

DISTRIBUTABLE (35)

BAREND VAN WYK
v
TARCON (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, 5 NOVEMBER, 2013 & JULY 10, 2014

N. Madya, for the appellant

R. Chingwena, for the respondent

PATEL JA: This is an appeal from the decision of the High Court granting absolution from the instance in respect of the appellant's claim. The claim was for US\$62,707.12 as the balance owing to him from 2002 to 2008 for unpaid salaries and allowances and charges for the hire of his truck. The respondent denied that there had been any agreed reconciliation with the appellant for the sums claimed. The respondent also averred that the appellant was not employed by it but by another entity, Tarcon Limitada, which was based in Mozambique.

The High Court held that the claim for salaries and allowances was not based on any stated account but on a contract of employment governed by the Labour Act [*Cap 28:01*] and therefore fell outside the jurisdiction of the court in the first instance. Moreover, the claim had prescribed after the lapse of two years. It further held that because the payments were to be made to the appellant outside the country they were not

recoverable as being in contravention of the Exchange Control Regulations 1996. Additionally, it was held that the proper claimant in respect of the truck hire charges should have been the appellant's company, Earthquip (Pvt) Ltd, and that the proper defendant should have been the entity based in Mozambique. Consequently, the appellant had no *locus standi* to institute that claim. For all of these reasons, the court granted the respondent's application for absolution from the instance.

LABOUR MATTER OR CLAIM ON STATED ACCOUNT

The respondent's position is that the reconciliation statements relied upon by the appellant required the approval of its chairman for any liability to arise. As no such approval was ever obtained, there was no agreed statement of account and, therefore, the appellant's claim for unpaid salaries was a purely labour matter subject to the exclusive jurisdiction of the Labour Court in terms of s 89(1) and (6) of the Labour Act. Moreover, s 94(1) of the Act stipulates that a labour dispute must be raised within a period of two years. In the instant case, that period had expired before the appellant issued summons and, therefore, his claim for salary and allowances has prescribed.

The two reconciliation statements in question contain the following identical handwritten appendage signed by the respondent's financial advisor (Desmond Nhemachena) on 7 November 2008: "*Pending approval by the chairman the above amount will be paid out at the agreed payment plan attached*". It is not entirely clear from the record whether or not the respondent's chairman had in fact approved the payment plans. However, this did not form any part of the respondent's defence in its

plea. Rather, it simply contended that the appellant and Nhemachena were not employed by the respondent but by Tarcon Limitada.

More importantly, the undisputed evidence of the appellant is that after the reconciliation statements were prepared he received two payments in cash and fuel from the respondent in respect of leave days due and two months' salary. The respondent did not at any stage claim any refund in respect of these payments or endeavour to recover them from the appellant. Equally significantly, the registration certificate of Tarcon Limitada shows that it was only registered on 6 February 2009, while Nhemachena signed the reconciliation statements three months before on 7 November 2008. Thus, the appellant and Nhemachena could not possibly have been employed by Tarcon Limitada at the time when the statements were prepared.

In the circumstances, I am inclined to take the view, in the absence of evidence to the contrary adduced before the court *a quo*, that the claim *in casu* was based on a stated account. There was an agreed acknowledgement of liability signed on behalf of the respondent. All that appears to have been required thereafter is its chairman's approval of the payment plan or method of discharging that agreed liability. As was recognised by the learned judge, it is competent to sue a debtor on his admission of liability as set out in an acknowledgement of debt, without founding the action on the original transaction giving rise to that acknowledgement. See *Mahomed Adam (Edms) Beperk v Raubenheimer* 1966 (3) SA 646 (TPD) and the authorities there cited. Consequently, the court *a quo* erred in holding that the contractual claim before it constituted a labour dispute beyond its

jurisdiction and within the exclusive domain of the Labour Court by virtue of ss 89(1)(c) and 89(6) of the Labour Act.

As regards the supposed prescription of the appellant's claim, it follows that the two year prescriptive period under s 94(1) of the Labour Act has no bearing on the appellant's contractual claim founded on a stated account. That provision is confined to claims or disputes that are subject to the exclusive governance of the Labour Act. It cannot operate to oust or override the periods of extinctive prescription applicable under the Prescription Act [*Cap 8:11*] in relation to the recovery of contractual debts in general.

EXCHANGE CONTROL APPROVAL

The respondent contends that the appellant's claim is for payments in foreign currency that required exchange control approval at the relevant time and that there is no proof that any such approval was ever obtained. Therefore, they are entitled to resist any claim for payments that were not duly authorised.

Section 11(1)(a) of the Exchange Control Regulations 1996 prohibits any Zimbabwean resident from making any payment outside Zimbabwe without the approval of an exchange control authority. In terms of s 45(1) of the Regulations, a debtor may avoid payment solely on the grounds that the debt is not payable without the permission of an exchange control authority or that any such authority has not granted permission for payment of the debt.

It is common cause that some of the payments due to the appellant were made in Zimbabwe while others were to be made to the appellant outside Zimbabwe. The court *a quo* found that no exchange control permission was granted for any of the payments in question. The court also held that the onus to produce proof of any such approval fell on the appellant and that, having failed to discharge that onus, he was not entitled to enforce an illegal contract.

The first point to note is that this defence of illegality was not raised at any stage in the pleadings. Be that as it may, it is difficult to accept the finding of the court *a quo* that no exchange control permission was ever obtained. A critical piece of evidence that was before the court is a letter from the respondent's financial director addressed to the appellant, dated 17 March 2006, requesting him to confirm the balance that was owed to him by the respondent as at 31 December 2005 in the sum of US\$32,022.50. This request was made to confirm staff liabilities for audit purposes. Given the unquestionably official purpose underlying this request, it seems highly improbable that the respondent was operating without the requisite exchange control approval vis-à-vis the payments made or owing to the appellant during the relevant period.

Going beyond the facts, it is even more difficult to comprehend the decision of the court *a quo* that the onus to prove exchange control approval lay with the appellant. As a rule of evidence, it is trite that he who asserts any fact must carry the burden to prove that fact. In the instant case, it is the respondent that resists payment on the ground that the necessary permission of the exchange control authority was not granted.

Therefore, just as it behoved the respondent, *qua* payer in the course of its transactions with the appellant, to obtain that permission, so was it incumbent upon it to discharge the burden of proving its assertion that no such permission was in fact obtained. It is abundantly clear that the learned judge misdirected himself in this regard.

LOCUS STANDI TO SUE ON TRUCK HIRE CONTRACT

The court *a quo* found that the truck in respect of which the appellant sued for hire charges was owned by his company, Earthquip (Pvt) Ltd, and not by the appellant himself. Additionally, it was found that the hire contract was concluded between Earthquip and Tarcon Limitada which was a separate legal entity distinct from the respondent. Consequently, the appellant had no *locus standi* to sue the respondent for the truck hire charges.

The above factual findings are borne out by the appellant's own evidence under cross-examination. However, it was also his evidence that Earthquip had ceased to operate at that stage and that, therefore, he personally entered into the truck hire contract with the respondent. On the other hand, there is nothing in his pleadings to substantiate the nexus between himself and Earthquip and, more critically, between the respondent and Tarcon Limitada. Moreover, notwithstanding his reliance on the stated account, his cause of action in respect of the truck hire contract is not separately identified as such and therefore cannot be supported on his own pleadings. Consequently, it is difficult to find fault with the finding by the learned judge below rejecting this particular claim. In any event, the appellant's cause of action and *locus standi* relative to this claim are

interrelated issues that should be more clearly determined by the court *a quo* at the conclusion of the trial.

DISPOSITION

Having regard to all of the foregoing, but subject to what I have stated above in connection with the truck hire contract, it is reasonably clear that the appellant has a valid cause of action by virtue of the agreed stated account upon which his claim for salary and allowances is predicated. Furthermore, he is entitled to payment of the amounts claimed in the absence of countervailing evidence in rebuttal from the respondent. It follows that the court *a quo* erred in granting absolution from the instance in respect of all of the appellant's claims without putting the respondent to its defence.

In the result, the appeal is allowed with costs and it is ordered that:

1. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
“The application for absolution from the instance is dismissed with costs.”
2. The matter is remitted to the court *a quo* for continuation of the trial in this matter.

GWAUNZA JA: I agree.

GOWORA JA: I agree.

Wintertons, appellant's legal practitioners

Ziumbe & Partners, respondent's legal practitioners