

EDMORE MASENDEKE
versus
KUKURA KURERWA BUS SERVICES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 7 September & 12 October 2016

Civil Trial

J. Zindi, for plaintiff
N. R. Sai, for defendant

CHIGUMBA J: The plaintiff issued summons against the defendant, on 21 April 2015, claiming, amongst other things, payment of the sum of USD\$100 000-00 as damages for violation of his freedom from discrimination, *injuria* and assault suffered as a result of being denied transport services on account of his disability, as well as interest on that sum at the prescribed rate, and costs of suit. This is an application for absolution from the instance brought by the defendant on the basis that the plaintiff, at the close of its case, had not adduced sufficient evidence to prove its cause of action, as it is pleaded. The defendant's application is premised on the settled principle of law, that a plaintiff will successfully withstand an application for absolution from the instance, if, at the close of its case, there is evidence upon which a court, directing its mind reasonably to such evidence, could, or might find for him. The issue that arises for determination in this application is therefore whether the plaintiff has adduced sufficient evidence to support the cause of action which he seeks to rely on, and whether the court could or might find for him on the basis of such evidence.

In the plaintiff's declaration it is averred that; at 10 o'clock in the morning of 20 October 2013, he boarded a bus belonging to the defendant in Kwekwe. It is common cause that the plaintiff cannot walk on his own without assistance due to a physical disability. He was accosted by defendant's conductor as he was boarding the bus, and asked rude and embarrassing questions

which impaired his dignity. The conductor addressed his sister and asked her whether she had given him his bus fare but did not offer him a seat. There was no area reserved for persons with disabilities on the bus as required by law. The plaintiff eventually found a seat for himself in the third row from the front of the bus. The conductor was rude to the plaintiff who withheld payment of the bus fare after the bus had started moving, unless the conductor apologized to him. The conductor refused to give the plaintiff his name and contact information.

When the bus arrived in Kadoma, the plaintiff was unceremoniously ejected from the bus by the conductor who with the assistance of two other men, manhandled him off the bus and dumped him on the ground on his back. He suffered contumelia. He was publicly humiliated and left stranded on the side of the road despite being unable to walk on his own without assistance. The basis of the defendant's liability is the *Disabled Person's Act* [Chapter17:01]. The defendant is vicariously liable for the wrongful conduct of its employees who acted within the course and scope of their employment when they verbally abused the plaintiff and forcibly threw him off the bus. The defendant's liability is based further, on *injuria* for negligence because it owes a duty of care to disabled persons. The defendant's treatment of the plaintiff was unfairly discriminatory, contrary to his freedom which is enshrined in s56¹

The defendant entered appearance to defend on 24 April 2015 and sought further particulars on 21 May 2015. Further particulars were supplied on 22 May 2015. The defendant's plea was filed of record on 16 July 2015. The defendant put plaintiff to the proof of his claim, and stated that it was unaware that there was a legal requirement to reserve seats for disabled persons on its bus. It averred that the provision of a name and contact details by its conductor was not a condition precedent to the payment of the bus fare. The defendant denied that it offered to compensate the plaintiff for his alleged treatment while on its bus and challenged the plaintiff to prove that indeed he boarded its bus as claimed. The defendant denied being negligent or unfairly discriminatory. The matter was referred to trial for determination of the following issue:- whether plaintiff is entitled to payment of USD\$100 000-00 or of any sum from the defendant for violation of his freedom from discrimination?

The evidence which was led on behalf of the plaintiff at the trial was that; - on 2 October 2013 the plaintiff identified the defendant's bus as the one which he intended to board from

¹ Constitution of Zimbabwe Amendment number 2 Act 2013

Kwekwe to Harare. The plaintiff's sister assisted him to walk towards the defendant's bus because he is disabled and unable to walk properly. The bus conductor asked the plaintiff's sister if she had given him his bus fare, and if the plaintiff was travelling alone and where he was going. The conductor did not ask the plaintiff or his sister whether the plaintiff could talk or understand him. No other disabled persons boarded the bus at this time. The conductor asked for confirmation that plaintiff could pay before he boarded the bus. The conductor's tone was sarcastic, rude and discriminatory. The plaintiff felt insulted because the conductor did not ask the other passengers who were boarding the bus the same questions. The plaintiff was only allowed onto the bus after his sister confirmed that he had the bus fare, something which the other passengers were not subjected to.

The plaintiff told the driver that he wished to report him for his discriminatory conduct and asked him for his name and contact details which were withheld. The plaintiff refused to pay the fare unless or until the conductor supplied him with the details. The atmosphere on the bus was hostile for the plaintiff. The plaintiff was manhandled and assaulted by the conductor and two unidentified adult males who unceremoniously ejected him from the bus in Kadoma. He was physically unable to defend himself because of his disability and slow reflexes. He was deposited onto the ground, face up, a position which made it more difficult for him to get up, because of his disability. He felt humiliated, degraded, and worthless. The plaintiff felt that defendant should have deposited him at a police station as opposed to taking the law into his own hands.

It was submitted on behalf of the defendant that;- absolution from the instance will generally be granted if at the close of the state case there is no evidence upon which a court may find for the plaintiff on the plaintiff's pleaded cause of action. 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 find for him. See *Supreme Service Station 1969 (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd*², *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd*³, *Walker v Industrial Equity Ltd*⁴, *United Air Charterers v Jarman*⁵. Put differently, the court must assess and weigh the evidence adduced on behalf of the plaintiff, and

² 1971 (1) RLR 1 (A) @5D-E

³ 1984 (2) ZLR 151 (S) @ 158B-E

⁴ 1995 (1) ZLR 87 (SC) @p94

⁵ 1994 (2) ZLR 341 (S)

decide whether the plaintiff has satisfied the court that it is possible that the events alluded to happened in the manner put forward by the plaintiff. The court must decide if it is possible that the plaintiff's version of events is correct. If it is possible, or might be possible, then the plaintiff will have discharged the burden of proof, on a *prima facie* basis. Is the plaintiff's version of events possible, on the face of it?

The submissions which were made on behalf of the plaintiff in response to this application are equally trite, that the courts should lean in favor of continuing a case, see *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor*⁶, and that a defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. See *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors.*⁷ The South African Supreme Court of Appeal has said the following, on absolution from the instance;-

“...when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would be finally required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could, or might, (not should, nor ought to) find for the plaintiff. *Gascoyne v Hunter* 1971 (TPD) 170 at 173; *Ruto Flour Mills (Pty) Ltd v Anderson* (2) 1958 (4) SA 307 (T).” See *Gordon Llyod Page & Associates v Rivera & Anor*⁸.

The defendant contended that the plaintiff's claim was filed in terms of s 8(1) (b) of the *Disabled Person's Act [Chapter 17: 01]* as read with s 8(3) thereof, and that therefore the plaintiff's cause of action was confined to this act. The plaintiff could not rely on the *acquillian* cause of action because it was not specifically pleaded. The defendant referred the court to the case of *Courtney- Clarke v Bassingthwaite*⁹, as authority for this proposition. At p103 the court in that case said that;-

“.....there is no precedent or principle allowing a court to give judgment in favor of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings in a case such as the present and giving judgment in favor of a plaintiff on a cause of action never pleaded”.

In the case of *Makhanya v University of Zululand*¹⁰, the South African Supreme Court stated that;-

⁶ 1988 (2) ZLR 547 (H)

⁷ 2002 (2) ZLR 484 (H)

⁸ 2001 (1) SA 88 (SCA) @p92

⁹ 1990 NR 89 (HC) @ 103

¹⁰ 2010 (1) SA 62 (SCA)

“When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point”.

It is trite that the purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed. A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. See *Imprefed (Pty) Ltd v National Transport Commission*¹¹, *Kali v Incorporated General Insurances Ltd*¹².

Having established the principles which ought to guide a litigant in drafting its pleadings in order to succeed in its cause of action, it was submitted on behalf of the defendant that the cause of action in terms of the Disabled Person’s Act is a narrow one which should be confined to what the lawmaker provided. The guiding phrase, it was submitted, was ‘on the ground of disability alone’, which translates into the following elements which a plaintiff must prove in order to establish a cause of action;-

1. That the plaintiff is disabled
2. That he/she sought access to a service/amenity which is ordinarily offered to members of the public at large
3. That he was denied the service only because he is disabled

A ‘cause of action’ has been defined as “...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved”. See *McKenzie v Farmers’ Co-operative Meat Industries*.

It is common cause that failing to pay the bus fare is an offence in terms of s 43 of the Motor Transportation Act [*Chapter 13:15*];- which provides that;-

“If any person commits any of the following acts with reference to a vehicle used in the operation of a passenger or transport service, that is to say-

- (a)....
- (b)...

¹¹ 1993 (3) SA 94 (A) @ 107C-110(A)

¹² 1976 (2) SA 179 (D) @ 182(A)

(c) Refuses or fails to pay on demand a fare lawfully due from him; shall be guilty of an offence and liable to a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment”.

It is trite that a person should not be allowed to benefit from his/her own wrongful act. See *Brooks v Minister of Safety and Security*¹³. It was submitted on behalf of the plaintiff that he had established a *prima facie case* against the defendant on the issue referred to trial, and that the evidence adduced on his behalf satisfies the definition of discrimination on the basis of disability which is set out in s 56(3) , 56 (4) of the Constitution as follows;-

“Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their...disability.....subjected directly or indirectly to a condition, restriction, or disability to which other people were not subjected...”

Paragraphs 1 and 4 of the plaintiff’s declaration set out the cause of action as being denial of a public service on account of disability. Paragraph 3 contains an admission that plaintiff refused to pay the prescribed fare. The submission made on behalf of the defendant that, by refusing to pay the prescribed fare, plaintiff committed an anticipatory breach or a repudiation of the contract finds support in the case of *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd*¹⁴ where the court said that;-

“It is correct that in determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract. It is also correct that repudiation is a series of anticipatory breach”.

The learned author *R. H. Christie*¹⁵, had this to say about breach of contract;-

“If it takes place before performance is due it is sometimes described as anticipatory breach and may take the form of a statement that the party concerned is not going to carry out the contract, or an unequivocal tender to perform less than what is due, or an unwarranted but unequivocal refusal by a buyer to pay the full purchase price, irrespective of his true intention and the amount of any reduction that may be claimed, or the taking of some action inconsistent with the intention to perform, or by his own conduct putting it out of his power to perform...”

It was submitted on behalf of the defendant that;- Plaintiff’s evidence that he refused to pay the prescribed fare unless the conductor supplied him with his name and contact details amounted to a unilateral variation of the contract of carriage. When plaintiff boarded the defendant’s bus he implied that he was willing to be transported to a destination of his choice,

¹³ 2009 (2) SA 94 (SCA) @ 100E-F

¹⁴ 2013 (2) ZLR 309 @p 323 H-324B

¹⁵ The law of Contract in South Africa, 3rd ed @p572-3

along the bus route, in exchange for the prescribed fare. It was not part of that contract of carriage that the payment of the fare could be suspended or varied for any reason. By imposing a condition which did not form part of the original contract of carriage, plaintiff in effect repudiated the contract, even though that may not have been his express intention. He created a different contract. See *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*¹⁶. The question then becomes one of whether the defendant owed the plaintiff a duty of care, or any duty at all when he refused to pay the fare and the contract of carriage was repudiated?

The plaintiff's submission that the defendant ought to have taken him to a police station is undoubtedly correct. There is no doubt that the defendant took the law into its own hands when it ejected the plaintiff off its bus. The evidence is clear however, that the ejection of the plaintiff from the bus was for failure to pay the fare, and not because of his disability. The evidence is clear that, having boarded the bus, plaintiff would have been transported to his destination had he paid the requisite fee. It cannot then be said that the plaintiff was ejected from the bus because of his disability. There was no denial of transport services on the basis of disability. The plaintiff repudiated the contract of carriage when he refused to pay the fare. He was not entitled to any carriage by defendant unless he paid the fare. We find that the cause of action based on the *Disabled Person's Act* was not proved on a *prima facie* basis

Did the plaintiff's evidence support a claim based on s54 of the Constitution? Did he prove, on a *prima facie* basis, that, he was treated in a discriminatory manner for the purposes of subsection 54(3) by being subjected directly or indirectly to a condition, restriction or disability which other people were not, or that other people were accorded directly or indirectly a privilege or advantage which he was not accorder? In my view he did. The plaintiff did show, on a *prima facie* basis, that the conductor subjected him to a restriction to which other passengers were not, by assuming that he could not speak for himself, that he needed assistance to travel to his destination, and that he did not have the prescribed bus fare. The plaintiff did show that he did not receive any assistance to find a seat on the bus despite his obvious disability. We therefore find that there is evidence upon which a court, directing its mind reasonably to such evidence, could, or might find for him.

¹⁶ 1994 (3) SA 673 (A) @ 6841-6845

It is this court's considered view that, although the pleadings did not expressly and specifically rely on s 54 of the Constitution to found a cause of action, it is clear that the Disabled Person's Act was borne of the provisions of s56(6) of the Constitution. It is a Legislative measure which provides for and protects the rights of disabled persons. It is based on the right to non-discrimination which is enshrined in the Constitution. In my view, it is a tautology to say that the Constitution cannot be relied on to found a cause of action when it is the mother that gave birth to the child known as the Disabled Person's Act. This court's view is that the Constitution itself provides that a Constitutional question which arises at any stage of the proceedings can and ought to be dealt with by a court of competent Constitutional jurisdiction. Section 176 of the Constitution provides that this court has inherent power to protect and regulate its own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.

We find that the plaintiff can rely on s54 of the Constitution because it cannot be said, as a matter of law, that he did not plead it as the basis of his cause of action. The defendant is entitled to assume that the case which it had to meet was based on the *Disabled Person's Act* which itself is based on s54 of the Constitution. We find that it is permissible, even at this late hour ask the defendant to meet a case based on s54 of the Constitution. The issue that arises for determination in this application is whether the plaintiff has adduced sufficient evidence to support the cause of action which he seeks to rely on, and whether the court could or might find for him on the basis of such evidence. We find that there is evidence on which this court could or might find for the plaintiff in terms of the cause of action which he pleaded. The plaintiff based his claim on an act of Parliament which was promulgated in terms of s54 of the Constitution, therefore evidence adduced on his behalf is sufficient to found a cause of action. There is evidence on which this court could, find for the Plaintiff, that he was treated in an unfairly discriminatory manner by the conductor of the defendant's bus before he boarded the bus. The rude questioning of the plaintiff's sister, the assumption that he did not have the bus fare, the assumption that he could not speak for himself, were conditions or restrictions to which other passengers who boarded the bus at that time, were not subjected to.

In the result, the application for absolution from the instance must fail. It is hereby dismissed. Costs shall remain in the cause.

Mtewa & Nyambirai, plaintiff's legal practitioners
Mundia & Mudhara, defendant's legal practitioners