CHITUNGWIZA MUNICIPAlITY

versus

DELATFIN INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 29 June 2011

Mr *B. Chidziva*, for the applicant

Adv *T. Mpofu*, for the respondent

CHIWESHE JP: The applicant municipality seeks an order compelling the respondent to release its plant, machinery and equipment which it avers is unlawfully in the custody of the respondents.

According to the applicant, sometime in June 2007 the parties entered into an agreement in terms of which the respondent would repair the applicant’s equipment at its own cost. The cost so incurred would be quantified by the respondent and forwarded to the applicant. The respondent would then use the equipment for its own business for such period as would be equivalent to the costs incurred in the repair of same. This arrangement was meant to be of thirty days duration, subject to renewal. In terms of this “Memorandum of Understanding” there was no specific provision for payment of any money by the applicant. Contrary to this position, the respondent claimed from the applicant the sum of $13 122 622 511.77. Although the applicant felt there was no legal basis for such a claim it nonetheless resolved to settle this amount but, despite payment, the respondent refused to release the equipment. This claim was followed by another one in the sum of $446 144 473 404.72 (Zimbabwean currency) and a further claim in the sum of US$281 840.00. Although the applicant avers that all these claims were without legal basis, it nonetheless disbursed in the final analysis a total sum of Z$271 000 000 000.00.

It is patent from the applicant’s rendition of the events leading to this dispute that there are gaps in its account of these events. No explanation has been given why these payments were being made against “baseless” claims on the part of the respondent.

Further, it is evident that there are material disputes of fact in this matter. I agree with Adv *Mpofu* that these disputes cannot be resolved on the papers as they stand. The application ought to be dismissed on that score alone. For example, the parties differ on the nature of the agreement that they entered into. This is a crucial matter because the dispute between the parties can only be resolved by reference to the terms of the agreement governing their relationship. Oral evidence would have to be adduced.

The agreement upon which the applicant bases its claim lists only four pieces of equipment but the applicant claims ten pieces. The respondent avers there were further agreements entered into by the parties. The nature of such further agreements, if any, must be interrogated.

The applicant paid monies to the respondent but it is also averred by it that in terms of the agreement between the parties, no monies were to be exchanged. Further, the respondent avers that the contract between the parties was oral, the terms of which are in dispute. How does the applicant expect the court to resolve such dispute without hearing “*viva voce*” evidence?

Under these circumstances I cannot entertain the applicant’s request that I take a robust approach and attempt to resolve these disputes on the papers. These disputes are best dealt with by a trial court. The parties must proceed by way of action. I understand the respondent has instituted action proceedings. These are pending before this court. It boggles the mind why if that is the case the applicant would have sought to now proceed by way of application. See *Oshea v Chiunda* 1999 (1) ZLR 333.

For these reasons I am inclined to dismiss this application. In my view this is an appropriate case in which the respondent could have sought costs on the higher scale. It did not.

Accordingly it is ordered as follows:

1. The application be and is hereby dismissed in its entirety.
2. The applicant pays the costs.

*Muskwe & Associates*, applicant’s legal practitioners

*Messrs H. Mukonoweshuro & Partners*, defendant’s legal practitioners