

JASON CORBETT N.O.
versus
ZECO HOLDINGS (PRIVATE) LIMITED
and
HALGOR ESTATE (PRIVATE) LIMITED
and
THE SHERIFF OF ZIMBABWE N.O.
and
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 23 October 2023 & 25 January 2024

CIVIL TRIAL – ABSOLUTION FROM THE INSTANCE

F Chinwawadzimba, for the plaintiff
T Tanyanyiwa, for the 1st & 2nd defendants
A B Chinake, for the 3rd defendant

MANZUNZU J

INTRODUCTION

In this civil trial the plaintiff led evidenced from one witness and closed his case. The 1st 2nd and 3rd defendants have applied for absolution from the instance at the close of the plaintiff's case. The plaintiff resists the applications.

BACKGROUND

The plaintiff and the deceased were employees and shareholders of the 1st defendant (Zeco). They had a labour dispute with Zeco which spilt into arbitration. The plaintiff and deceased were successful. They registered an arbitral award with this court in case number HC 1991/14. Consequently, a writ of execution was issued against Zeco for US\$243 334.00. An immovable property (the property), belonging to Zeco, held by the 2nd defendant (Halgor), was attached by the 3rd defendant (the Sheriff). The property was sold through a Sheriff's auction sale and the deceased was the highest bidder at US\$350 000.00.

Plaintiff further pleads that the Sheriff paid out, from the purchase price, Zeco's creditors to the tune of US\$314 960.00 and other ancillary payments incidental to the auction.

Zeco challenged the Sheriff's sale which only succeeded at the Supreme court on 7 July 2022 when the sale was set aside.

Based on these facts the plaintiff has sued Zeco and the Sheriff for unjust enrichment in the sums of US\$318 347.00 and US\$35 040.00 respectively.

Zeco denies that it was unjustly enriched as it claimed it had no knowledge of any of its creditors being paid from the proceeds of the sale. It challenged the plaintiff to prove that fact.

The Sheriff contests the claim and has pleaded that at all times he acted lawfully in the execution of his duties. At the time he earned his commission and disbursed the money to creditors, he said there was no legal impediment because Zeco's initial appeal was struck off the roll. Unjust enrichment is denied. He said the successful appeal was only lodged after the lawful completion of the sale.

ISSUES FOR TRIAL

At the case management conference, the parties agreed that the following were the issues for trial with the onus resting on the plaintiff;

1. whether or not the Plaintiff made payment of the purchase price to the Sheriff?
2. whether or not the Sheriff acted recklessly and negligently in paying out the creditors before transfer of the property to the plaintiff?

3. whether or not the Sheriff due to its unlawful actions has caused the plaintiff to suffer loss in the sum of USD\$ 350 000.00 and therefore must pay the plaintiff damages in the said sum.
4. whether or not the Sheriff has been unjustly enriched by receiving a commission for a sale that was set aside?
5. whether or not Zeco has been unjustly enriched by having its creditors paid in full with proceeds from the sale of the property? If so, what is the quantum of damages the Plaintiff is entitled to receive from ZECO.
6. whether or not Zeco has been enriched by having rates at Ruwa Local Board cleared by the plaintiff? If so, whether the plaintiff is entitled to reimbursement of all the payments made in respect of rates paid to Ruwa Local Board.

THE LAW ON ABSOLUTION FROM THE INSTANCE

What then is the test in determining an application for absolution from the instance? In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A) at 5 D –E* the court pronounced with approval the principle enunciated in the case of *Gascoyne v Paul & Hunter 1917 TPD 170 at 173* 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 ..., in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant).” (emphasis is mine)

In *United Air Charters (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (SC) @ 341* the court had this to say;

“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him.”

What discerns from these two precedents is the test of whether the plaintiff placed evidence upon which a court applying its mind reasonably to such evidence, could or might find in favour of the plaintiff. In other words, absolution from the instance may be granted at the conclusion of the plaintiff’s case if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff. In short, a plaintiff has to make out a *prima facie* case to survive absolution.

In *casu*, the court shall examine the plaintiff’s evidence to determine if a *prima facie* case was made.

1st and 2nd DEFENDANTS’ APPLICATION

The main thrust of the defendants’ application is that the plaintiff’s witness failed to prove the currency in his claim, something which arose during cross examination. Furthermore, payment of purchase price and to creditors were done by bank transfer. It is further alleged the plaintiff failed to substantiate his claim in United States dollars in light of the law which affected currency’

3RD DEFENDANT’S APPLICATION

The 3rd defendant’s application was based on the fact that the plaintiff’s evidence sought relief on a claim based on damages contrary to the pleadings which deal with unjust

enrichment. The plaintiff's evidence during cross examination made certain concessions which exculpate the 3rd defendant from liability. The issue of currency was also relied upon in support of this application.

PLAINTIFF'S RESPONSE TO THE APPLICATIONS

The plaintiff has opposed the application on the basis that he gave sufficient evidence upon which a reasonable man might grant judgment against the 1st defendant and the 3rd defendant. The evidence led shows that the plaintiff has a *prima facie* case against the 1st defendant and the 3rd defendant, he maintained.

The plaintiff further stated that his evidence shows that, the debts of the 1st defendant had been settled from the purchase price, to that end, the 1st defendant has been unjustly enriched at the expense of the plaintiff. As against the 3rd defendant, the plaintiff seeks restitution of the *pretium*. It was argued for the plaintiff that, the fact that he said was asking for damages was of no consequence given his status as a lay person.

ANALYSIS OF PLAINTIFF'S EVIDENCE.

At this stage the test is whether the plaintiff's evidence covers all the elements of the action as opposed to whether it establishes what would finally be required to be established at the end of the trial. This is the position of the law in both South African and Zimbabwean courts. *In Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A)* where the court stated the following:

“...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a

Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.” (emphasis is mine).

Back home, in *Chiswanda v OK Zimbabwe Limited, SC 84/20* the court stated; “*Crucially the test to be applied is not whether or not the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. The evidence required at this stage is whether or not the plaintiff has made out a prima facie case to prove the claim.... This implies that a plaintiff has to make out a prima facie case-in the sense that there is evidence relating to all elements of the claim – to survive absolution...*”(emphasis is mine)

The plaintiff relied on the evidence of one witness being the plaintiff. His claim is based on unjust enrichment the requirements of which are stated in *Industrial Equity v Walker 1996 (1) ZLR 269 (H)* at 270 C-F that:

- the defendant must be enriched.
- the plaintiff must have been impoverished by the enrichment of the defendant.
- the enrichment must be unjustified.
- the enrichment must not come within the scope of one of the classical enrichment actions.
- there must be no positive rule of law that refuses an action to the impoverished person.

The plaintiff’s evidence must be tested against the identified issues for trial and the requirements of his claim. I will summarize hereunder the relevant part of his evidence:

- (1) it is common cause that the property was sold through a Sheriff’s auction sale for the sum of USD\$ 350 000.00 (an agreement of sale was referred to).

- (2) the purchase price was paid in full by the plaintiff to the Sheriff (documentary proof was referred to)
- (3) the purchase price was disbursed to the creditors of Zeco before transfer of the property to the plaintiff. (the distribution plan by the Sheriff was referred to)
- (4) the sale was set aside by Supreme Court on the 7th July 2022, is common cause.
- (5) the plaintiff has not been refunded the purchase price and the property remains with Zeco.
- (6) the plaintiff paid rates at Ruwa Local Board on behalf of Zeco which had an obligation to do so in terms of the agreement.
- (7) The cause of action arose upon the sale being set aside by the judgment of the Supreme Court on 7 July 2022.
- (8) That he is entitled to damages in the United States dollar currency.

In other words, the plaintiff is simply saying, “while I paid the purchase price for the property in full, I neither got a transfer of the property nor refund of the purchase price, yet Zeco and the Sheriff unjustly benefitted from the money.”

An application for absolution from the instance should be granted when the plaintiff’s claim is hopeless at the close of the plaintiff’s case. See also *De Klerke v Absa Bank Ltd and Ors* 2003 (4) SA 315 (SCA), *Madombwe v Rumbi* HH 354/15 The plaintiff’s case must be so weak that no reasonable court could find for the plaintiff. The defendants seem to dwell much on the credibility of plaintiff’s evidence something which should come up at the end of the trial.

In this jurisdiction, a defendant has every right to apply for absolution from the instance at the close of the plaintiff's case. Such an application should not be raised as a shield by a defendant who does not want to go into their case.

In *casu*, I am satisfied that the plaintiff has made a *prima facie* case which calls for the defendants to answer. A defendant who unsuccessfully embarks on a mission for an absolution from the instance must carry the burden of costs arising out of such application.

DISPOSITION

1. The application for absolution from the instance by the 1st and 2nd defendants be and is hereby dismissed with costs.
2. The application for absolution from the instance by the 3rd defendant be and is hereby dismissed with costs.

Tanyanyiwa and Associates, legal practitioners for the 1st and 2nd defendants.
Kantor & Immerman, legal practitioners for the 3rd defendant.