LEPHAT ZULU

Versus

NATIONAL RAILWAYS OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 7 OCTOBER 2021 & 11 NOVEMBER

Civil trial

B. Dube, for the plaintiff
V. Chagonda, for the defendant

DUBE-BANDA J: On the 6 September 2018, plaintiff sued out a summons against defendant claiming payment in the sum of $7 374.00, it being an amount allegedly due and payable to him as compensation for injuries he suffered at work during his employment with defendant, interests and costs of suit on a legal practitioner and client scale. The action is defended.

Factual background

This action will be better understood against the background that follows. Plaintiff was employed by the National Railways of Zimbabwe (defendant), a registered statutory body capable of suing and being sued in its corporate name and established in terms of section 3 of the Railways Act [chapter 13:09].Plaintiff was employed by the defendant and on the 3rd May 1983, he was involved in an accident while on duty and was injured. He was assessed to have suffered a 15 percent disability. The National Social Security Authority approved an award of $7 374.50 which is based on a disability of 15 percent loss of body function. Defendant alleges that it paid the plaintiff the sum of $7 374.50 on the 15 January 2002. Plaintiff denies that he was paid as claimed by the defendant. It is against this background that plaintiff sued out this action seeking the relief mentioned above.

Defendant filed a special plea in abatement. In this plea it contended that plaintiff's claim had prescribed and that the cause of action arose at the time the Zimbabwean dollar was the sole legal tender. He could not claim payment in the United States dollars, which currency was not legal tender at the time his injury. This court in *Lephat Zulu v National Railways of Zimbabwe* HB 70/20, held that the Supreme Court decision in Zambezi Gas Zimbabwe (Pvt)

Ltd v N.R. Barber (Pvt) Ltd & Anor SC 3/20 had rendered the currency issue redundant. The court considered only the issue of prescription, which it dismissed and ordered that the action proceeds to trial.

Burden of proof

At the pre-trial conference held before a judge the following were identified as the issues for trial:

1.1 Whether or not the defendant paid the plaintiff the sum of $7 374.50.
1.2 If the defendant did not pay the money:-
   a. Whether the plaintiff is entitled to payment of such sum in view of the fact that the Zimbabwean Dollar became moribund in 2009.
   b. Whether or not plaintiff is entitled to payment of the amount claimed in the United States Dollars at the rate which obtained in year 2002 (US$1-00 to ZW$55-04).
   c. Whether or not the plaintiff is entitled to interest on the amount as at 15 January 2002.

The question of who bears the *onus* regarding issue 1.1 was not resolved at the pre-trial conference. Counsel for the litigants informed this court that the presiding judge at the pre-trial conference indicated that the trial court would resolve this issue, i.e. as to who bears the *onus* to prove whether or not the defendant paid the plaintiff the sum of $7 374.50. After hearing the parties I ruled that the *onus* on this issue was on the defendant.

In its plea defendant averred that on the 7th January 2020, it advised plaintiff that he had been awarded compensation for the injuries he suffered at work, and on the 15th January 2002, it made cheque payment to plaintiff in the sum of $7 374.50. Defendant is not disputing that it was liable to pay plaintiff the sum of $7 374.50, its plea is that it had discharged its obligation by making a payment to him.

In a claim for recovery of a debt it is for the plaintiff to prove that debt was owed, but a defendant who alleges that the debt had been repaid bears the burden of proving that fact in order for the defense to succeed. If at the end of the trial it is clear that the debt was owed, but

it is unclear whether it was repaid, the plaintiff will succeed. See: Schwikkard *at al Principles of Evidence* (2nd ed. Juta 2002) 538. In *Pillay v Krishna* 1946 AD 946 951-2, the court said:

> If one person claims something from another in a court of law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it: where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defense, then he is regarded *quoad* that defense, as being the claimant: for his defense to be upheld he must satisfy the court that he is entitled to succeed on it…….

In *casu* defendant admits that plaintiff was indeed entitled to compensation payment in the sum of $7 374.50, however pleads that it made payment by cheque on the 15 January 2002. It is therefore for the defendant to prove that it discharged its obligations to the plaintiff by payment in the sum of $7 374.50. It is for these reasons that I ruled that the *onus* on issue 1.1 was on the defendant. There was no dispute of the seat of the *onus* regarding issues 1.2 (a), (b) and (c). The joint pre-trial conference memorandum shows that on these issues the *onus* falls on the plaintiff.

Plaintiff's case

Plaintiff testified that he was employed by the defendant. In 1985 he was injured at work. He consulted a doctor who treated and prescribed some medication for him. The treatment continued until 2001. His disability, arising from the injury was assessed to be 15 percent. He tendered a letter from Mr. B. A. V. Ncube an Orthopaedic Surgeon, who treated him and assessed the extent of his disability. The letter is before court as Exhibit A1. In August 2001 he took the letter to the defendant's senior medical doctor. On the 14 May 2015, the same doctors gave him another letter addressed to the defendant's medical officer restating the same opinion that he had a 15 percent disability. The second letter is before court as Exhibit A2.

He testified that on the 11 January 2016, he took Exhibit A2 to the defendant's senior medical doctor. A clerk in the doctor's office informed him that he was paid the sum of $7 374.00. He disputed that he was ever paid. The clerk phoned defendant's Head Quarters (HQ), thereafter plaintiff was then invited at the HQ. At the HQ he found another clerk, one Mr Nherera who insisted he was paid his compensation. He was shown a copy for the Cheque Listing for January 2002. This is a document which contains names of persons and entities that were paid in January 2002. His name was in that document and it was underlined. He asked

why his name was underlined, he was informed that it was because it was a disputed case. This surprised him because it was his first time to go to that office to enquire about his payment. The Cheque Listing for January 2002 before court as Exhibit A3.

On the 10 March 2016, he wrote two letters to the defendant, the first (Exhibit A4) addressed to the Finance Manager and the second (Exhibit A5) addressed to the Director (Finance and Administration). In both letters he disputed that he was paid his compensation. He received a reply from the Director (Finance and Administration) (Exhibit A6). In the letter the Director said defendant would not acknowledge any further liability as plaintiff was paid the sum of ZW$7 374.50 through cheque number 113396 issued on the 15 January 2002. After receipt of Exhibit A6 he met the Director, who told him if he was aggrieved he should approach the civil court for relief. The Director gave him a document marked Exhibit A8. Plaintiff testified that he did not receive such a letter. Defendant was refusing to pay his medical bills until he sued out this case.

He then reported the matter to the police. The police opened a docket, it is before court marked Exhibit A7. The docket shows that the Director of Public Prosecution declined to prosecute. Again, plaintiff placed before court a letter (Exhibit A10) from the Reserve Bank of Zimbabwe which confirms that the exchange rate of Zimbabwe dollar (ZWD) to the United States dollar (USD) as at 15 January 2002 was USD1:ZWD55.04.

Under cross examination plaintiff testified that he did not know that after being informed of the percentage of his disability that he was supposed to be paid compensation. All he knew at the time was that if one was injured at work, he should go to hospital. He testified that after being shown the Cheque Listing for January 2002 Exhibit A3) he went to the bank to check his account. At the bank there was no indication that such a cheque was deposited into his account. He was given a bank statement. He gave the bank statement to his lawyers. It was put to him that he did not show the bank statement to the defendant, his answer was “yes I get you.”

When it was suggested to him that he received Exhibit A8 i.e. a letter informing him that his compensation had been approved and that he was entitled to a lump sum payment of $7 374.50, he disputed that he received such a letter. He confirmed that he used to receive some cheques at his address, but did not receive the one in question. Under re-examination plaintiff

testified that he has always been resident at number 228 Nketa 6, Bulawayo. That is where he still resides. He received all his mail from the same address. Asked whether there has been any dispute about mail not received at his address, his answer was there has never been such a dispute.

Defendant's case

Defendant called the evidence of two witnesses. The first to testify was Paul Nhevera. This witness testified that he is employed by the defendant as an Acting Accountant – NRZ Projects. He joined the Finance Office in 2015. He holds a BSC in Accounts. Sometime in 2016 plaintiff approached the offices of defendant and complained that he was not paid his dues in terms of the compensation award. This witness then activated an investigation to establish whether plaintiff was paid or not. This investigation entailed going through the records of the relevant time to establish the issue of payment. Records of payment are kept in two offices, i.e. Control and Budget Office and Cash Book Office. The Cash Book Office is responsible for the payment. This witness testified that in terms of the available records it was noted that plaintiff was paid his dues.

He testified that Exhibit A3 is a document that is kept by defendant which indicates the list of people whose dues had been disbursed. He showed this exhibit to plaintiff and gave him a copy. Plaintiff continued coming to the office protesting that he was not paid. He testified that plaintiff's name will not appear in Exhibit A3 if he was not paid. If he was not paid his name will appear in an account of unpaid claims.

Under cross examination this witness testified that he was not responsible for signing and disbursing cheques. He said Exhibit A3 was generated from the Cash Office and is an extract from a ledger. The information contained in Exhibit A3 is authentic. He testified that defendant's accounts are audited, and if this payment was not made the audit would show that such payment was indeed not made. He conceded that he did not see the actual cheque that was used to pay plaintiff. He is relying on documents in the office which show that he was paid. He said he is sure that plaintiff was sent a cheque. Exhibit A3 shows that payment was indeed made to the plaintiff. He was questioned on the possibility of anyone using a computer to generate a fake document like Exhibit A3, the witness was emphatic that plaintiff deals with public funds, no one can generate a fake a document like Exhibit A3. He testified that he always

has access to defendant's audit reports. He stated that the available records show that plaintiff was indeed paid.

The second witness for the defendant was Prisca Muzarabani. She is employed by the defendant as a Senior Accounts Clerk. This witness testified that the 1st witness informed her that plaintiff says he was not paid his compensation dues. She said Exhibit A3 is a copy of the original that is kept at the office. She is the one who underlined plaintiff's name in Exhibit A3, she did this for the purpose of highlighting it. She testified that in her office there is only Exhibit A3, as other documents have been phased out. The retention period of documents at the office is five years. After the retention period documents are removed to open space for new ones. On removal from their office, documents are taken to a place called Repository. She does not know the period documents are kept at the Repository.

At the relevant period defendant was banking with ZB Bank. Defendant communicated with the Bank, and was informed that the retention of documents period is ten years (Exhibit B1). The Bank no longer has documents for the relevant period, i.e. 2002. She testified that if plaintiff had not been paid, the reconciliations at the office would have shown that payment was not made, i.e. that there was a cheque that was not presented to the Bank. She stated that Exhibit A3 shows that plaintiff was indeed paid. Reconciliations did not show that there was a cheque that was not presented. She testified that the systems at defendant's office are such that if payment was not made, this could have been detected at the relevant time. First there is an office that makes a payment requisition, this is the office that creates a voucher for the payment. Second there is an office that makes the actual payment. Third there is an office that deals with reconciliations. If payment was not paid, the requesting office would have made a follow up and the issue would have been resolved. She testified that the fact that the requesting office did not raise an issue, shows that payment was made to the plaintiff. She testified that if payment was not made, i.e. the cheque not received and processed the system would have picked it up. She said that based on the accounts systems at NRZ she can confirm that plaintiff was indeed paid the sum of ZW$7 374.50.

Under cross examination this witness testified that she was employed by defendant in 1984. In 2002 she was an Accounts Clerk. Her duties entailed amongst others, preparing cash payment vouchers and printing of cheque listings. At the time Exhibit A3 was generated she was not the only one in that office, there were three. She could not remember whether she is

the one who generated Exhibit A3, or it was done by one of her workmates. She testified that the procedure of preparing Exhibit A3 leaves no room for an error. The information once entered into the computer is checked by a supervisor. She could not remember printing a cheque for the plaintiff, because these events happened long back in 2002. She said Exhibit A3 can only be produced with proper authorization. Exhibit A3 would be generated after queues have been prepared. There must have been a payment voucher which said pay plaintiff, thereafter a cheque was prepared and then Exhibit A3. She could not say the cheque was sent and received by plaintiff. Asked whether she had bank reconciliations for 2002, she said such records are no longer available. Even the copy of the cheque used to pay plaintiff was no longer available. Detailed records for 2002 where no longer available. She insisted that from the accounts systems, plaintiff was indeed paid.

The law

The evidence shows that there is no direct evidence showing that defendant on the 15 January 2002, paid plaintiff through cheque number 113396 in the sum of ZW$7 374.50. The defendant relies on circumstantial evidence that it paid. For the court to ascertain whether or not defendant has discharged the *onus* on a preponderance of probabilities that plaintiff was paid, it has to consider the totality of the evidence, the facts, and balance up probabilities, draw inferences therefrom and select a conclusion which seems the more natural and plausible one, even though such a conclusion is not the only reasonable one. In *British American Tobbaco Zimbabwe v Chibaya* SC 30/19 the court referred to a number of authorities in this jurisdiction and beyond regarding the test the court must deploy in a case where there is no direct evidence in a civil matter. The court said that:

> In court in *Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H), 176, held that:
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> In a civil case, where the court seeks to draw inferences from the facts, it may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several conceivable ones, even though that conclusion is not the only reasonable one.
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> In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, the concept of balancing probabilities was explained as follows:

> It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not.
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> In the book, The South African Law of Evidence, 4th Edition, *Hoffman and Zeffertt* state as follows:
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> In a civil case … if the facts permit more than one inference, the court must select the most plausible. If this favours the plaintiff, he is entitled to judgment. If inferences in favour of both parties are equally possible, the plaintiff has not discharged the burden of proof.…
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> The learned authors expound further and explain that the court may however find that the contentions of the party who has produced no evidence are the more probable. They state that what is weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case.
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> In the text Principles of Evidence, 4th edition, the authors Schwikkard and van der Merwe similarly state:
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> In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference. For example, in *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* (1982 (2) SA 603 (A)) it was held that a plaintiff who relies on circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences.

In *Govan v Skidmore* 1952 (1) SA 732 (N) it was held that a court, in making factual findings in a civil action, should, by balancing probabilities, select a conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.

Application of law to the facts

I now proceed to evaluate the evidence. On the central issue, as to whether or not the defendant paid the plaintiff the sum of $7 374.50 there are two irreconcilable versions. The *onus* is on defendant to prove on a balance of probabilities that it paid the plaintiff. The balance

of probabilities standard means that a court is satisfied that a fact or event occurred if it considers that, on the evidence, the occurrence of the fact or event was more likely than not. The tool used in deciding which of the versions in conflict must be preferred are the principles set out in the case of *Stellenbosch Farmers Winery Group (Ltd) and Another v Martell et Cié* 2003 (1) SA 11 (SCA) at page 14. Based on this case, the court is enjoined to make findings on the credibility of the witnesses; their reliability, and the probabilities.

In the overall adjudication of this case, I take into account that defendant's witnesses are mere office functionaries, testifying regarding their office functions. They have no axe to grind with the plaintiff, and it was not even suggested that they have a reason to mislead this court. I did not even detect an intention to mislead or peddle untruths. Their evidence is reliable and credible and in sync with the probabilities of the case. I accept it. Plaintiff was evasive and unreliable. His evidence has a ring of artificiality and untruthfulness, e.g. for him to aver that he did not know that he was entitled to compensation, after he had consulted a specialist and his disability assessed to 15 percent is just a falsehood.

It is not in dispute that plaintiff was employed by the defendant. On the 3rd May 1983, he was involved in a work related accident. On the 15 August 2001, an Orthopaedic Surgeon opined that his percentage disability was 15 percent. The National Social Security Authority (NASSA) approved a lump sum award of $7 374.50 as compensation to the plaintiff. The dispute turns on whether plaintiff was paid the compensation amount of $7 374.00. Plaintiff contends that he was not paid, while on the other hand defendant contends that he was paid.

In a letter dated 7 June 2016, before court as Exhibit A6 defendant informed plaintiff that he was paid on the 15 January 2002, through cheque number 113396 in the amount of ZW$7 374.50. Exhibit A3 is a NRZ Cheque Listing for January 2002, an extract from a list that contains individuals and entities that were paid by the defendant in the month of January 2002. It provides the date; cheque number; name and amount paid. In the list there is the following information: date 15 January 2002; cheque number 113396; Name L. Zulu and amount $7 374.50. There is no dispute that L. Zulu referred to in the List is the Plaintiff.

The first witness for the defendant testified that plaintiff's name will not appear in Exhibit A3 if he was not paid. If he was not paid his name will appear in an account of unpaid claims. He testified that defendant's accounts are audited, and if this payment was not made

the audit would show that such payment was indeed not made. He is relying on Exhibit A3 and the systems in the office to conclude that plaintiff was paid. He said he is sure that plaintiff was sent a cheque. Exhibit A3 shows that payment was indeed made to the plaintiff.

The evidence of the defendant's second witness is that systems and controls point to one conclusion, that plaintiff was paid. She testified that the systems at defendant's office are such that if payment was not made, this could have been detected at the relevant time. The payment requisition office would have made a follow up with the office that makes the actual payment. The reconciliations would have shown that there was an unpaid cheque. She testified that the fact that the requesting office did not raise an issue, shows that payment was made to the plaintiff. She testified that if payment was not made, i.e. the cheque not received and processed the system would have picked it up. There is nothing in the evidence before court to suggest that defendant did not follow its payment procedures when dealing with payment it contends it made to the plaintiff.

Further the evidence shows that plaintiff was pursuing his compensation payment right from the time of the injury. On the 15 August 2001, he got an assessment letter from the Orthopaedic Surgeon showing that his percentage disability was 15 percent (Exhibit A1). On the same day he received this assessment letter he submitted a copy to the senior medical doctor at the N.R.Z. His evidence is that after submitting the assessment letter he continued being in pain. The defendant was not assisting him with medication nor paying his medical bills.

On the 14 May 2015, he gets another assessment letter (Exhibit A2) from the same Orthopaedic Surgeon, almost identically worded as the first letter, he again submits it to the senior medical doctor at N.R.Z. The letter of the 14 May 2015, introduced nothing new that he did not know in 2001. He testified that in May 2015, the N.R.Z. doctor told him that he was paid his compensation, and he said he was not paid. It is his evidence that he started following up the issue of payment with the N. R.Z.

He was injured at work, he consults a specialist. He is advised of his percentage injury (Exhibit A1). He immediately submits his letter of assessment to defendant's senior medical doctor. Plaintiff is not an illiterate person. He was employed as a clerk. There would be no reason for him in 2001 to run around, go to a Specialist Orthopaedic Surgeon, and get an assessment of his disability just for the purposes of submitting the assessment to the doctor at

N.R.Z. and no more. He knew or must have known that he was entitled to compensation based on assessment of his disability. He remained quiet for approximately fourteen years. It is because of this that his inactivity from 2001 to 2015 is disconcerting. His explanation that he did not know that he was entitled to compensation cannot be the truth.

What is further disconcerting about this quietness or inactivity is that it starts in August 2001 when he submitted Exhibit A1 to the N.R.Z. senior medical doctor. By his own version he was still in pain during this period as he is still in pain now. For approximately fourteen years he does not make a follow up of the assessment letter he submitted to the N.R.Z. doctor. On the 7 January 2002, defendant alleges that it wrote him a letter (Exhibit A8), informing him of his lump sum compensation payment of $7 374.50. He criticizes the authenticity of the letter and says he did not receive it. I do not agree.

Defendant contends that plaintiff was paid on the 15 January 2002. The time between the submission of Exhibit A1 to the time N.R.Z. and the time he is alleged to have been paid is approximately six months. This was not an inordinate delay in effecting the payment. Thereafter plaintiff disappears and is not heard of again until 2015. All this is compounded by the fact that N.R.Z. has the date of payment, i.e. 15 January 2002; the Cheque number 113396; name of the payee and amount paid, i.e. $7 374.50.This quietness and inactivity in pursuing his compensation is worrying and suggestive of the fact that he received payment.

Defendant has an explanation for its inability to avail documentary proof of payment from its bankers. Defendant communicated with the Bank, and it was informed that the retention period of documents is ten years (Exhibit B1). The Bank no longer had documents for the relevant period, i.e. 2002. I take the view that this explanation is credible.

Under cross examination plaintiff testified that he had bank statements which shows that he was not paid. In support of his case plaintiff tendered ten documentary exhibits before court, but did not tender the bank statement. In the police docket there is plaintiff's bank statement, it is from Central African Building Society (CABS), account number 9032209634. The statement start date is 01/08/1998 and ends on the 07/03/01. If on the 4th February 2016, the date of the bank statement, the 1998 transactions could be retrieved, plaintiff should have been able to place before this court the January 2002 transactions. Again if the bank statement for the relevant period is with his legal practitioners, the question is why did the lawyers hold

on to it? The *onus* on the issue of payment is with the defendant, however plaintiff has an evidential burden or duty of rebuttal to discharge. The question that looms high is that if plaintiff or his legal practitioners have the bank statement for the relevant period, why was it hidden from this court.

I take the view that on the facts and totality of the evidence in this case, the conclusion that plaintiff was paid and received such payment is the more plausible one. It is the most probable inference that can be drawn from the evidence and the facts of this case. This conclusion might not be the only reasonable one, but I find it that it carries a reasonable degree of probability. On the evidence, I can say I think it more probable than not that plaintiff was paid and received his payment. Of the two versions before court I find that defendant's version the more probable of the two. I find that defendant has discharged the *onus* of showing on a balance of probabilities that it paid plaintiff the sum of $7 374.50.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the plaintiff.

Disposition

On a conspectus of the facts and all the evidence placed before court, I am of the view that defendant has discharged the *onus* of showing that it paid the plaintiff the sum of $7 374.50.

In the result, plaintiff claim is and hereby dismissed with costs of suit.

Mabundu and Ndlovu Law Chambers, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & partners, defendant's legal practitioners