operations according to his evidence. In a letter which the plaintiff wrote to the service providers of the internet service (p. 8 of exh 1.) the plaintiff expressly holds himself to be the proprietor of Lucky's Internet Café. In that letter he complained of poor service which had caused him to incur expenses for the business out of his pocket in respect of rent, wages and other expenses. In his evidence in this court he confirmed that indeed at some point he paid up to US\$150-00 to some trainee technicians employed by the Internet Café. His very tenuous explanation that he paid such a considerable amount because the defendant and his wife had refused to pay them simply does not make sense when one considers his earlier evidence that before those two were absorbed into the Internet Café business he was not paying them a cent – not even for the transport or meals. More seriously, it simply is not the kind of evidence upon which the court reasonably applying its mind thereto could accept when one considers his evidence that he himself had not been paid by the defendant, and his assertion that the defendant never bought him even a bottle of water.

The plaintiff's evidence is that he never claimed any payment from May to November 2010, a period of almost 7 months, even though, according to his evidence, the Internet Café started operating from 11 June 2010 (which he at some point changed to July 2010).

The above evidence taken together is not such that a reasonable court might or could make a mistake and give judgment in favour of the plaintiff. The evidence does not establish any case to which the defendant may be called upon to respond.

On quantum, the evidence would clearly have absolved the defendant from the instance even if the alleged agreement had been established. The figures stated have not been proved, and appear to have been thumb-sucked from the air. Earlier on the plaintiff rendered an invoice in which he was claiming a sum of US\$20 045-00. That amount was the subject of a claim which was subsequently withdrawn before the figure was inflated to US\$23 925-00. The plaintiff's explanation for the changing figures is that the first invoice was based upon 'friendly rates'. However, a look at the two documents reveals that the rates remain the same. What changed are the hours that the plaintiff alleges to have worked, which were increased from four hours in the first invoice to nine hours in the second invoice. Despite reference to 'Union rates,' no evidence of such rates was placed before the court. In his evidence the plaintiff later stated in cross-examination that what he had called 'union rates' were his own business's rates. Where those rates come from is not a matter that was explained.

While the authorities do state that in case of doubt a court must lean in favour of proceeding to the defendant's case rather than disposing the matter by way of absolution from the instance, no such doubt exists in this case. The plaintiff simply did not place evidence which warrants placing the defendant on his defence.

In the result, it is ordered that:

1. Application for absolution from the instance be and is hereby granted.
2. The plaintiff shall pay the defendant's costs in respect of the main claim.

*C Mutsahuni Chikore & Partners*, plaintiff's legal practitioner's  
*Honey & Blanckenberg*, defendant's legal practitioners'