GUARDFORCE INVESTMENTS (PVT) LTD

Versus

THULANI GUMBO N.O. & 2 OTHERS

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 29 FEBRUARY 2024

Opposed Application

Advocate P. Dube for the applicant
K. Ncube for the 1st respondent

MOYO J: This is an application wherein applicant seeks the following relief:

"1. The 1st respondent's action instituted by summons under case HC 411/13 be and is hereby dismissed on the grounds that it is frivolous and vexatious.

2. The 1st respondent shall pay the costs of suit on an attorney and client scale."

At the hearing of the application, 1st respondent raised preliminary points to the effect that there is no valid application before the court as the attached resolution was for the applicant's Sheunesu Chando to use it on matters pertaining to Carrack Investments and not Guardforce Investments, the applicant herein. However applicant's counsel submitted that there is a resolution by the applicant in favour of Sheunesu Chando and that in all matters prior and pending before the courts, Sheunesu Chando has always been so authorised and that 1st respondent is aware of this fact and that therefore nothing turns on this challenge. I hold the view that this is now a tired objection wherein as long as the parties know each other's identity and their usual representatives, it is not an issue that should be

raised in a case where parties know each other's authorised representatives due to numerous litigation between themselves. This objection must only be made out of a serious concern on the issue of whether the person before the court has truly been so authorised. What matters is that the court must be satisfied that the authorised party is before it. I refer in this instance to the judgment of *African Banking Corporation of Zimbabwe Ltd t/a BANCABC* vs *PWL Motors (Pvt) Ltd & 3 Others* HH-123-13 wherein the court stated thus:

> "However, it occurs to me that that form of proof is not necessary in every case each case must be considered on its own merits. All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not the unauthorised person. To my mind the attachment of a resolution has been blown out of proportion and to ridiculous levels."

I tend to agree with this view, for the simple reason that 1st respondent is aware of all the other instances wherein Sheunesu Chando has represented applicant with a resolution that has no typo issues, but decides nonetheless, to nit-pick on the contents of the attached resolution with a view to challenging it. The 2nd preliminary objection relates to the failure by applicant to attach an agreement of sale to the founding affidavit. An agreement that 1st respondent terms is the cause of action in this application. Applicant refutes this submission that the agreement of sale is the cause of action. Clearly, one wonders where 1st respondent formulates this view from. To start with, the relief sought is about a dismissal of a suit namely HC 411/13 as being frivolous and vexatious. It is not about upholding any agreement of sale. Chronicled in the founding affidavit is the journey travelled by these parties in litigation, spanning across a decade with a spill over to the Supreme Court and the applicant is simply saying can this journey be curtailed by a dismissal of a suit that applicant in its view finds to be frivolous and vexatious. Can it be said that the agreement of sale is the cause of action? No. Whilst the main bone to chew between the parties is the agreement

of sale, this interlocutory application is not about the agreement of sale as a cause of action in my view, but it is about whether 1st respondent's conduct in spearheading the suit is frivolous and vexatious or not. It is thus my considered view that the preliminary point on the cause of action is misplaced. I will thus not uphold the points *in limine* raised as I find them misplaced and with no merit. It is my considered view that a reading of the answering affidavit and the attachment of the agreement is not to establish the cause of action but to enlighten the 1st respondent. It is in answer to 1st respondent's affidavit paragraph 5 therein which alleges fraud. It does not occur to me that for this reason, the agreement of sale formulates the cause of action in an interlocutory application where an applicant seeks to have proceedings declared frivolous and vexatiousness. In an application where the applicant seeks a dismissal on the ground of frivolity and vexatious what it has to show are all the relevant factors pertaining to that and not an agreement of sale.

It is for these reasons that I will not uphold the points *in limine* as I have not found any merit in them.

The points *in limine* are dismissed with costs being in the cause and the matter is proceeding to be heard on the merits on a date to be advised to the parties.

Malinga, Mpofu Legal Practitioners, applicant's legal practitioners
Kossam Ncube & Partners, respondent's legal practitioners