HB 122/18
HC 1777/04
X REF HC 1188/07; HC 4241/12

JOSEPH MARSHAL STUART

Versus

NATIONAL RAILWAYS OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 20 APRIL & 31 MAY 2018

Judgment

V. Majoko for the plaintiff
A. Muchadehama for defendant

NDOU J: The plaintiff has applied for leave to re-open the case to adduce further evidence after the close of the defendant's case. This kind of application is rare in practice. This interlocutory application should, however, be understood in the context of the peculiar facts of this case. The gravamen of this application is the following. When the plaintiff was presenting his case, he indicated that he wanted to call a witness in the employ of the Human Resources Department of the defendant, one Ndlovu. Mr Ndlovu is the Personnel Manager at the defendant. *Mr Majoko*, for the plaintiff stated "My Lord the plaintiff has proposed and had subpoenaed the personnel manager of the National Railways of Zimbabwe, Mr Ndlovu but we were advised yesterday that he would not be available until about the 23rd of January. …"

In response, *Mr Muchadehama*, for the defendant had this to say – "My Lord in relation to the witness that was the first time matter that was said. I had not been made to be aware that my learned friend (was) seeking the presence of that witness… In my respectful observation my Lord it's not the proper thing to do. *We also advised my learned friend that the very witness that he intends to call is our witness, witness from the NRZ to come and deal with those issues that was (sic) raised during cross-examination. I submit my Lord that it is not proper for my learned friend to seek to call a witness who we wanted to call and, who will certainly be conflicted in terms of his testimony."* (emphasis added)

In response *Mr Majoko* stated – "… I did look at the synopsis of evidence there was, I must point out, no indication that the witness we proposed to call would actually be called by the defendant. And so I am not aware of a rule that gives one party monopoly of witnesses over the other. If he is a dispassionate witness of the truth as he should, then he must be available to be called even by the plaintiff. *The reason why this witness is sought, part of the plaintiff's claim relates to prospective damages, what he has lost or what he stands to lose. So it requires someone with information as to what the plaintiff's … what his colleagues are actually being paid so that they can observe as to what he would have been paid had his employment continued and so he becomes a necessary, a material witness in this regard.* (emphasis added)

The matter was postponed before this issue was resolved. On resumption, *Mr Majoko* addressed the court in the following terms:

> "My Lord last year the plaintiff indicated that he was desirous of calling Mr G. Ndlovu the human resources manager of the defendant and counsel for the defendant indicated that they would be calling the same witness and the parties have exchanged correspondence on the issue of that particular witness and the defendant has confirmed that Mr Ndlovu remains their witness and is not available to be called as a witness for the plaintiff. On the understanding that the defendant will be calling Mr Ndlovu, the plaintiff has no other witness to call and will be closing his case. If on the other hand there has been a change and the defendant no longer wises to call Mr Ndlovu then the plaintiff wishes to call Mr Ndlovu so perhaps at this juncture before formally closing counsel for the defendant would shed light on how they propose to deal on whether they will be calling Mr Ndlovu or not."

In response *Mr Muchadehama* had this to say:

> "It is correct my Lord that the parties exchanged correspondences in relation to Mr G. Ndlovu or any other person in his department as a potential witness. What, however, we made clear to my learned friend was that Mr G. Ndlovu was a witness for the defendant and he was going to be called as a witness by the defendant to rebut whatever evidence the plaintiff will be led against the defendant. So what was clearly made known to the plaintiff was that we were only going to call Mr Ndlovu to rebut the evidence that he would have been led against defendant. We also made it clear to the plaintiff that it was entirely up to him to prove his case against the defendant, to bring to court whatever evidence he feels to prove his case, not to depend on the defendant to prove his case against it's (case). So my Lord what I am saying here is the defendant was going to call Mr Ndlovu only if the plaintiff has led evidence against the defendant. What they indicated is that they were totally against the calling of Mr G. Ndlovu by plaintiff in order to be used to prove the case against defendant. But my Lord what must be clear from the record is that the plaintiff has actually closed his case. So whether or not the defendant is going to call G. Ndlovu or not is now of no consequence because the plaintiff has clearly indicated that he is now closing his case. That should be the end of the matter. So again even if the defendant has called G. Ndlovu or not, for now it is of no consequence because the plaintiff has closed his case."

Mr Majoko then said:-

> "Yes it is degenerating I think into a game of wits which a trial should not be. The plaintiff closes his case with a rider that the defendant should know that if the defendant (does) not call Mr G. Ndlovu they can be certain an application is going to be led to re-open the plaintiff's case to lead Mr Ndlovu's evidence. That evidence had not been led on the understanding that Mr Ndlovu is a witness for the defendant but should the defendant then not call him and close his case, then plaintiff reserved the right to re-open its case and still call Mr Ndlovu."

The defendant closed its case without calling Mr G. Ndlovu to testify. In the circumstances, the plaintiff has applied to re-open his case and call him. The defendant strongly opposes the application to re-open the plaintiff's case for the aforesaid purpose. In terms of Order 19 Rule 437 (5) of the High Court Rules, 1971, either party may, with the leave of the court, adduce further evidence at any time before judgment, but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.

It is trite law that the discretion to permit the adduction of further evidence must be exercised judicially, upon consideration of all relevant factors, and in essence it is a matter of fairness to both sides. Key factors for consideration are: (1) explanation for the failure to lead

the available evidence timeously; (2) the danger of prejudice to the other party, and (3) sufficient materiality of the evidence – *Mkwananzi* v *van der Merwe & Anor* 1970 (1) SA 609 (A) at 616B; *Coetzee* v *Jansen* 1954 (3) SA 173 and *Blose* v *Ethekwini Municipality* (20053/14) [2015] ZASCA 87.

In the current matter the explanation for the non-timeous calling of the witness is justifiable as evinced by the submissions made by Mr Majoko above before the plaintiff closed his case. As alluded to above, the plaintiff put a rider that should the defendant decide not to call Mr Ndlovu, he will apply to re-open his case for the purposes of adducing evidence from him. As shown above, the defendant strenuously opposed the calling of Mr Ndlovu by the plaintiff saying the said was its witness. In the circumstances, the plaintiff did not intentionally withhold the evidence of the said witness. The plaintiff tried in vain to adduce the testimony of Mr Ndlovu timeously but fails because of the opposition by the defendant. On the question of prejudice I do not think the defendant will suffer any prejudice. This witness was its witness whom it deliberately abandoned. In any event defendant will be afforded the opportunity to cross-examine the witness if it so wishes.

Finally, there is sufficient materiality of the evidence of the witness. It is on account of such materiality that the defendant initially jealously protected him as its witness. If the evidence of the witness is not material the defendant would not have vehemently opposed attempts by the plaintiff to call him.

In the circumstances, I grant leave to the plaintiff to re-open his case and adduce the evidence of Mr G. Ndlovu.

Majoko & Majoko, plaintiff's legal practitioners
Mbidzo, Muchadehama & Makoni, defendant's legal practitioners