

LAWRENCE SHUMBAYAONDA
versus
MADHATTER MINING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 21 July 2010

N G Maphosa, for the plaintiff
G. Muchandiona, for the respondent

HUNGWE J: The plaintiff issued summons claiming:

1. Payment of \$135 964 920-00 being monies due and payable to the plaintiff in respect of unpaid salary and benefits in terms of the contract of employment which the plaintiff gave written notice to terminate beginning 1 October 2004
2. Interest from 1 January 2008 to date of payment in full calculated at the prescribed rate
3. The release of the Isuzu KB 320 registration No. 780-824W to the plaintiff within 48 hours of the date of this order and
4. Costs of suit.

Defendant entered an appearance to defend.

The basis of the claim is set out in the plaintiff's declaration as follows:-

On 29 September 2004 the plaintiff tendered his letter of resignation from the defendant's employment and gave three months notice with effect from 1 October 2004. Defendant accepted the letter of resignation but instructed the plaintiff to leave employment with immediate effect.

Plaintiff avers that it was also part of the contract of employment between the parties that the company's motor vehicle the plaintiff was using, an Isuzu KB 320 twin cab registration number 780-824W would be given to him after it had travelled 200 000 kilometres. As it had clocked 220 000 km at the date of his resignation, he was entitled to the right of ownership of the vehicle.

In its plea the defendant denied that the plaintiff gave three months notice of resignation. It states that the contract of employment was terminated with immediate effect on 30 September by mutual consent after the defendant waived the three months notice period required of the plaintiff.

Defendant counter claimed for the payment of the sum of \$11 308 680-62 being the balance of a loan due to the defendant by the plaintiff after the deduction of the plaintiff's terminal benefits; interest on the said sum at the prescribed rate from 4 October 2004 to date of payment and costs of suit.

At the pre-trial conference, three issues were identified for the resolution of this dispute. There are:-

- (a) whether the plaintiff is entitled to case in-lieu of leave and; if no;
- (b) whether the plaintiff is entitled to \$135 960-00 or any other lesser amount by way of in lieu of leave; and
- (c) whether the plaintiff is entitled to the Isuzu KB 320 motor vehicle identified above.

Plaintiff gave evidence on his own behalf on the matter.

In respect of the first issue he stated that he joined the defendant's company at a fairly senior level in 1996 and had rose through the ranks to become its general manager (mining) in 1998. He enjoyed the use of a company car. He enjoyed non-contributory medical aid with his family. He decided to resign. He handed in his letter of resignation to the Company's Managing Director on 29 September 2004. The Managing Director requested that he meets him to discuss who was to succeed him and other hand over take over issues. In his letter of resignation, he pointed out that he intended to serve the three months notice period. This effectively meant he would work up to 31 December 2004. As such, if the defendant did not require his services, he would be entitled to three months salary in lieu of notice.

When he went into the meeting with the Managing Director, Mr McTaggart another director, Richard Bridges was called to attend. He says that the meeting was an acrimonious one as Mr McTaggart became rude and upset. He claims that the defendant's Managing Director literally dismissed him in the meeting and ordered that he removes his property from the premises. He denied that the meeting was conducted in an amicable manner. He felt intimidated by the two directors and ended up signing an acknowledgement of debt and a certificate for audit purposes. He denied that he was engaged in a private mining venture. Had he been so found, he could be fired on the sport for conflict of interest. He disputed that the parties agreed to a mutual termination of employment.

He explained why he did not protest the treatment he got by saying he felt overawed by the two directors.

On this issue the defendant says that when McTaggart saw the letter of resignation by the plaintiff he was concerned as to the reasons he gave. Plaintiff had helped build the defendant up to where it was. Why was he leaving? Could it be remuneration or other reasons that he could look into and rectify? When the plaintiff came into his office to obtain the resignation he had asked the plaintiff if he was involved in activities which were in conflict with those of the defendant company. Plaintiff confirmed this to him stating that he had been seeking tribute agreements with Zimasco. Plaintiff indicated that he had also established a Mining Consultancy Company.

McTaggart told the court that in view of the conflict of interest he accepted resignation and terminated the contract of employment between the defendant and the plaintiff. He asked the financial Director one Bridges to finalise any financial agreements with the plaintiff as the plaintiff had taken a loan from the defendant.

In view of the fact that plaintiff was seeking a tributary agreement with Zimasco, which is a client of the defendant, the plaintiff's continued presence at the defendant's premises was in conflict with the defendant's interests. This was the basis for the mutual termination of their relationship.

McTaggart denied that he had promised the plaintiff ownership of an Isuzu KB double cab once it had clocked 200 000 km. He could not do so as any disposal of the defendant's assets required a company resolution to that effect. Previously company managers used Toyota Hilux pick-ups. The managers had requested that they up grade to twin cabs. The Isuzu KB 320 were bought for their use in light of their positions. It was never agreed that ownership of the motor vehicles reverts to them upon the motor vehicles clocking 200 000km.

He had approached one Kudakwashe Makoni to take over the plaintiff's position. The latter accepted. Makoni was given the KB320 to use.

As to whether the plaintiff was dismissed and ordered to leave immediately, McTaggart stated that up till 30 September 2004, the plaintiff enjoyed a professional relationship with the directors of the defendant. The resignation letter tendered by the plaintiff precipitated the meeting of 30 September 2004 in which the directors sought to discuss whether the reason for resignation could be addressed so as to avoid the plaintiff's departure. As the plaintiff made it clear he was going to pursue private interests which were clearly in conflict with the defendant, it was untenable that the plaintiff would serve the statutory three months notice period. In any event there was a loan outstanding which the plaintiff

acknowledged. An amicable solution was found and the parties agreed that upon an appropriate handover takeover being undertaken, the plaintiff would leave. According to McTaggart, this took about a week. The handover takeover involved visits to various mines. It could not be done in a day.

Richard Christopher Bridges is the defendant's Financial Director. His evidence was that he was in charge of Human Resources issues. In September 2004 the plaintiff tendered exh. 1 his notice of intention to retire. A meeting was convened by Mr McTaggart in the latter's office.

The purpose of the meeting was to discuss the plaintiff's resignation. In exh, 1 the plaintiff indicated that he had decided to set up a mining consultancy on his own account. Mr McTaggart wished the plaintiff to leave without giving three months notice, pointing to a conflict of interests. In the discussion it emerged that the plaintiff would be working in competition with the defendant for the benefit of the same client Zimasco. Plaintiff agreed to forego the notice period as this would permit him to start immediately on his new venture. McTaggart asked him to go and work out the plaintiff's terminal benefits.

Plaintiff had taken out a loan for Z\$50 000 000-00 some five or six months before September 2004. Exh. 7 is the loan agreement. He suggested that 4/12 or 5/12 of the loan be deducted in view of the fact that the plaintiff had not met his production target through no fault on his part. He instructed Mrs Thorpe to calculate the plaintiff's terminal benefits and deduct the balance of the loan from those benefits.

Mrs Thorpe did so and produced a schedule setting out the various amounts due to the plaintiff and to the defendant from the plaintiff. Plaintiff was presented with the schedule which he accepted and duly signed. According to Bridges, the plaintiff was pleased with deductions made in his favour.

Bridges then drafted an acknowledgement of debt which the plaintiff signed in Bridges' office. It is Exh 6 of the papers and is dated 30 September 2004.

According to Bridges, it would be unusual for an employee to acquire ownership of a company vehicle on the basis that it has done 200 000km. He denied the existence of such a policy at defendant. He denied that an offer was made to him along those lines.

He only learnt of the plaintiff's claims through a letter of demand from the plaintiff's legal practitioners, exh 7.

According to Bridges, it could be difficult for McTaggart to donate the motor vehicle since he would be acting without the knowledge or consent of other directors or shareholders. Zimasco and two other companies are the shareholders of the defendant. Their consent through a company resolution would have been required to dispose of assets in the manner claimed by the plaintiff.

Mrs Rachael Thorpe is the wages Administrator of the defendant. She did the calculations on exh.6 on Bridges instruction. Plaintiff signed it. She then drafted exh. 8 which she and the plaintiff signed. She telephoned the plaintiff to follow up on payments of the acknowledged debt to no avail till the defendant's legal practitioners wrote exh. 9 to the plaintiff.

Witnesses for the defendant gave their evidence well. They were not shaken by counsel's very thorough cross-examination. They impressed the court as candid witness deposing to matters within their knowledge.

Their evidence flowed and impressed as being consistent with probabilities. They corroborated each other in material respects.

As an example of this is their evidence as to how the meeting with McTaggart progressed. Plaintiff and the two directors attending this meeting. The subject of the meeting was the plaintiff's resignation. One of the directors had said that the plaintiff was involved in a mining venture and in competition with the defendant. Prior to the meeting there was no evidence of conflict of interest. They enjoyed good relations. It is the plaintiff who confirmed his interest in a mining consultancy as well as other mining interests. When their worst fears were confirmed by the plaintiff, they did not waste time to make a proposal. The proposal was to the effect that the plaintiff needed not see out the three months notice period as he had a loan outstanding. Plaintiff accepted this proposal. He signed away whatever rights he may have against the defendant. There is no suggestion that exh. 6 and 8 were signed under duress or induced by fraud. In short the plaintiff by signing exh(s). 6 and 8 waived his rights to a notice period by mutual agreement.

Plaintiff claims that the meeting called to discuss his resignation quickly turned into an inquiry where he was standing accused of conflict of interest. I am unable to agree. If the plaintiff had been dismissed as he argues, he would not have signed the documents which he signed acknowledging indebtedness. Plaintiff was not a timid ordinary worker but a general manager. He knew his rights. He waived his rights as he was indebted to the company over the

loan which he took out. If he was entitled to cash-in-lieu on three months' notice why would he signed an acknowledgement of debt of a lesser amount? In my view this shows that the parties agreed to terminate mutually their relationship. Plaintiff waived his rights and agreed to leave the employ of the defendant on the terms set out in their discussion. He is not entitled at this stage to claim that which he renounced and expressly signed away.

As for the entitlement to the Isuzu twin cab KB 320 registration number 780-824W the plaintiff came nowhere near proving this as an entitlement. It remains company's property.

In the result the plaintiff's claim is dismissed with costs. On the other hand I find that the defendant's counter-claim succeeds with costs.

It shall so be ordered.

Sawyer & Mkushi, plaintiff's legal practitioners
Danzinger and Partners, defendant's legal practitioners