NOBERT KATERERE

Versus

STANDARD CHARTERED BANK ZIMBABWE LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 AND 22 MAY 2008

C P Moyo, for the plaintiff
J Tshuma, for the defendant

Trial Cause

NDOU J: This is an application for absolution from the instance at the close of the plaintiff's case. It is in essence a judgment at the close of the plaintiff's case. The lines along which the court should address itself to the question whether it will at this stage of the trial grant a judgment of absolution have been laid in the case of *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 173 by De VILLIERS JP as Follows:

> "At the close of the case for the plaintiff, therefore, the question which arises for consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? … The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant Hunter, in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter" – see also *Mazibuko* v *Santam Insurance Co Ltd & Anor* 1982 (3) SA 125 (A); *Moyo* v *Knight Frank & Anor* HB-87-05 and *Ikeogu* v *Guard Alert (Pvt) Ltd* HB-13-08.

In *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at page 5 BEADLE CJ laid down the test in the following words:

> "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 mistake a reasonable court might make – a definition which helps not at all." – See also *Munhuwa* v *Mhukahuru Bus Services* 1994(2) ZLR 382 (H) at 383G-384A.

This court should be extremely chary of granting absolution at the close of plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of a plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim – *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403(A); *Marine & Trade Insurance Co Ltd* v *Van der Schyff* 1972 (1) SA 26(A) and *Sithole* v *PG Industrues (Pvt) Ltd* HB-47-05.

In casu, therefore, the issue is whether there is a very special consideration for rejecting the plaintiff's evidence or whether the plaintiff has failed to establish an essential element of his claim. The salient facts of the case are the following. In 2000, the plaintiff was based in the United Kingdom. He heard about investment opportunities in Zimbabwe from fellow Zimbabweans. He made enquiries with his friend. As a result of such enquiries he saw a fax from the defendant with investment portfolio that it had on offer. The fax indicated where the money would be invested i.e. Treasury Bills and Bankers Acceptance. The fax also detailed the prevailing rates to be earned. In pursuant to this information, the plaintiff made an application to open two accounts, namely the Foreign Currency Account ("FCA") and the Zimbabwe Denominated Account ("ZDA") with the defendant.

It is the plaintiff's testimony that the FCA was to be used to receive foreign currency i.e. British Sterling Pound that the plaintiff wanted to invest. And, that the ZDA was the account which the British Pounds were to be paid into and thereafter converted in Zimbabwean dollar. The latter would then be invested in Treasury Bills or Bankers Acceptance or whatever investment. The plaintiff said he did not really mind whichever as he had faith in the defendant as his bankers. The plaintiff testified that he did receive statement of accounts which confirmed receipt of his 8 200 Pound Sterling deposited into his FCA, the transfer of this amount into his ZDA as a vehicle for investment. He was satisfied that his instructions had been carried and he left the investment to be run by the defendant. The documentary evidence confirmed that that amount was indeed invested and it indeed earned some interest. The plaintiff's contention, however, is that the agreement between the parties was the FCA and ZDA were going to run parallel. He said this was the verbal undertaking made on defendant's behalf by its employee Bob Matemera and later confirmed by Henry Kwangwari. Put in another way: Did the defendant undertake that the

Zimbabwe denominated interest earned from the investment of 8 200 Pound Sterling would be converted, together with the capital amount, into Pound Sterling? This is the crux of the matter in this case. As alluded to above, the plaintiff evinced that the defendant made such an undertaking through Bob Matemera and Henry Kwangwar. As pointed out above, I have to, at this stage, assume that the testimony of the plaintiff is true. I should not, at this stage, evaluate and reject his evidence – *Atlantic Continental Assurance Co of SA* v *Vermaak* 1973 (2) SA 525 (E), *Claude Neon Lights (SA)* v *Daniel*, *supra*, and *The Civil Practice of the Supreme Court of South Africa* (4th Ed) Herbstein and Van Winsen at 683. Without the evidence by the defendant on the destiny of the invested funds, a court might make a reasonable mistake and give judgment for the plaintiff. Admittedly, the defendant made reference to some documents indicative of the destiny of the plaintiff's investment funds. These

documents have, however, not yet been produced formally and challenged by the plaintiff. What I have is the plaintiff's testimony that he had not been paid his interest and the capital amount in foreign currency as undertaken by the defendant. The timing of this absolution from the instance is, therefore, wrong.

Accordingly, I dismiss the defendant's application from the instance at the close of the plaintiff's case.

Moyo & Nyoni, plaintiff's legal practitioners
Webb, Low & Barry, defendant's legal practitioners