

GEORGE TSHABANGU

Versus

NATIONAL RAILWAYS ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 19 JUNE 2019 AND 14 MAY 2020

Opposed Application

S Mbundiya, for the applicant
T Goro, for the respondent

TAKUVA J: This is an application for Summary Judgment in terms of Order 10 Rule 64 of the Rules of this court. The background of the case is that the applicant who is the plaintiff in the main matter issued summons against the respondent. In his summons, applicant claims the sum of \$40 697-19 from the respondent.

The respondent entered appearance to defend whereupon the applicant makes this present application for summary judgment stating that in his belief there is no *bona fide* defence to the action.

Briefly, the facts are that;

1. The applicant is a former employee of the defendant having reached retirement on 21st of October 2017.
2. During his period of employment respondent failed to pay the applicant his full salary and benefits. The amount due and payable by the respondent to the applicant is the total sum of \$40 697-19, which amount despite demand respondent has failed, neglected or refused to pay.
3. The applicant instituted proceedings against the respondent under cover of case No. HC 695/18, in which the applicant claimed full payment of this amount.
4. The respondent has entered appearance to the summons.

5. The respondent has admitted indebtedness to the applicant in this amount and has only raised that it is having financial challenges and cannot pay all its employees arrear salaries at once.
6. The respondent has opposed this application on the following grounds;
 - (i) that it began making payments towards the arrear salaries and therefore the amount due may have been reduced,
 - (ii) that financial challenges have made it unable to discharge the full amount and
 - (iii) that an agreement exists between themselves and Trade Unions representing their current employees allowing them to make payments periodically.

At the hearing of the matter respondent added two more grounds namely;

- (a) that this court has no-jurisdiction because this is a purely labour matter and
- (b) that the cause of action has not been verified by the applicant. Respondent argued that since these are points of law they can be raised at any time – *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S), *Muskwe v Nyajina and Others* SC – 17-12, *Gold Driven Investments (Pvt) Ltd v Telone (Pvt) Ltd and Another* SC 9-13.

It is only logical that I dispose of the issue of lack of jurisdiction first. It is trite that the Labour Court has exclusive jurisdiction in labour matters – see *Tuso v City of Harare* HH 1-04.

However in *Madinda Ndlovu v Highlanders Football Club* HB 95-11, the court said;

“With regards to the issue of jurisdiction I have had sight of the case of *Tuso v City of Harare* HH 1/04 which was referred to me by Mr Z Ncube which I am grateful. I am of the view, that the present matter is distinguishable as it deals with an acknowledgement of debt which is, itself a liquid document and therefore does not fall within the definition of a labour dispute as envisaged under section 89(6) of the Labour Act (Chapter 28:01). It is my respectful view, that while it was the intention of the Legislature to oust the jurisdiction of the courts from adjudicating on labour matters involving labour disputes, an acknowledgement of debt even if it arises from a contract of labour is not what the legislature intended to mean. An acknowledgement of debt is nothing but a liquid document which is covered by the rules of this court, for which an application for Summary Judgment can be applied for.”(emphasis added)

In casu respondent demanded further particulars from the plaintiff before it filed its plea. Plaintiff supplied the further particulars wherein he filed a letter dated 11 January 2018 by respondent's Human Resources Manager, one G.M Kunda. In this letter, respondent acknowledged liability and confirmed the outstanding amount. Can it be said that this letter is not part of the proceedings filed in support of plaintiff's case as stated in his declaration? In my view, the answer is in the negative.

In order to appreciate its import, it is necessary to produce the whole letter. It is addressed to the applicant. It states:

“REF: PAYMENT OF MY FINAL DUES AFTER RETIREMENT

1. I refer to your letter dated 10 January 2018 regarding the abovementioned subject matter.
2. You are hereby advised that you will be paid a salary on a monthly basis. As you did not qualify for monthly pension emoluments you will be considered for payment of substantial amounts as and when funds permit. I regret to advise that owing to cash constraints faced by the organization, the outstanding amount cannot be paid as a lump sum.
3. You are free to approach my office should there be a need requiring urgent financial assistance.
4. Please accept my sincere apology for the delay in settling your outstanding salaries and any inconvenience caused to you.

Yours faithfully,

G. M Kunda

Human Resources Manager.”(my emphasis)

The author attached a document to this letter scribbled “G. Tshabangu (489317) \$41 258,94”

What in my view is significant to note is that the respondent has not denied liability or its indebtedness to the applicant. What respondent has simply stated is that it has made some payments towards the reduction of the Capital amount and which amount is not stated and further that on the basis of those payments, the Capital amount has been reduced to a figure that is not stated.

This in my view bears all the hallmarks of an acknowledgment of debt. Respondent complains that it denies the quantum of the debt. However this argument is *mala fide* in that respondent knows the outstanding figure or it can easily ascertain the figure. Secondly it knows or can easily find out what it paid to the applicant. This information is exclusively in the custody of the respondent. Surprisingly, respondent decided to pretend that it does not know the amounts paid and the outstanding amount. What would have been *bona fide* was for respondent to provide a schedule of payments showing what it considers as the outstanding amount.

The letter is in my view an acknowledgment of debt in that it spells out the nature or reason for the debt. It acknowledges that certain payments have been made and how the balance will be paid. More importantly, it mentions a figure. For these reasons, this court has jurisdiction to entertain the matter.

The second point *in limine* has no merit in that the cause of action is and has always been the failure to pay arrear salaries. It is neither here nor there that it arises from breach of an employment contract or an acknowledgment of debt subsequently made by the respondent.

On the merits, what the respondent has raised is not a defence at law. In *Hales v Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 234 (H) it was held that:-

“Where a plaintiff applies for summary judgment against the defendant and the defendant raise a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether if these facts are proved at the trial, this will constitute a valid defence to the plaintiff’s claim. It is not sufficient for the defendant to make vague generalizations or to provide bald and sketchy facts.”

In casu, respondent has not stated facts which if proven at trial would constitute a valid defence to the applicant’s claim. Merely alleging financial challenges or incapacity does not amount to a *bona fide* defence. Also the allegation of an agreement is not a defence as the applicant is no longer an employee of the respondent and is not represented by any such Trade Union. In my view, the respondent is being deliberately vague in order to delay the applicant from realising the relief sought.

In the circumstances, I find that the respondent has not tendered a *bona fide* defence and the opposition is merely a delaying tactic.

Accordingly, it is ordered that:

Judgment be and is hereby entered summarily for the plaintiff in case No. HC 695/18 as follows;

1. The respondent is ordered to make payment in the sum of RTGS\$40 697.19 to the applicant;
2. The respondent be and is hereby ordered to pay interest *a tempora morae* at the rate of 5 percent per annum calculated from the 1st of November 2017 to date of payment in full.
3. The respondent be and is hereby ordered to pay applicant’s costs of suit.

Messrs Webb, Low & Barry Inc Ben Baron & Partners, applicant’s legal practitioners
Mbidzo Muchadehama & Makoni c/o National Railways of Zimbabwe, respondent’s legal practitioners

