MEGALINK INVESTMENTS (PRIVATE) LIMITED
versus
RESERVE BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 August 2014 & 11 January 2017

Civil Trial – Absolution from the instance

K. Ncube, for the plaintiff
T. H. Chitapi, for the defendant

ZHOU J: The plaintiff issued summons against the defendant claiming payment of a sum of US$46 333-35 together with interest thereon at the prescribed rate from 1 September 2008 to the date of payment in full, and costs of suit. The claim, as set out in the plaintiff's declaration, is in respect of transport services rendered to the defendant by the plaintiff in terms of an agreement concluded by the parties in July 2008. At the pre-trial conference the plaintiff's claim was reduced to a sum of US$32 536-35 after deducting from the original claim a sum of US$13 797-00 which the parties accepted as having been shown to have been paid. The defendant, in its plea, admitted that the plaintiff was indeed one of the companies which were contracted by it to provide transport services. However, it denied that there was agreement for the plaintiff to pay US$0-70 per kilometre as alleged by the plaintiff. The defendant put in issue the services rendered by the plaintiff and challenged the amount being claimed.

In respect of the reduced claim of US$32 536-35, two issues were referred to trial, namely: (1) Whether or not the plaintiff rendered transport services to the defendant which were not paid for and the amount thereof; and (2) Whether or not the plaintiff is entitled to payment which it may prove to be due to it in United States dollars or in Zimbabwe dollars.

The plaintiff led evidence from two witnesses, Dave Siziba and LIoyd Masimura Paratambwa.

Dave Siziba was employed by the plaintiff as a driver during the period stretching from 2008 to 2009. He testified that on a date that he could not recall he was assigned to deliver a consignment of goods belonging to the defendant to a school in Kwekwe. He could not remember the name of the school as well. What he remembered was that on his return trip to Harare his motor vehicle developed a fault at a place known as Martin. The goods which he delivered to Kwekwe were loaded onto his truck from BAK Storage in Harare. He was accompanied on that trip by an employee of the defendant and two police officers. The witness identified a document which is headed: "Stock Dispatch Form (Driver's Copy)", which bears the defendant's name and logo at the top right hand side. The name of the driver is stated as D. J. Siziba which referred to him. His identity particulars are recorded in the form. The destination is given as "Kwekwe" in the Midlands Province. The name of the defendant's issuing officer is recorded in the form as "D. Mazingaizo". The plaintiff's name appears as the trucking company. The registration number of the trailer used to carry the goods is also given as AAK 8095. The form gives details of the goods transported as well as the quantities thereof. The form was signed by the witness and Mazingaizo on 29 August 2008. Below the signatures and the date it is stated that the fuel allocated for the trip was 200 litres. In respect of the trip to Kwekwe an invoice showing a sum of US$1 386-00 was raised.

The second trip that the witness related to in his evidence was from Harare to Marondera and Murehwa. He was the driver during that delivery. He identified the relevant stock dispatch form for that trip. The invoice for that delivery contains a sum of US$1 512-00.

The witness stated that his role was just to drive the truck to the required destination. The process of handing over the goods to the intended persons at the destinations was the responsibility of the defendant's employees who would accompany him on every trip that he undertook.

The second witness, LIoyd Masimura Paratambwa, was employed by the plaintiff as its Administration Officer. His duties entailed arranging the plaintiff's trucks to transport goods for clients or buses to transport passengers. He was also responsible for allocating the trucks to the drivers employed by the plaintiff. He stated that the plaintiff was involved predominantly in the business of transport for goods and passengers. The plaintiff's agreement with the defendant was for the transportation of farm mechanization equipment as well as some groceries. The trip to the

destination was charged at a rate of US$0-70 per kilometre while the return trip was at a rate of US$0-35 per kilometre. The difference in the rates was based on the rationale that during the return trip the truck would not be carrying any goods, hence the reduced rate. The witness identified the invoices and dispatch forms for trips from Harare to Bulawayo, then Zvishavane, as well as for the Harare-Mutare trip. The charges were US$4 152-75 for the Harare – Bulawayo – Zvishavane delivery and US$2 520-00 for the Harare-Mutare trip as shown in the invoices which are contained in the bundle of documents which was produced as exh1. The other invoices were for the deliveries made as follows: Harare Mutoko US$1 323; Harare to Jairosi Jiri Centre in Harare US$378-00; Harare-Marondera Murehwa US$1 512-00, already referred to above by the first witness; Harare-Mount Darwin; Harare-Kwekwe, also referred to by the first witness; Harare-Zvishavane US$2 898-00; Harare-Mange-Insiza US$6 363-00; Harare – Beitbridge US$4 095-00. He stated that some of the trips involved deliveries at different centres such as schools. All trips started from Harare. His evidence which was similar to that of the first witness was that the original of the dispatch form was retained by the defendant. The plaintiff would only receive a photocopy. As for why in some dispatch forms the names of the persons who received the goods were stated while in others they were not mentioned, his explanation was that it was the responsibility of the defendant's officials to handle the deliveries and see to the filling in and signing of the document. During cross-examination the witness stated that whenever the drivers returned from a trip they would hand over to him the copies of stock dispatch forms and any other documents given to them by the defendant's employees. He would give those documents to the plaintiff's accountant. He admitted that in respect of some claims there were errors of calculation of distances which affected the amounts claimed.

After the plaintiff had closed its case the defendant made an application for absolution from the instance. Both parties filed written submissions in support of their respective positions in respect of the application for absolution from the instance.

The *locus classicus* on the principles applicable to absolution is the case of *Gascoyne* v *Paul & Hunter* 1917 TPD, where, at p. 173 the following is said:

> "At the close of the plaintiff's case, therefore, the question which arises for the 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."

The above test, which has stood the test of time, enjoins the court to consider whether on the evidence led on behalf of the plaintiff the court could or might (not should or ought to) find for the plaintiff. The authorities from this jurisdiction and South Africa illustrate that an application for absolution from the instance at the close of the plaintiff's case is akin to and stands on much the same footing as an application for the discharge of an accused at the close of the case for the prosecution. See *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1(A) at 4C-D; *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87(S) at 94F-G; and *Taunton Enterprises (Pvt) Ltd & Anor* v *Marais* 1996 (2) ZLR 303(H) at 313C. In the case of *Supreme Service Station (1969) (Pvt) Ltd (supra)* at p. 5D, BEADLE CJ put the test thus:

> "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 – a definition which helps not at all."

It has been held that:

> "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."

United Air Carriers (Pvt) Ltd v *Jarman* 1994 (2) ZLR 341(S) at 343B-C; *Walker* v *Industrial Equity Ltd (supra)* at 94C-D.

A further principle in relation to absolution from the instance is that in case of doubt the court should always lean in favour of allowing the case to proceed to the defendant's case rather than granting absolution from the instance at this stage of the proceedings. See *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547(H) at 554A-B; *Supreme Service Station (1969) (Pvt) Ltd (supra)* at p. 6. The second point which is related to or reflects the preferred approach, is that courts are "very loath to decide upon questions of fact without hearing all the evidence on both sides". *Theron* v *Behr* 1918 CPD 443 at 451(Per JUTA J), cited in *Supreme Service Station (1969) (Pvt) Ltd (supra)* at p. 6, and in *Standard Chartered Finance Zimbabwe Ltd (supra)* at 553B-C.

What emerges from the preponderance of judicial thinking evidenced by the authorities cited above is that a court should not readily dispose of a matter by way of absolution from the instance at the close of the plaintiff's case unless the evidence tendered is such that the court might not or could not give judgment in favour of the plaintiff should the defendant decide not to lead any evidence. If there is that chance that a court might or could give judgment in favour of the plaintiff then the matter ought to proceed to the defendant's case. The reference to the chance of making a reasonable mistake is intended to underscore the lightness of the burden upon the plaintiff at this stage of the proceedings. I need to point out, too, that at this stage the court is not so much concerned with questions of the credibility of the witnesses and the probabilities of the case as there is nothing to measure those aspects against in the absence of the defendant's evidence. The court at this stage is presented with only one side of the story which alone must be examined to determine whether the requirements for absolution have been satisfied.

The plaintiff's witnesses gave evidence of the services rendered to the defendant by transporting goods to different places. Those destinations or, at least, some of them, are clearly stated in documents which were originated by the defendant and completed in most parts by the defendant's employees. These documents are the stock dispatch forms. The plaintiff's witnesses gave evidence, and were not challenged, that the original documents are in the custody of the defendant. The dispatch forms show on the face thereof that the goods listed therein were delivered by the plaintiff or, at the very least, that the plaintiff was contracted to deliver the goods to the stated destinations. If the defendant contests that the stated goods were transported to the stated destinations or that deliveries were made then it is up to it to lead evidence to contradict its own documents or to show that the plaintiff breached the contract by not transporting the goods stated to the intended destinations. The witnesses for the plaintiff gave evidence, and they were not challenged, that their only employee in each trip was the driver whose duty was to drive to the destination assigned to him. The question as to whom the goods were given is for the defendant's employees who accompanied the truck wherever it went to answer. The issue of whether the distances stated in the invoices are accurate affects only the figures. The defendant has not led any evidence that it paid an amount that corresponds with what it considers to be the accurate distances.

Put in other words, the evidence led on behalf of the plaintiff, including the documents produced, tell a complete story upon which the court might or could find for the plaintiff.

This, therefore, is not an appropriate case for absolution from the instance to be granted.

In the result, it is ordered that:

1. The application for absolution from the instance is dismissed.
2. The defendant shall pay the plaintiff's costs incurred in connection with opposing the application for absolution from the instance.

Gill Godlonton & Gerrans, plaintiff's legal practitioners
T. H. Chitapi & Associates, defendant's legal practitioners