

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2010/HP/752

(Civil jurisdiction)

BETWEEN:

LAMECK ZIMBA

PLAINTIFF

AND

CASSIUS RUMSEY

1ST DEFENDANT

CR HOLDINGS LIMITED

2ND DEFENDANT

Before: Hon. Judge B.M.M. Mung'omba on this 2nd day of December, 2014.

For the Plaintiff: N/A

For the Defendants: Mr. S. Lungu of Shamwana & Company

JUDGMENT

Cases referred to:

1. *Robert Simeza & 3 others vs Elizabeth Mzyece - SCZ Judgement No. 23 of 2011.*
2. *Pakeza Bakery Limited, Divine Foods Take Away & Butcher Limited vs Aetos Transfarm Limited, Stillsanos George Koukoudis (2004/4K/331)*
3. *Mazoka & Others vs Mwanawasa & Others Others (2005) Z.R. 138:*
4. *Khalid Mohammed vs Attorney General.*
5. *Wilson Masauso Zulu vs Avondale Housing Project Limited.*

6. *Galaunia Farms Limited vs National Milling Company Limited & Another.*

Works referred to:

Phipson on Evidence, Seventeenth Edition, (Thomson Reuters Legal) Limited, 2010)

On 16th July, 2010, the Plaintiff, **Lameck Zimba**, took out of the Principal Registry writ of summons claiming the following:

- 1) Restitution of the private personal vehicle Toyota Nadia Registration No. ABV 6620 Chassis No. SXN10-0004508 engine No. 3S 5046625;
- 2) Delivery or attachment of the said Vehicle Toyota Nadia Registration No 6620;
- 3) Damages for loss of use of the Vehicle for the period from 2nd May 2010 to the date of restitution;
- 4) Special damages at a rate of K200,000 per day from 2nd May 2010 to date of delivery;
- 5) Declaratory Order that the purported dismissal null and void *ab initio* or wrongful;
- 6) Damages for wrongful dismissal;
- 7) Damages for conversion of private property;
- 8) Order for payment of all terminal benefits for the period worked and all entitlement of the emoluments, allowances and an dues;
- 9) Interest on money found due;
- 10) Any other relief the Court may deem fit, and
- 11) Costs

In the statement of claim that accompanied the writ of summons also dated 16th July, 2010, the Plaintiff avers that he was a driver in the employ of

the 2nd Defendant. The 1st Defendant is and was at all material times an individual resident at Lusaka and running transport business through the 2nd Defendant. The 2nd Defendant was at all material times a limited company incorporated in Zambia by the 1st Defendant having its registered office at Lusaka.

He stated that on or about 27th April, 2010, the Plaintiff was on duty as an employee of the Defendants. He was driving a Company bus registration No ABP 141 from Lusaka, Zambia, to Johannesburg South Africa when he arrested for some passengers' parcel carried in the said bus.

The Plaintiff was detained in South Africa. He states that upon getting released on 2nd May 2010 and reaching Zambia, the Plaintiff suffered double tragedy. He avers to have been immediately suspended by the Plaintiff and impounded or confiscated the Plaintiffs personal Private Car Toyota Nadia Registration No ABV 6620. He contends that this action was unlawful.

The statement of claim reveals that the Plaintiff pursued the issue further with the Defendants whereupon the Defendants verbally informed him of the dismissal. He was also told by the Defendants that all his benefits he had worked for a period of five years had been forfeited together with the private personal car valued at K50, 000, 000.00 (now K50, 000.00).

According to the Plaintiff, he requested to know how much he had forfeited for his benefits and the Defendants refused to disclose unless he signed an undertaking to pay the Defendants for what they termed loss of business. He contends that he has not used his private personal vehicle from 2nd May 2010 as the same has continued to be detained by the Defendants to the detriment and inconvenience of the Plaintiff.

The Plaintiff has not also been allowed to work with the Defendants and has therefore lost the earnings and no clear explanation or written dismissal has been effected. The Plaintiff avers that he has suffered great

inconvenience, loss and suffering as a result of the Defendants' wrongful and unlawful action. He therefore contends that as a result of the aforesaid, he has suffered losses and damages and claims as per the endorsement on the writ aforementioned.

The Defendants entered their memorandum of appearance and defence on 29th July, 2010. They also counterclaimed. Save as herein admitted the Defendants denied each and every allegation as though the same were traversed seriatim. They however stated that the Plaintiff was arrested on 27th April, 2010, as a result of illegally carrying a bag containing sports jerseys in one of the diesel compartment of the bus.

According to the Defendants, the Plaintiff contravened his conditions of service with the Defendants because he was not supposed to carry illegal articles on the bus. The Defendants further avers that they exercised a lien over the vehicle No ABV 6620 because the Plaintiff agreed to reimburse the Defendants for the loss occasioned to the Defendant as a result of his illegal activities.

The Defendants denies that the Plaintiff has been dismissed from employment but that he is merely on suspension. Therefore, the Defendants contend that the Plaintiff is not entitled to any of the claims in the Statement of Claim.

In the counterclaim, the Defendants repeated the contents of the defence delved into earlier. The Defendants contend that in breach of his conditions of employment the Plaintiff carried on the bus an illegal parcel. They argue that on the 27th April 2010, and upon reaching Beit Bridge Border, the bus was searched and found to be carrying unauthorized material. As a consequence of the illegal material, the Plaintiff was arrested and indicted in the South African Courts. He pleaded guilty to the offence and was fined.

The Defendants set out the particulars of loss suffered as a result of the Plaintiff's illegal activities as follows:

Particulars of the loss

1. Customs fine	R12,400.00
2. Allowance for back up bus	R 7,144.67
3. Plaintiffs bail release	R 8,000.00
4. Refund to Passengers	R 5,100.00
5. Fuel for Co-Driver	R 600.00
6. Moving truck back to Beit Bridge	R 500.00
7. Accommodation for rescheduled Passengers	R 6.580.00
8. Loss of business	<u>R 30,000.00</u>
	<u>R 70,324.00</u>

The Defendants therefore counterclaim against the Plaintiff; the amount of R 70,324.67, interest and costs

In his reply filed into Court on 20th September, 2010, the Plaintiff joins issue with the Defendants on their defence. As regards the counterclaim, the Plaintiff avers that he never breached any condition of employment. He contends that the parcel carried was within the course of his and duty as it was never a duty of the Plaintiff to inspect and open parcels loaded on the bus.

The Plaintiff clarifies that the fine was merely imposed due to the fact that the parcel was found on the bus which belongs to the Defendants. Further that the Plaintiff was driving and that the alleged offence was in relation to the course of duty as a Driver like any other offence which go with Roads and Traffic Rules.

The Plaintiff denies contents of paragraph 16 and 17 of the counterclaim as he alleges that the bus in question had a co- driver who

proceeded with the journey. He contends that any other alleged loss cannot be attributed to the Plaintiff who was on duty like any other driver.

This matter kept suffering adjournments. When, it came up for trial on 21st October, 2014, I noted that the Plaintiff was again not in attendance. I concluded that the Plaintiff is not desirous of pursuing his claim. This is so because each time this matter came up the Plaintiff has not availed himself. For instance, when the matter came up on 22nd August, 2014, Counsel for the Plaintiff indicated that they had difficulties locating their client. As such Counsel filed into Court a notice of withdrawal as advocates.

On same date of 21st October, 2014, Mr. Lungu, Counsel for the Defendants applied to prosecute the counterclaim and I so ordered.

In support of the counterclaim, DW was **Cassius Rumsey**, the 1st Defendant. He knows the Plaintiff as a former employee of the CR Holdings Limited. He worked as a driver and has since left employment.

He told Court that the Plaintiff was operating on the South Africa - Johannesburg route. During the period of the world cup in 2010, the Plaintiff left Lusaka heading for South Africa. When he got to Beit Bridge, the customs officers found on the bus T-Shirts which were not allowed to be sold in South Africa.

Upon finding the prohibited T-Shirts, the driver was detained and the bus was impounded by the South African authorities. The Plaintiff was charged for carrying unauthorized goods and he appeared in Court.

DW stated further that when the bus was impounded, the passengers were ordered to disembark and the company had to find alternative means of transport, such as minibuses, to Johannesburg. As regards passengers who did not manage to proceed to Johannesburg on that day, the company had to organize alternative accommodation at City Inn.

The witness testified that after the Plaintiff had appeared in Court, he was convicted and fined. The company was also fined for the bus. Both fines were paid by the company and the Plaintiff was released. He referred to receipts at page 29 of the Defendant's Bundle of Documents.

It was his testimony that when the Plaintiff came back to Lusaka, he was asked to give an account of what transpired on that fateful day regarding the detention and seizure of the bus. A letter was written to him and the Plaintiff accepted responsibility for what had transpired

He narrated that when the Plaintiff was leaving for South Africa, he had left his motor vehicle in the workshop. After the detention and seizure incidence referred to above, the company decided to hold on to the said motor vehicle until the Plaintiff had reimbursed the costs incurred during the incidence. His counterclaim amounts to R70, 324.67.

After hearing the counterclaim, I adjourned the matter to 2nd December, 2014 for judgment.

I have considered the matters raised and argued in this case. I have also considered the documentary evidence on record.

I will begin by addressing the issue of non attendance of the Plaintiff on the 21st October, 2014, when the matter came up for trial. I proceeded against a back drop of several adjournments being occasioned by the Plaintiff with no explanation tendered for his absence. This is despite notices of hearing being issued. I was fortified in my decision to proceed on the basis of the authority of the case of **Robert Simeza & 3 others vs Elizabeth Mzyece - SCZ Judgement No. 23 of 2011** ⁽¹⁾ where the Supreme Court stated: *that there is no procedural injustice occasioned when a party who is aware of proceedings does not turn up.*

In ***Pakeza Bakery Limited, Divine Foods Take Away & Butcher Limited vs Aetos Transfarm Limited, Stillsanos George Koukoudis (2004/4K/331)*** ⁽²⁾ held:

“The trial proceeded in the absence of the Defendants, and their Counsel because they had not reasonably or sufficiently excused their absence.”

Order 35/1/1/ of the 1999 Rules of the Supreme Court (White Book) states that:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.”

Before proceeding to consider the counter claim by the Defendants. I warn myself that the burden of proof rests on the Defendants to prove their counterclaim on a balance of probability. It is trite law that this is the standard of proof applicable in civil cases.

The learned authors of ***Phipson on Evidence*** 17th edition in paragraph 6 - 06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

In ***Mazoka & Others vs Mwanawasa & Others*** ,⁽³⁾ the Supreme Court pointed out that

“As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

I am alive to the principle articulated in the ***Khalid Mohammed vs Attorney General; ⁽⁴⁾ Wilson Masauso Zulu vs Avondale Housing Project Limited ⁽⁵⁾ & Galaunia Farms Limited vs National Milling Company Limited & Another,⁽⁶⁾*** that the mere failure of a Defendant’s case does not automatically entitle the Plaintiff to Judgment if the Plaintiff fails to prove his case against the Defendant.

In the case at hand the Defendant has made a counterclaim and therefore the onus rests on the Defendant to prove his counterclaim against the Plaintiff.

The Defendant’s counterclaim arises from the events on the 27th April, 2010, when the Plaintiff who at the time was a driver in the employ of the Defendant was arrested and indicted in South Africa for carrying unauthorized material.

The Plaintiff upon pleading guilty was fined. The 1st Defendant is contending that as a result of the Plaintiffs illegal activities the Defendants suffered a loss which he has particularized. The total sum to R70,324.67.

The question for resolution by this Court is; are the expenses incurred by the Defendant after the bus was impounded or detained attributed to the Plaintiff?

It is not in dispute that the Plaintiff was the Defendant’s driver and after the bus he was driving was impounded by the South African Authorities he was charged and pleaded guilty to carrying unauthorized goods.

It is also not in dispute that the Defendant sustained a loss. I have perused the documentary evidence on record which includes receipts at page 29 of the Defendant’s Bundle. Taking in consideration all the evidence

before me I have no difficulty in arriving at the conclusion that the loss incurred by the Defendant emanated from the Plaintiff's conduct.

The Court is satisfied that the Defendants have discharged the onus placed on them and proved their counterclaim on a preponderance of probability.

Judgment is entered in favour of the Defendants for the sum of R70,324.67 with interest at the average short term bank deposit rate, from date of writ to date of Judgment, thereafter at the current bank lending rate as determined by Bank of Zambia until date of payment.

Costs for the Defendants to be taxed in default of agreement.

Leave to appeal granted.

Dated this 2nd of day of December, 2014

B.M.M. Mung'omba
HIGH COURT JUDGE

