DAIRIBORD ZIMBABWE (PRIVATE) LIMITED
and
COMFORT HR STRATEGIES

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 22 February & 31 October 2022

COURT APPLICATION

Z T Zvobvo, for the Applicant
M Moyo, for the Respondent

INTRODUCTION

MANZUNZU J : This is an application for summary dismissal of an action in terms of Order 11 rule 75 (1) of the then High Court Rules 1971 which provides that: *"(1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious."*

The applicant seeks an order against the respondent in the following terms:
"*IT IS ORDERED THAT:*

1. *The instant application succeeds.*
2. *The respondent 's summons and declaration under HC 2591/20 be and are hereby dismissed on the grounds that the claim is frivolous and vexatious.*
3. *The respondent shall pay the applicant's costs of suit for both the present application as well as the dismissed summons action under HC 2591/20."*

BACKGROUND

The respondent, Comfort HR Strategies (Comfort) sued the applicant, Dairibord Zimbabwe (Private) Limited (Dairibord) under case number HC 2591/20 for the refund of USD110 000.00 a claim based on unjust enrichment. Comfort is a company registered in terms of the laws of

South Africa. According to Comfort 's declaration, there was a verbal agreement between the parties in October 2018 the material terms of which were that Comfort would pay, on behalf of Dairibord, to Dairibord's foreign suppliers for the purchase of certain input materials. It was agreed that Comfort will pay a total sum of USD500 000.00 to Dairibord's foreign suppliers. In turn Dairibord will pay Comfort a Zimbabwean dollar amount equivalent to USD500 000.00 at a premium which at the material time was agreed at ZWL$1 250 000.00 which amount was held in trust by Samukange Hungwe Attorneys (the lawyers) pending performance by Comfort. The declaration further says Dairibord repudiated the agreement when it withdrew ZWL$975 000.00 of the money from the trust account. Comfort accepted that the repudiation cancelled the agreement but has raised the claim for unjust enrichment.

Following an exchange of pleadings after the request for further particulars and supply of the same, Dairibord filed a plea in which it confirmed the material terms of the agreement. It alleged that Comfort was in breach of the material terms of the agreement when it failed to effectuate payment of the entire USD500 000.00. Dairibord denied repudiation of the contract on its part. A claim for unjust enrichment was also denied.

Dairibord does not deny that Comfort paid USD110 000.00 on its behalf to its foreign suppliers but argues the amount is equivalent to ZWL$275 000.00 which amount was left in the trust account for Comfort to redeem. On this basis Dairibord says the claim for unjust enrichment cannot be sustained hence the present application.

Comfort has opposed this application. The bone of contention is centred on the amount of ZWL$1 250 000.00 deposited in the lawyers' trust account. Dairibord says the amount was equivalent to USD500.000.00 as agreed to by the parties. Comfort's position is that it was an agreed amount to show proof of funds as the actual amount to be paid by Dairibord was to be at the prevailing interbank rate. In any event Comfort could not redeem any amount of money from the trust account without Dairibord's specific written instructions to the lawyer which instructions were never given.

ISSUES

The only issue emerging is whether or not Comfort's action in case number HC 2591/20 is frivolous or vexatious. Dairibord says it is. Comfort says it is not.

THE LAW

An action is frivolous or vexatious if it is impossible to succeed. It must be hopeless with no chance of success. This is an objective test.

In *Rogers v Rogers and Another, SC SC64/07* the Supreme court had this to say; "*Summary dismissal of an action in terms of r 79(2) of the Rules is an extraordinary remedy to be granted in clear and exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access to the Court. The object of the rule is to enable the Court to stop an action which should not have been launched. In Lawrence v Norreys 39 Ch.D 213 BOWEN LJ at p 234 said:*

> *"It is abuse of the process of the court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief."*

In S v Cooper & Ors 1977(3) SA 475 at 476D BOSHOFF J said that the word "frivolous" in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" <u>when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation</u>. See also Western Assurance Co v Caldwell's Trustee 1918 AD 262 at p 271; Corderoy v Union Government 1918 AD 512 at p 517; Wood NO v Edwards 1968(2) RLR 212 at 213 A-F; Fisheries Development Corporation v Jorgensen & Anor 1979 (3) SA 1331 at 1339 E-F; Martin v Attorney General & Anor 1993(1) ZLR 153(S).

It appears to me that a plaintiff who commences action in a Court of law when he or she has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable." (emphasis is mine).

The onus is on Dairibord to show that Comfort's action is frivolous and vexatious. There is no heavy burden upon Comfort which merely has to show that there is a triable issue. In *Jena v Nechipote 1986 (1) ZLR 29 (SC)* the court said; *"All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that there is*

a mere possibility of success, he has a plausible case, there is a triable issue or there is a reasonable possibility that an injustice may be done if summary judgment is granted."

ANALYSIS OF EVIDENCE

Has Dairibord discharged the burden of proof upon it to show that Comfort's action is unsustainable, manifestly groundless or utterly hopeless and without foundation?

In submissions Mr Zvogbo for the applicant tend to dismiss that part of Comfort's evidence which says the parties agreed that Dairibord will pay Comfort at the prevailing interbank rate because at the time there was no interbank rate until SI 33 of 2019 was introduced. This is despite what counsel wrote in his letter of 22 January 2020 (annexure "B" to opposing affidavit paragraph 5) which states that; *"The amount of USD$110 000.00, which was acknowledged by our client, amounted to the sum of ZWL$275 000.00 at the interbank rate of 2,5 prevailing at the time in question…" (emphasis is mine).*

While Dairibord argues that the real cause behind Comfort's summons is inflation, I disagree for two reasons. There is an issue arising out of the summons. The issue is how was Comfort to be compensated in Zimbabwean dollars'. It is clear from the evidence that the parties have taken contradicting positions. Secondly, Comfort says had no access to the funds in the trust account without written instructions from Dairibord to the lawyers that such money be paid to Comfort. Reference was made to email communication of the 1st and 5th November 2018 (annexures 11 and 12 of founding affidavit) in which Dairibord gave specific instructions that funds will not be released to Comfort without their instructions. In a letter to the lawyers dated 28 June 2019 Dairibord said funds were never to be released without its written authority. There is no evidence to say such written authority was given and yet Dairibord persists that Comfort failed to redeem ZWL$275 000.00 from the trust account. Whether or not Dairibord repudiated the contract is a triable issue.

This application has no merit. The respondent was justified to ask for its dismissal. However, the respondent asked for costs on a higher scale. Costs are at the discretion of the court. In *casu* it was not demonstrated why costs should be at a punitive scale.

DISPOSITION

The application be and is hereby dismissed with costs.

Zvobgo Attorneys, Applicant's Legal Practitioners

Dube-Banda, Nzarayapenga and Partners,Respondent's Legal Practitioners.