ZIMBABWE ONLINE (PVT) LTD

versus

TELECONTRACT (PVT) LTD t/a TELCO

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 9 February, 2012

**Opposed Application**

*E.W.W. Morris*, for the applicant

Miss *R. Theron*, for the respondent

MUTEMA J: The two applications were consolidated for the simple reason that they involve the same parties wherein the respondent, as the plaintiff, instituted actions against the applicant as the defendant, claiming certain amounts of money “being the outstanding balance owed to the plaintiff by the defendant for *inter alia* internet access provider services”.

In case No. HC 8118/10 for instance, the respondent’s declaration is composed of 13 paragraphs, excluding the prayer, spanning over six pages. In both cases the applicant filed a request for further particulars. Of the fifty further particulars requested in HC 8118/10 only one relating to the prayer regarding the basis on which interest is claimed from 26 April, 2010, was supplied.

In both cases, in refusing to supply the requested further particulars, the respondent reasoned thus;

“The particulars requested herein are within the defendant’s knowledge. The defendant has a copy of the agreement as well as the invoices. In any event, the further particulars requested herein are matters of evidence and or law which the defendant does not require for purposes of pleading”.

The foregoing reply prompted the applicant in either case to lodge the present court application to compel provision of the further particulars requested on 10 December, 2010. In either application the respondent opposed the relief sought on the basis quoted above.

In their book The Civil Practice of the Superior Courts in South Africa 3rd ed at p 310, Herbstein and Van Winsen state that the function of particulars required to enable a party to plead to his opponent’s pleading is to provide a more precise, albeit fuller, statement of the issues which will arise on the trial. The supply of such particulars will of necessity, limit the generality of the allegations in the pleadings and will prevent the party so supplied from being taken by surprise at the trial.

In its heads of argument, the respondent aptly captured the relevant law governing the subject of further particulars. For instance, in the Civil Practice Handbook 1996 Mary Welsh, at pp 8-10 says that where another party’s claim or defence is not sufficiently clear, a party may request further particulars of the claim which will enable him to plead. Particulars are intended to define the issues and prevent a party from being taken by surprise at the trial. Only those particulars which are strictly necessary will be supplied and not where disclosure of evidence is sought, or where the request is fishing expedition or to gain time or to assemble material for cross-examination or where particulars relate to a statement of law.

It also cited the case of *Trinity Engineering (Pvt) Ltd* v *Commercial Bank of Zimbabwe Ltd* 1999(2) ZLR 417(H) at 421 B where SMITH J quoted with approval *White* v *Moffet Building and Contracting (Pty) Ltd* 1952 (3) SA 307(O) which held that a defendant was entitled to request and be supplied with particulars when the plaintiff’s declaration was lacking in certainty and particularity.

In *Purdon* v *Muller* 1961(2) SA 21(A) OGILVIE THOMPSON JA, dealing with the detailed further particulars which had been requested therein, cautioned against the tendency on the part of practitioners to abuse the further particulars procedure by making unnecessary and unduly lengthy requests for information before pleading thereby clouding the real issues between the parties.

Also, in *Trinity Engineering (Pvt) Ltd* v *Commercial Bank of Zimbabwe Ltd* 2000 (2) ZLR 385 (H) at 389 E-390 GILLESPIE J said,

“In terms of these rules of court, particulars of a claim or defence may be supplied on the principle that:

‘A litigant is entitled to know the cause or defence he has to meet; not only to know whether he should admit or deny the particular allegation. He is entitled to be placed in the position of being able to decide whether to persist in his claim or defence’.

The particulars to which a litigant is entitled however, are … particulars of matters in respect of which the onus is on the opponent…”.

However, the respondent *in casu* has not been able to establish that the lengthy requests made by the applicant fall within the purview of disclosure of evidence or fishing expedition or statement of law. The lengthy requests made are justified on the following grounds:-

1. The suit at hand is not an ordinary run of the mill suits. It is of a technical nature which calls for a more precise or fuller declaration.
2. The tenor of the respondent’s declarations in both cases lacks sufficient particularity to fully appraise the applicant regarding *inter alia* when the agreements were concluded, if prior to introduction of the multicurrency regime whether the respondent could charge in foreign currency, several agreements having been concluded both orally and in writing over the years which of those agreements were allegedly breached by the applicant, the applicant having made payment of what it deems is owing in respect of what services and which customers the alleged balance is predicated upon, the basis of the calculations, what structural connectivity entails and the import and relevance of the alleged clandestinely erected base station.
3. The particulars being requested are of matters in respect of which the onus is on the respondent – he who avers must prove. The declarations lack the necessary particularity to the extent of being susceptible to exception. They do not place the applicant in a position to know whether it should admit or deny the respective allegations or to be able to decide whether to persist in its defence.

Both applications must therefore succeed.

Regarding costs, each party prayed for them on a legal practitioner and

client scale.

In *Borrowdale Country Club* v *Murandu* 1987 (2) ZLR 77(H) MTAMBANENGWE J held that whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale such an award will be granted where the unsuccessful party’s conduct has been completely unreasonable and reprehensible. In the present case, the respondent’s attitude had been that of a man who has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have been resolved quite amicably and inexpensively if he had showed the slightest co-operation. In such circumstances it was quite unfair for the successful party to be put out of pocket in the matter of costs.

Rubin L in Law of Costs in South Africa, Juta & Co (1949) at 190 listed principles guiding courts in deciding whether or not to award costs on an attorney and client scale as follows:-

“1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings.

2. Malicious conduct

3. Vexatious proceedings

4. Reckless proceedings

5. Frivolous proceedings”

And in *Neil* v *Waterberg Landbouwers Ko-operative Vereening* 1946 AD

597 at 607, TINDALL JA (as he then was) said:-

“The true explanation of awards of Attorney and Client costs not authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which gave rise to the action or conduct of the losing party, the Court in a particular case considers it just, by means of such an Order to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation”.

In the instant case, the respondent having poorly drafted its declarations as spelt out above, and the applicant having had the good sense of not going for an exception but requesting for further particulars (a less expensive procedure) and the respondent, for no good cause shown, having refused to furnish the particulars, such conduct befits the description of vexatious or reckless or frivolous. I consider it just that the applicant should not be put out of pocket in respect of the expense occasioned to it by these applications.

In the event, I make the following order:-

1. Both applications in HC 6895/11 and HC 6896/11 be and are hereby

granted in terms of their respective draft orders;

1. The respondent is ordered to pay the applicant’s costs on the scale of

legal practitioner and client.

*Atherstone & Cook*, applicant’s legal practitioners

*Scanlen and Holderness*, respondent’s legal practitioners