

**NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND****Versus****MUGADZA TRADING & TRANSPORT
t/a CHASE WATER SERVICE****and****MAGRET MUGADZA****And****CLAUDE MUGADZA****IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 JUNE & 5 JULY 2018****Civil Trial***B. Masamvu* for the plaintiff*L. Chikwakwa* for the defendants

MAKONESE J: On the 5th of June 2018 the parties' legal practitioners and their clients appeared before me in chambers. I was informed that the parties needed to agree on certain calculations as there was still a possibility of an out of court settlement. Further, I was advised that the plaintiff needed to obtain source documents in respect of operating costs.

The parties and their legal practitioners failed to reach agreement. The trial commenced on the 8th of June 2018. The plaintiff's case rested on one single witness, Abel Nsingo. He testified and was cross-examined by defendant's counsel. The plaintiff closed its case. An application for absolution from the instance was made. I invited both parties to submit written arguments. I have now been favoured with written submissions. This is my ruling on the application for absolution from the instance.

Factual background

The plaintiff is the National Railways of Zimbabwe Contributory Pension Fund. First defendant is a tenant at shop number 55, Bulawayo Centre in terms of a lease agreement concluded on the 21st June 2010. On the 12th June 2015 the parties signed an addendum to the lease agreement which took effect from 1st July 2014. It was a term of the agreement that rentals would be the sum of US\$653 from 1st of July 2014. It was a further term of the lease, that an attributable share of US\$0,92 of the total maintenance and operating costs based upon the ratio of the floor area of the leased premises would be paid by the defendants. The defendants were required to pay all the electricity and water charges on a *pro rata* basis. In addition the defendants would pay all owners charges levied on the defendants together with Value Added Tax (VAT). The defendants were further required to insure certain assets within the leased premises.

The plaintiff issued summons against defendants seeking the following relief:

- (a) cancellation of the lease agreement
- (b) payment of the sum of US\$10 568,86 being arrear rentals and US\$58,74 being operating costs by the defendants jointly and severally the one paying the others to be absolved
- (c) eviction of the 1st defendant and all those who claim occupation through it from shop 55, Bulawayo Centre, Bulawayo.
- (d) defendants pay holding over damages calculated at the rate of US\$65,00 and operating costs calculated at 0,92% attributable share from August 2016 to date of payment
- (e) costs of suit on an attorney and client scale.

The defendant entered a plea to the claims and averred as follows:

“1. *In limine*

The same claim is pending under case number HC 1939/14. It is just figures which have changed but the cause of action is the same.

As the plaintiff has displayed scant regard to the rules and has been tardy in his pleadings the honourable court is urged to dismiss the matter with punitive costs”

The defendant further pleaded that there were no amounts due to the plaintiff and that in fact they had overpaid the plaintiff and are entitled to a refund in terms of their counter claim. The issues for trial as set out in the parties’ joint pre trial conference memorandum of issues are as follows;

- (a) whether or not the defendant is in breach of the lease agreement.
- (b) whether or not defendant owes the plaintiff the sum claimed in the summons.

Plaintiff’s case and the evidence

Plaintiff led oral testimony from one witness **Abel Nsingo**. He is employed by Knight Frank Zimbabwe. They are managing agents for the plaintiff. The witness’ testimony was to the effect that the plaintiff’s claim was based on the defendants’ arrears dating back to the year 2010 when the parties signed the lease agreement. The plaintiff tendered into the record what was referred to as a running account which began in April 2010. Exhibit 3a is a rent schedule which indicates that the defendants were not timeously paying rentals in terms of the agreement. The schedule reflects an irregular payment pattern by the defendants. The plaintiff’s witness testified that the claim against the defendants included running interests from April 2010 up to date. The plaintiff also admitted that in relation to operating costs they were unable to secure all the source documents due to the lapse of time. They could only retrieve some documents to prove their claim for the last six months ending May 31st, 2018. The witness was asked to comment about the pending court proceedings under HC 1132/14. His response was that he was not sure what had happened to that matter. There was an attempt by the plaintiff to explain the status of that matter in the heads of argument. This is of course not permissible as the plaintiff

may not lead evidence through heads of argument. However, for what it is worth, the plaintiff argues in the heads of argument as follows:

“The summons referred to by the defendant under HC 1132/14 are based on the agreement dated 25 March 2013 and the other previous agreements.”

This response which, admittedly makes no real sense and does nothing to deal with the defence of *lis pendens*, raised by the defendants only adds to the confusion in the plaintiff’s case. The evidence of the plaintiff’s witness was at variance in all material respects with the summons. The witness stated that the claims against the defendants are for the period beginning April 2010 up to date. It was put to the witness that although the payments were irregular, the defendants had proved having paid the sum of US\$20 393 for the period July 2014 and July 2016 against an amount due of US\$16 325. The witness did not dispute the figure representing the payments effected by the defendants, for operating costs. The witness admitted that the source documents in relation to operating cost were not available.

The witness did concede and admit that, without the source documents, the plaintiff was not able to prove the figure for operating costs. The witness further admitted that exhibit 3a and 3b were a creation by the plaintiff and not actual statements of account sent to the defendant at the end of every month. In my view, the failure to produce the source documents, which by all accounts was central to the proof of plaintiff’s claims left the court without any real evidence to substantiate plaintiff’s claims. More importantly, however, plaintiff failed to lead evidence on any particular figure of arrear rental, on which the court was being asked to grant judgment. When asked to explain how the figures in the summons were arrived at, the witness stated that they had done a manual reconciliation of figures. The witness stated that they had *“picked up computer generated figures and put them manually.”*

The applicable law

It is a principle of our law that where a plaintiff in a civil trial has failed to establish a *prima facie* case at the close of plaintiff’s case, the defendant may apply for absolution from the instance. Such an application is akin to the dismissal of a case at the close of the state case in

criminal trial. The test for an application for absolution from the instance is well settled in this jurisdiction and has been discussed in a number of authorities. The *locus classicus*, which has been followed by the courts in this jurisdiction is *Gascoyne v Paul and Hunter* 1917 TPD 170 were at page 173 De VILLIERS JP laid down the test 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 before the court upon which a reasonable man might, not should, give judgment against (the defendant).”

Gascoyne v Paul and Hunter was followed in *Supreme Service Station (Pvt) (1969) v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) BEATLE CJ expressed his views at page 5B-D as follows:

“Once it is accepted that a judgment which a court “might” give may differ from that which it “ought” to give, it is clear that the judgment which it “might” give and which differs from the judgment which it ought to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court “might” do, allowance must be made for its making and giving an incorrect judgment ... The test therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case, must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make 0 a definition which helps not at all.”

On the facts of the present case, the evidence of the plaintiff’s witness was at variance with the pleaded case. The plaintiff’s witness failed to disprove the assertion by the defendants that their own reconciliation showed that they had overpaid the amount for operating costs. The plaintiff’s witness stated unequivocally that he could not dispute that according to the bundle of documents filed of record the defendants had paid a total sum of \$20 393, an amount more than the sum claimed in the summons, as at the date of issuance of summons. The witness conceded that there was another case pending under case number HC 1132/14. The witness indicated that he was not sure what had happened to that case. The witness conceded that no source documents were available to prove the operating costs being disputed by the defendants. I have no doubt that at the close of the plaintiff’s case the plaintiff had not proved defendants’ indebtedness as

prayed in the summons. To proceed with the matter beyond the plaintiff's case would be to try and find evidence that may buttress the plaintiff's case. It is not desirable to do so. The plaintiff's case falls or stands on its pleaded case read together with the *viva voce* evidence led in court.

In another leading authority on the subject of absolution from the instance, in *Claude Neon Lights (SA) v Daniel* 1976 (4) SA 405, the court held that when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff established 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 or ought to) find for the plaintiff.

In the circumstances, I have no difficulty in concluding that the evidence led at the close of the plaintiff's case falls far short of what is expected to establish a *prime facie* case.

In the final result, the defendant's application for absolution from the instance is hereby granted with costs.

Dube-Tachiona & Tsvangirai plaintiff's legal practitioners
Sansole & Senda, defendant's legal practitioners