BAREND VAN WYK
versus
TARCON (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 27 November 2012

Civil Trial

P.C. Paul, for the plaintiff
R. Chingwena, for the defendant

MUTEMA J: The plaintiff's declaration reads:-

"1. The plaintiff's claim is for payment of the balance owing in respect of a running account for various transactions.
2. On or about 07 November 2008, Mr Nhemachena who was the financial advisor of the defendant drew up two reconciliation *(sic*) which are annexed hereto marked "A" and "B".
3. That the reconciliations so prepared were agreed between the plaintiff and the defendant.
4. In respect of annexure "A" the balance of $32 074.13 was reduced by a payment of $8 000.00 and in respect of annexure "B" the amount of $30 360.26 was reduced by a payment of $9 277.27.
5. After taking into account the payments made, the total balance owing to the plaintiff was $62 767.12 which amount despite demand the defendant has failed or refused to pay."

The claim, as stated in the summons, "is for payment of the sum of US$62 707.12 being the balance of monies owed by the defendant to the plaintiff arising out of the plaintiff's employment by the defendant being salaries and allowances and charges for the use of the plaintiff's Ohoskosh Low Loader for the period 2002 to 2008 which indebtedness has been frequently acknowledged by the defendant and which amount despite demand the defendant has failed or refused to pay plus costs of suit."

The defendant denies owing the plaintiff anything or that any reconciliation was done on its behalf. It avers that the plaintiff had no contract of employment with it but

with Tarcon Limitada of Mozambique. Also, the plaintiff had a hire contract with Tarcon Limitada and not with the defendant. When Desmond Nhemachena provided financial advisory services to Tarcon Limitada, he was not acting for the defendant. The defendant and Tarcon Limitada are autonomous corporate entities with independent capacities to hold rights and incur liabilities.

The plaintiff's case rested on his sole evidence, which following closure of his case the defendant applied for absolution from the instance based on several grounds. I shall proceed to deal with those grounds seriatim.

THAT THE DISPUTE BETWEEN THE PARTIES RELATES TO EMPLOYMENT THUS FALLING WITHIN THE EXCLUSIVE DOMAIN OF THE LABOUR COURT IN TERMS OF S. 89 OF THE LABOUR ACT.

The plaintiff conceded in his evidence that he was an employee of the defendant and that some of the amounts he is claiming as shown on exhibits 1, 2, 3, and 4 relate to outstanding salaries and allowances.

The plaintiff argued that his cause of action is not based on contract of employment but on a stated account and so this court has jurisdiction over the matter.

While the case of *Mahomed Adam (EDMS) Beperk v Raubenheimer* 1966 (3) SA 646 (TPD) relied upon by the plaintiff held that it is competent to sue a debtor on his admission of liability set out in a stated account without basing the action on the original transactions detailed in that account (*in casu* exhibits 1, 2, 3 and 4), that case is distinguishable from the one at hand. In the case at hand, the named exhibits do not amount to the defendant's admission of liability. The alleged liability reflected on exhibit 1 was not confirmed by the plaintiff as was asked of him to do therein.

Exhibits 2, 3 and 4 simply bear the plaintiff's and D. Nhemachena's signatures. Apart from the absence of proof of authority by the defendant's Board authorising Nhemachena to concede liability on defendant's behalf, exhibits 3 and 4 bear hand written insertions of "Assets $17 500-00" alongside "Tools from Ben's company." The plaintiff conceded that this amount was not agreed upon and it did not form part and parcel of the alleged arrear salaries and allowances. Over and above that, those two exhibits also bear a handwritten appendage which reads: "*Pending Approval by the*

chairman, the above amount will be paid out at the agreed payment plan attached." (My emphasis). The chairman's approval was not obtained. In the event, it cannot be argued that it was competent for the plaintiff to sue the defendant on the alleged admission of liability set out in those exhibits. There was no final and conclusive acknowledgement of liability/debt by the defendant. This means that the plaintiff's cause of action remains one emanating from the employer-employee relationship, related to payment of alleged outstanding salaries and allowances. This constitutes a dispute of right involving alleged breach of contract of employment which is clearly covered by S. 89 (1) (c) of the Labour Act, [*Cap 28:01*]. In that event, in terms of subsection (6) of that section, this court has no jurisdiction in the first instance to hear and determine the matter. It is idle for the plaintiff to argue that he could not approach a labour officer for conciliation in 2011 because the two – year prescriptive period would harm-string him. That cannot confer this court with jurisdiction. He sat on his rights.

THAT ALL TRANSACTIONS PRIOR TO 2009 REQUIRED EXCHANGE CONTROL AUTHORITY.

In terms of section 10 (1) (b) of the Exchange Control Regulations S.I. 109 of 1996, no person shall, in Zimbabwe, make any payment to or for the credit of a Zimbabwean resident. Section 11 (1) (a) prohibits making any payment outside Zimbabwe by a Zimbabwean resident without exchange control authority.

Section 45 (1) (a) provides as follows:-

"45 Effect of regulations on proceedings for recovery of debts

(1) In any proceedings for the recovery of a debt, a debtor may avoid payment solely on the grounds that;-

a) the debt is not payable without the permission or authority of an exchange control authority; or

b) an exchange control authority has not granted permission or authority for payment of the debt, or such……"

It is common cause that *in casu* some of the payments were made while others were to be made to the plaintiff outside Zimbabwe, in Mozambique. Those that were made in Zimbabwe in Zimdollars were converted into US dollars (the exchange rate was not stated). In all instances there was no exchange control authority granted for the transaction. The onus was on the plaintiff to produce it and he did not. It is idle for the plaintiff to concede that without prior exchange control approval for payments outside Zimbabwe contracts in respect of residents are illegal and unforceable but the court should not deal with that issue because it is not known whether *in casu* such approval was obtained or not. It was his onus to discharge.

This defence, constituting a point of law as it does, it matters not that it had not been pleaded. In the case of *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) it was held that it is competent to raise a point of law which goes to the root of the matter at any time, even for the first time on appeal if its consideration involves no unfairness to the party against whom it is directed. The same obtains regarding the jurisdictional issue dealt with supra. In both issues I find no unfairness to the plaintiff for he ought to have known that this court did not have jurisdiction in the Labour dispute and that the debt was certainly governed by the Exchange Control Regulations and that there was no way the court would close its eyes to the two issues. The court cannot found jurisdiction where an Act of Parliament ousts it or enforce an illegal contract.

THAT THE CLAIM FOR TOOLS FROM BEN'S COMPANY IS NOT PART OF SUMMONS AND DECLARATION. IT IS ALSO PRESCRIBED.

It is correct that this claim is not incorporated in either the summons or declaration. It was broached in the plaintiff's evidence in chief. A defendant is entitled to know the full nature and extent of the claim it is going to face. Such claim must form part of the summons commencing action and or declaration to enable a defendant to adequately prepare its defence. It is therefore incompetent for a plaintiff to raise a new claim in his evidence in chief.

Regarding prescription, Mr Paul conceded, properly in my view, that the claim for tooling is prescribed. It is only dealt with in the 2007 reconciliation and not in subsequent ones and was first claimed in 2012 hence outside the three year period.

THAT THE PLAINTIFF HAS NO *LOCUS STANDI* TO CLAIM FOR PAYMENT.
RE: TRUCK HIRE FROM THE DEFENDANT.

It is not in dispute that the truck (Hoskosh) that was hired is owned not by the plaintiff but by his company called *Earthquip (Pvt) Ltd*. It is also not disputed that the contract of hire of the truck was concluded by Earthquip and Tarcon Mozambique which is a separate legal entity from the defendant. The defendant was only involved in this contract by way of exporting the truck to Mozambique and supplied spares later.

The plaintiff argued that this claim is based on a stated account by the defendant agreeing to pay the amount to the plaintiff and that it is not the defendant's prerogative to direct how the plaintiff would account for the money to his company.

I have already dealt with the issue of the alleged stated account *supra* and the reasons stated therein apply with equal force in respect of it here. Over and above the foregoing, if the contract of hire was between the plaintiff on behalf of *Earthquip (Pvt*) *Ltd* and Tarcon Mozambique why should the defendant be held liable for *Tarcon Mozambique's* debts if account is had of the doctrine of separate legal entities. In any case the proper plaintiff for this claim should have been *Earthquip (Pvt) Ltd* and not the plaintiff *in casu.*

On the totality of the foregoing findings, this is a proper case where absolution from the instance should be ordered and I hereby so order.

Wintertons, plaintiff's legal practitioners
Ziumbe & Mutambanengwe, the defendant's legal practitioners