

ARNOLD SIKHUMBUZO MAHLANGU
versus
C Z L INCORPORATED (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 17 January 2013

Opposed Matter

D C Kufaruwenga, for the applicant
T.Sibanda, for the respondent

MAKONI J: The applicant issued summons claiming payment of the sum of US15 900-00, interest on the amount at the prescribed rate and costs of suit on attorney-client scale. The respondent entered an appearance to defend. The applicant then applied for summary judgment.

The basis for the application is that the applicant was an employee of the respondent. Upon reaching retirement age the parties agreed on the retirements benefits due to the applicant in the sum of US15 900-00. The parties signed a letter to the effect that the respondent would pay the above stated amount on or before 14 October 2011. The respondent did not pay and the applicant then issued summons. It is the applicant's contention that its claim is unanswerable and the respondent entered an appearance to defend solely for purposes of buying time.

The application is opposed. The respondent raised a point in *limine* that this court has no jurisdiction on the basis that the claim arises from the termination of the applicant's employment contract with the respondent. The matter falls within the realm of the labour law. On the merits, the respondent contends that the letter on which the claim is based states that the figure of US\$15 900-00 excludes tax. The applicant is therefore not entitled to the amount claimed.

The applicant then filed a replying affidavit in which he persisted with the issue that this court has no jurisdiction to determine the matter. He conceded that the amount claimed is subject to tax. He then produced a tax-directive which he alleges he obtained from the respondent's employees. The Employees Tax Deduction Directive directs that an amount of

US\$5 623-80 be deducted from the gratuity due to the applicant. It leaves a balance of US\$10 276-20.

The applicant further averred that he was entitled to a further sum of US\$1 325-72 from the respondent for deductions made from his salary in respect of his pension but were not forwarded to the Pension Fund. He then concluded by claiming a reduced amount in the sum of US\$11 601-92. He avers that he was entitled to adduce evidence which results in a reduction of his claim by virtue Order 10 r 67 (a) of the High Court Rules.

I will deal with the point in *limine* first. It is now settled in our law that this court has no jurisdiction to determine labour disputes. See *Tuso v City of Harare* HH 1-04 and *Mawere v Agriculture Finance Corporation* HH 46-06. The issue before me is whether the dispute between the applicant and the respondent falls within the definition of a labour dispute as envisaged under s 89 (6) of the Labour Act [*Cap 28:01*]. My view is that the dispute between the parties is not a labour dispute. The employment relationship between the applicant to the respondent no longer subsists. It terminated on 7 October 2011 by consent of both parties. There is no dispute as to whether the relationship was lawfully terminated or not.

The applicant is suing the respondent based on a document signed by parties setting out the terms and conditions of the termination of their relationship. Although it is not termed an acknowledgement of debt, its akin to one. The respondent acknowledged that it owes the applicant the sum of US\$15 900-00 less tax.

I agree with the sentiments of CHEDA J in *Mandinda Ndlovu v Highlanders Football Club* HB 95/11 when he stated:

“It is my respectful view, that while it was the intention of the legislature to oust the jurisdiction of the courts from adjudicating on matters involving labour disputes, in acknowledgement of debt even if it arises from a contract of labour is not what the legislature intended to mean. An acknowledgment of debt is nothing but a liquid document which is covered by the rules of this court, for which an application for a summary judgment can be applied for.”

I will therefore dismiss the point in *limine*.

Before dealing with the merits of the matter I would like to deal with the issue of the filing of the applicant’s replying affidavit. It appears that some legal practitioners might not be aware of the circumstances under which a further affidavit maybe filed is summary judgment proceedings and the procedure thereof. Time and again we are being confronted with answering and replying affidavits in summary judgment proceedings.

The position on this issue was made clear by MUTAMBANENGWE J in *Lincoln Court (Pvt) Ltd v Axis International (Pvt) Ltd Anor* HH 54-94 when he stated:

“At this point I feel I must point out the fact that the amendment to the proviso to r 67 is not a licence for the plaintiff to dispense with the provisions of the rule itself, which says ‘No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice’. The purpose of the amendment is not to enable the plaintiff to reply to the respondent’s affidavit otherwise summary judgment proceedings will be allowed to develop into’ motion proceedings to the fullest sense.’ See *Beresford and Plan (Pvt) Ltd v Urquart* 1975 (3) SA 619 (RAD) at 625.

Secondly the proviso says the court may permit the plaintiff to supplement his affidavit with a further affidavit. Obviously the permission has to be sought for such an affidavit to be put in. In my view, therefore this can only be done with leave of court, and the plaintiff has to apply for such leave and the defendant has a right to oppose such an application on the basis that the proposed affidavit does not meet the requirements of the proviso to the rule.”

I quoted in *extenso* what MUTAMBANENGWE J stated in the *Lincoln* case *supra*, as those are the sentiments that I would want to express in *casu*. When Mr *Kufaruwenga* stood up to address me, I thought he would first address the issue of the filing of the replying affidavit but he did not. During the course of his address he then made reference to the replying affidavit. When I asked him whether the affidavit was properly before the court, it became clear that he was not clear on the procedure to be followed. At the end of the day, there was no application for leave to file the replying affidavit. The replying affidavit is therefore not properly before me and I will not have regard to it.

The applicant’s claim as it is stated in the founding affidavit is unanswerable. The respondent does not dispute owing the applicant some money but states in its defence that the amount claimed by the applicant includes tax which is due to Zimra. It is the respondent’s obligation and responsibility to seek a tax directive and deduct the tax from the amount agreed between the parties. The respondent does not give an explanation as to why it has not obtained an employer’s tax deduction directive. I will therefore make an order that the respondent pays to the applicant the amount due to him less the tax.

The amount relating to the pension was not claimed in the summons and cannot be claimed in summary judgment proceedings for the first time. In any event it was mentioned, for the first time, in the replying affidavit which I have ruled to be not properly before the court.

The applicant prayed for costs on a higher scale. If the applicant's papers were in order I would have considered awarding costs on a higher scale. In *casu* the applicant unnecessarily complicated the issue by filing papers without following the procedure as provided for in the rules. I will therefore award costs on the ordinary scale.

In the result, I will make the following order:

1. Summary judgment is hereby entered in favour of the applicant against the respondent in the following terms:
 - (a) The respondent to pay the applicant the sum of US\$15 900-00 less the tax that is due to Zimra plus interest at the prescribed rate from 14 October 2011 to date of full payment.
 - (b) The respondent is to obtain the relevant tax deduction directive within seven days of being served with this order.
 - (c) The respondent to pay costs of suit.

Dzimba Jaravaza & Associaties, applicant's legal practitioners
Tamuka Moyo Attorneys, respondent's legal practitioners