Abdul Latif Bin Mohamed Tahiar (trading as Canary Agencies) v Saeed Husain s/o Hakim Gulam Mohiudin (trading as United Limousine)
[2003] SGHC 15

Case Number : DCA 22/2002

Decision Date : 31 January 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Andrew J Hanam (Hanam & Co) for the plaintiff/appellant; K Anparasan (Khattar Wong & Partners) for the defendant/respondent

Parties : Abdul Latif Bin Mohamed Tahiar (trading as Canary Agencies) — Saeed Husain s/o Hakim Gulam Mohiudin (trading as United Limousine)

Civil Procedure – Pleadings – Amendment – Whether defect in pleadings can be cured by averments in affidavit.

Employment Law – Employees' duties – Employee set up competing business whilst in employ of employer – Whether employee in breach of fiduciary duty to employer

1 This appeal by the plaintiff arose from the decision of the District Judge Zainol Abeedin handed down on 8 November 2002, after a trial lasting 3½ days.

2 The background to this appeal was this. The plaintiff was engaged in the business of providing chauffeur driven cars on hire to various clients for a fixed period. Mitsubishi Corporation ('Mitsubishi') was one of the plaintiff's customers to whom the plaintiff supplied chauffeur driven cars and had, in the event, entered into a contract to provide them with two chauffeur driven cars from 4 May 1998 till 3 May 2001. The plaintiff was paid $6,000 a month for the supply of each car with a driver from 8 am to 6 pm on Mondays to Fridays (excluding public holidays) and approximately a further $2,000 a month for each car and a driver for week nights, week-ends and public holidays. The defendant was one of the drivers in the employ of the plaintiff from 1 July 1997 and was assigned to drive one of the plaintiff's vehicles under hire to Mitsubishi, until his services were terminated by the plaintiff on 24 March 2001.

3 It was not in dispute that the defendant's services were terminated by the plaintiff when the latter discovered in the course of March 2001 that the defendant had surreptitiously registered a business known as United Limousine from about 25 September 2000 with the object of supplying chauffeur driven cars to interested parties and had in fact obtained a contract from Mitsubishi to supply them for one such car whilst he was still in the employ of the plaintiff. The plaintiff also came to know later that the defendant whilst remaining in the service of the plaintiff, sent a quotation on 14 March 2001 to Mitsubishi, this time, for the supply of "one unit of chauffeur driven *combi* (a passenger van) for one year. The plaintiff who did not know of the defendant's secret endeavours submitted his quotation to Mitsubishi on 15 March 2001 also for a chauffeur driven *combi*. As it transpired, the plaintiff failed in his bid whereas the defendant managed to secure the contract from Mitsubishi for the supply of one chauffeur driven *combi* on 28 March 2001 for one year.

4 Having discovered the defendant's acts of disloyalty and being stung by the set-backs resulting from them, the plaintiff commenced this action against the defendant. The plaintiff's claim contained two components, one particularised under the heading 'Mercedes Contract' and the other under the heading "Combi Contract". Both claims were for damages said to have been suffered by the plaintiff,

as a result of the defendant's breach of fiduciary duties. In the main, the substance of the plaintiff's claim was that the defendant, whilst being in the employment of the plaintiff, unlawfully carried out activities and engaged himself in a secret business venture in competition with that of the plaintiff.

5 The plaintiff's claim as pleaded and particularized by him in his amended statement of claim under the first heading, Mercedes Contract was for a sum of $101,700. Under the Combi Contract, the plaintiff claimed a sum of $37,934. At the end of the trial, the District Judge after disallowing the Combi claim awarded the plaintiff damages amounting to $107,100 and costs of $18,500.

6 The defendant did not appeal against the decision but the plaintiff, being dissatisfied with the decision on all three items, appealed to the High Court, contending that the District Judge was in error in not awarding him a sum of $158,500, being the sum mentioned by the plaintiff's accountant, his expert witness, in a report presented to the court in respect of the Combi claim. The plaintiff also appealed against the order for costs below as being too low.

7 Having heard arguments from both counsel, I came to the conclusion that the arguments by the plaintiff's counsel as respects the Mercedes claim was without merit for the simple reason that the sum awarded by the court below was exactly the sum that was particularised and claimed in the plaintiff's amended statement of claim. Although a higher figure was mentioned in the plaintiff's accountant's report, strangely, no application was ever made to the court to amend the pleadings. It is a settled principle of law that parties stand by their pleaded case and any defect in the pleadings cannot be cured by any averments in affidavits, let alone an oblique reference in counsel's closing speeches (see *Gold Ores Reduction Co v Pain* [1892] 2 QB 14; *Novotel Societe D' Investissements Et D' Exploitation Hoteliers & Anor v Pernas Hotel Chain (Selangor) Bhd* [1987] 1 MLJ 210 at 214 D-E (left) and *Spedding v Fitzpatrick* (1888) 38 Ch D 410).

8 It was evident from the facts presented that plaintiff's counsel did not take the requisite steps to amend the pleadings at any stage of the proceedings, although he was aware that his accountant's estimate of damages based on certain assumptions mentioned a higher figure than the amount claimed. When asked by the court during appeal arguments, why no application was made to re-amend the pleadings, he could only say that it was an oversight on his part.

9 In my view, the District Judge was not in error in awarding judgment for the amount claimed in statement of claim on the facts founded by him. Counsel for the plaintiff should have made an application to amend, and having failed to do so it did not lie in his mouth to blame the court to do his homework. Given the scenario, the plaintiff's appeal as regards the Mercedes component lacked merit and ought to be dismissed.

10 As regards the second part of the appeal, namely, the Combi component, it would appear from the grounds of decision that the district judge disallowed the claim for the reason that although the defendant attempted to obtain the combi contract whilst he remained in the plaintiff's employ, he was not awarded the said contract until his services had been terminated and in any event, the contract secured by the defendant was different in character from the one sought by the plaintiff.

11 In my view, the district judge seemed to have overlooked some important features in regard to the combi component. First, the defendant was in clear breach of his employment obligations in competing with his employer and endeavouring to secure a contract for his benefit from the customer of the plaintiff on 14 March 2001. He was an insider. He would have in all probability known the rates that were being offered by the plaintiff to his customers. To use a figure of speech, he was like a fence which instead of protecting the very crop it was supposed to do, had gone about damaging its existence. Although he was eventually found out and dismissed from service on 24 March 2001, the contract awarded to him on 28 March 2001 was found to contain almost all the terms of the quotation submitted by him on 14 March 2001. There were a few slight variations. But these were decidedly more advantageous to the defendant than what was quoted by him in his letter of 14 March 2001. In fact, the defendant managed to supply a second-hand vehicle instead of a new vehicle and further managed to obtain one month's advance rental payment and two month's deposit which did not feature in his quotation. This aspect immediately put paid to the defence argument that the defendants' quotation of 14 March 2001 was rejected by Mitsubishi.

12 In the premises, the conclusion that the defendant was not liable in damages because the combi contract obtained by him a few days after he had left the service of the plaintiff was different in character from that of the plaintiff, was an over simplification and did not seem to accord with settled principles of law.

13 In *Wessex Dairies Limited v Smith* [1935] 2 KB 80, the court of appeal in England held that a servant who, while still in the service of his master, solicits the customers of his master to transfer their custom to himself, even though that transfer is to take effect only after the service has terminated, commits a breach of his duty to his master, and for that breach he is liable in damages. The defendant in that case was not terminated owing to any misconduct or breach of fidelity on his part but it was he who terminated his service by giving to the plaintiff one week's pay in lieu of notice. Yet, the Court in finding against him, held that the servant's obligation to protect his masters' interests lasts until the last hour of his service. Greer LJ said (at page 85, *supra*) 'In this case the defendant acted contrary to his duty. During the last week of his service with the plaintiffs, while pursuing his duty by calling on customers and delivering milk to them, he tried to induce them to become his customers after his employment with the plaintiffs was terminated and for the direct result of that wrongful act he is liable to pay damages.'

14 In the present case, the defendant, by all accounts, was in flagrant violation of a cardinal rule that an employee cannot act in derogation of his duties to be faithful to his employer. This aspect, as I said earlier, was unfortunately overlooked by the court below.

15 On the question of the amount of damages to be awarded, several configurations were presented to the court by both counsel. Having considered them, I am of the view that the computation of the notional loss to the plaintiff should be pegged at nine months' loss of profits, bearing in mind that the intended duration of the proposed contract by the plaintiff was just about nine months ie, from about the end of March 2001 until December 2001. As for the loss of additional payments, I was of the view that it should be based on the figures appearing in the contract awarded to the defendant on 28 March 2001. In this, the calculations produced by both counsel suggested a sum of $14,875. Consequently, the plaintiff's appeal on the *combi* component was allowed and the plaintiff was awarded a sum of $14,875 payable by the defendant.

16 The next aspect concerned the costs awarded by the court below. Plaintiff's counsel contended that the award was manifestly inadequate and that the plaintiff should have been awarded at least $35,000. In my view, the award of $11,000 for the first day, $3,000 each for the subsequent two full days and $1,500 for the next half day could in no way be considered low or manifestly inadequate. Although the District Judge could have treated the final half day as one day for the purposes of computation, this aspect by itself did not warrant any reviewing the costs awarded. Now, as respects the costs of the appeal, I was of the view that since the plaintiff had succeeded overall, he was, as a matter of course, entitled to costs which I fixed at $3,500.

17 For the reasons appearing herein, I allowed the plaintiff's appeal to the extent that he was awarded a further sum of $14,875 as additional damages under the Combi component and costs of $3,500. It was further ordered that the security for costs deposited by the plaintiff be refunded to him or his solicitors

Order accordingly