

SHADRECK MOYO AND 13 ORS
versus
J. LARRY HOFFMAN
and
CENTRAL AFRICAN BATTERIES (PVT) LTD

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 15 and 16 February 2012

Civil Trial

Shadreck Moyo in person
13 Other plaintiffs in default
TA Chiurayi, for the defendants

KUDYA J: The plaintiff's pleadings are a mess. They do not comply with the strict requirements of the High Court rules. The face of the summons does not identify the 13 others. The declaration does not do so either. In addition it does not comply with the rules of court. It contains extraneous information and is argumentative in nature. A letter of suspension, three death certificates, a burial order and the Supreme Court judgment SC 66/02 concerning the plaintiff and the second defendant are attached to the declaration. It is in the format of a founding affidavit rather than a declaration. When the defendants requested for further particulars, the plaintiff responded by applying for default judgment. The default judgment was refused and the plaintiff was directed to file the further particulars. On receipt of the further particulars on 11 January 2010 the defendants excepted on 13 January 2010. The plaintiff responded by excepting to the exception. It is unclear from the papers what became of the exception.

The defendants, however, proceeded to file a plea on 14 April 2010. On 6 May 2010, the plaintiff filed a 23 paged document entitled "plaintiff's opposing affidavit to defendant's plea" and three further attachments. The plaintiff withdrew the notice of opposition in question on 24 May 2010 and proceeded to change what had been the opposing affidavit into a 23 paged replication.

Notwithstanding the state of the plaintiff's pleadings, the matter was referred to trial on 5 November 2010 on the defendants' pre-trial issues. The issues were:

1. Who are the plaintiffs in this matter
2. Have they been lawfully dismissed
3. If not, have they suffered any damages, and if so, in what amount and on what cause

The pleadings are in such shambles because the plaintiff was not represented by a legal practitioner. Rather, he relied on his trade union styled Zimbabwe Federation of Trade Unions. In order to determine the real issue between the parties I condoned the state of the plaintiff's pleadings and proceeded with the trial.

At the commencement of trial, the only plaintiff in attendance was Shadreck Moyo. The other unnamed thirteen were in default. The trial proceeded on the basis that only one plaintiff was before the court. This affected the claim in the summons. On 16 November 2009, the plaintiff Shadreck Moyo and 13 others claimed damages and compensation and outstanding wages and salaries in the sum of US\$3, 5 million; a further sum of US\$3, 5 million for outstanding wages and salaries and compensation for loss of earnings for a period of 12 years, interest on these sums at the rate of 30 per centum per annum and costs of suit. At the trial, the only plaintiff before me reduced the amounts claimed to US\$ 275 375.08 for outstanding salaries and benefits and US\$500 000.00 for general damages.

He set out the history of the matter and by consent referred to exh 1, the 25 paged bundle of documents that the defendants intended to produce as an exhibit. He was an employee of the second defendant. On 3 and 4 December 1997, together with other employees, he participated in an illegal collective job action. On 5 January 1998 and in terms of s 3 (1) (a) of the Labour Relations (General Condition of Employment) (Termination of Employment) Regulations SI 371 of 1985, he was suspended from employment without pay or benefits pending an application to the Ministry of Labour for his dismissal.

On 6 January 1998, the second defendant, through its chairman, the first defendant, applied to the labour relations officer for an order terminating the employment of 15 employees amongst whom was the plaintiff. A hearing was held and on 20 July 1998, the labour relations officer ordered the reinstatement of all the 15 employees without loss of pay and benefits. The second defendant appealed to the senior labour relations officer. On 11 January 1999, the senior labour relations officer made the following determination:

“From the foregoing facts the determination of the Labour Relations Officer is set aside in its entirety.

Appellant is granted permission to dismiss the 15 employees with effect from the date of suspension.

Appellant must pay the 15 employees all their terminal benefits within 14 days of receipt of this determination.”

The 15 employees appealed to the Labour Relations Tribunal. On 25 September 2000, the Labour Relations Tribunal upheld the appeal of one of the 15 but dismissed the appeal of the other 14 who included the plaintiff. The 14 appealed to the Supreme Court, which dismissed their appeal in its entirety on 18 June 2002 in the case of *Shadreck Moyo and Thirteen Others v Central African Batteries (Pvt) Ltd SC 66/02*. Moyo averred that he only received a copy of the judgment on 3 September 2009 and not on any earlier date because his legal practitioner at the time Mr Mabuye of Mabuye and Associates met an untimely death.

He alleged that as he had not been dismissed from employment he was entitled to damages in respect of lost earnings of US\$275 375.08. He produced exh 2 and 3 to justify his computation. He averred that by 30 October 2010, an employee in grade 5 was in receipt of a salary of US\$240.03. He used this salary to calculate what was due to him over the 155 months that he has been on suspension. He used the same salary to calculate his pay leave over the 12 years that he has been on suspension. He also used the same salary to calculate the thirteenth cheque bonus over 12 years. He stated that he was entitled to receive daily allowances at work for sadza, milk, tea and toiletries. He conservatively placed the cost at US\$1.00 a day and multiplied this by the number of days he was supposed to be at work over the 12 year period.

On the general damages he thumb sucked the figure of US\$500 00.00 but based it on the prejudice that has visited the education of his children. He did not state the number of the children and how they were prejudiced.

Mr *Chiurayi*, for the defendant, applied for absolution from the instance on two broad grounds. The first was that the plaintiff failed to disclose a cause of action and the second was that even if he did disclose it, he failed to prove the damages he is entitled to receive.

The first ground calls for an interpretation of the order of the senior labour officer. The plaintiff averred that the second defendant was obliged to write to him informing him

that he stood dismissed from the date of suspension and thereafter pay him his terminal benefits within two weeks of the receipt of the order. He contended that the failure to write the letter of dismissal meant that he remained an employee. Mr *Chiurayi* contended that he was dismissed by the senior labour officer from the date of suspension.

Section 2(1) of the Labour regulations in question read:

“No employer shall summarily or otherwise terminate a contract of employment with an employee unless-

- a) He has obtained the prior written approval of the Minister to do so, or
- b)not relevant
- c)not relevant
- d) The contract of employment is terminated in terms of s 3”

Section 3 reads:

“3 (1) Where an employer has good cause to believe that an employee is guilty of-

- a) Any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract;
- b) (b) –(i) not relevant

The employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment.”

Section 2 (1) and 3(1) (a) replaced the common law right of an employer to summarily dismiss an employee. Instead the authority to dismiss an employee was given to the minister or his delegate. The second defendant complied with the requirements of this section as demonstrated by the letter of 6 January 1998. In that letter, the second defendant applied for an order terminating the plaintiff’s employment. The senior labour officer granted an order terminating the plaintiff’s employment with effect from the date of his suspension. The date of suspension was 5 January 1998. It was not necessary for the second defendant to formally write to the plaintiff that it was terminating his employment from the date of suspension. The contention by the plaintiff that he remains an employee until he formally receives a letter terminating his employment does not make sense. This is because if the second defendant was to write such a letter, it would simply state that he was dismissed from the date of suspension. He would not be entitled to claim earnings from the date of suspension cum dismissal to the date the letter is written. The plaintiff’s further submission that s 13 (1) of the Labour Act [*Cap 28:01*] maintains the employer-employee relationship

where terminal benefits have not be paid is incorrect. All it does is to criminalize unreasonable delay in payment and deign it an unfair labour practice.

The determination ordered that the plaintiff be paid his terminal benefits within two weeks of receipt of the determination by the second defendant. There is in exh 1 a letter for Mr Jeche dated 25 January 1999 from the second defendant inviting him to receive payment of his terminal benefits. It was part of the plaintiff's case that his terminal benefits were not paid. His terminal benefits would be for the period commencing on the date he joined the second defendant to 5 January 1998 when his contract was lawfully terminated. He, however, claimed terminal benefits from the date of his suspension to an unspecified date in the future when he will receive a letter of dismissal.

At the close of the plaintiff's case, both defendants applied for absolution from the instance. The first defendant based his application on the ground that the plaintiff failed to establish the basis for citing him in in his personal capacity. The plaintiff contended that the first defendant was the one who signed the letter of suspension. He, however, conceded that he did so as the chairman of the second defendant. The pleadings averred that he was the chairman of and shareholder in the second defendant at the material time. It is trite that a private company is separate and distinct from its shareholders and office bearers. The plaintiff has not shown the basis for citing the first defendant in these proceedings. I am satisfied that there is no basis to place him on his defence and would grant him absolution from the instance.

The second defendant based its application on two grounds. The first was that the plaintiff had failed to disclose a cause of action against it. In my view, such a ground should have properly been raised by way of exception. It appeared that the second defendant abandoned the exception it had filed. Be that as it may, I see no basis for declining to determine the issue at the close of the plaintiff's case. The plaintiff's action flowed from the determination of the senior labour officer. He misinterpreted the determination and wrongly claimed for damages and loss of earnings arising from a period after he ceased to be an employee.

I am satisfied that he had no cause of action against the second defendant, other than the payment of his terminal benefits up to 5 January 1998. He, however, did not claim,

quantify or prove those terminal benefits. It is not feasible to grant terminal benefits he has not sought or proved.

The second basis for absolution sought by the second defendant was that the plaintiff failed to prove its claims. I agree with the submission. Thus even if it could be found that he remains an employee until he receives a letter formally terminating his employment, the plaintiff did not justify why he chose a salary for a particular month for use over the period he believed he was entitled to loss of earnings. He sought to rely on the provisions of s 22 (1) of the Battery Manufacturing Industry Employment Regulations SI 665/1983. However, that section deals with the calculation of a gratuity based on “the current monthly wage on termination.” It does not deal with the computation of loss of earnings over the period of suspension. The insurmountable difficulty he faced was that a greater portion of the period that he claimed for loss of earnings, that is from 5 January 1998 to February 2009; the currency used in Zimbabwe was the Zimbabwe dollar. He neither stated nor proved the amount due to him in local currency. He did not lay a basis for converting that amount into the current United States dollar dominated multicurrency regime. Again, for the period from February 2009 to the date of his dismissal, it was his duty to establish and prove the actual amounts due to him as a grade 5 employee of the plaintiff. He would have relied on information similar to the one captured in exh 3.

His evidence was woefully short in establishing the basis for awarding him general damages. He based his claim on failure to give his children an education. In my view, this was a novel ground. General damages are often awarded for the hurt, pain, indignity and injury the claimant suffers that he attributes to the wrongful actions of the defendant. All I can say is that the plaintiff did not properly think through his claim for general damages. He failed to justify, establish, or prove it.

Had the plaintiff’s interpretation of the determination been correct, I would have granted the second defendant absolution on the basis that the plaintiff failed to justify, establish and prove its claims. I, however, grant absolution to the first defendant on the ground that the plaintiff wrongly and improperly cited him in these proceedings; and to the second defendant on the ground that he firstly, failed to establish a cause of action against it and secondly did not claim or prove the terminal benefits due to him to the date of his dismissal.

The plaintiff's claims were totally hopeless. In my view, they were designed to harass the defendants. The language used in the plaintiff's pleadings was intemperate and discourteous. The action amounts to an abuse of court process. The correct measure of costs awarded to the defendants is on the scale of legal practitioner and client.

Accordingly, it is ordered that:

1. The first and second defendants be and are hereby absolved from the instance
2. The plaintiff shall pay the defendants' costs on the scale of legal practitioner and client.

Coghlan, Welsh and Guest, the defendants' legal practitioners