LIBERG AUTOMOTIVE
and
CRAIG LOGAN
and
BRUCE SMIDT
and
RENEE BOTHMA
versus
FIRST MUTUAL COMMERCIAL ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAVANGIRA J.
HARARE, 23 July and 13 November, 2013

Opposed Application

N. Willsmer, for the applicants
T. Pasirayi, for the respondent

MAVANGIRA J. This is an application in which an order is sought for the respondent to furnish the further and better particulars requested by the applicants on 25 November 2011. The second applicant is the deponent to the founding affidavit wherein he avers that he is authorised by the first applicant to make the affidavit and bring the application. He also avers that he also brings the application on behalf of himself as well as the third and fourth applicants.

The respondent opposes the application. In relation to the third and fourth applicants the respondent contends that there is no application before this court in respect to them as there is no evidence that they authorised the second defendant to depose to an affidavit or act on their behalf in connection with this application.

The respondent also contends that the particulars already furnished to the applicants in response to their requests are more than sufficient to enable the first and second applicants to file a plea. The particulars so furnished are listed in paragraph 5.4 of the opposing affidavit.

It is noted that the third and fourth applicants filed a joint answering affidavit wherein they contest the respondent's averment that they are not applicants in this matter. They aver that a deponent to an affidavit in motion proceedings which he brings on behalf of himself and others does not need to have his averment that he is authorised to represent those other persons supported by affidavits from them. They aver that it is merely the institution of the proceedings as such that must be authorised by the other parties. They further state therein that the second applicant was authorised to act on their behalf in filing the founding affidavit and bringing this application.

In *Fourways Mall (Pty) Ltd & Another* v *South African Commercial Catering*, 1999 (3) SA 752(W), CLAASSEN J. stated at p 758:

> "……It is further alleged by Retief that both Le Roux and himself 'have been duly authorised by the applicants and Sanlam Properties (Pty) Ltd in its capacity as administrator of the shopping centres to bring this application on their behalf'. However, no resolution of either the applicants or Sanlam Properties were attached to support these allegations to the founding affidavit.
> …….
> …….. In the replying affidavits the applicants attached extracts from minutes by the two applicants' boards of directors as well as Sanlam Properties Ltd, which constitutes authorisation and ratification of Retief and Le Roux to launch the application.
>
> In my view there is no substance in the respondent's point *in limine* in this regard. The required allegations of due authorisation were in fact made in the founding affidavit but were not substantiated by documentary proof thereof. In the replying affidavit such documentary proof of authorisation and/or ratification are supplied …….. The second point *in limine* is therefore also dismissed."

In casu the respondent's claim against the applicants in the main matter arises out of a lease agreement that it entered into with the first applicant herein. The second, third and fourth applicants were sued as second, third and fourth defendants in their respective capacities as sureties and co-principal debtors for the performance by the first applicant herein (first defendant in the main matter) of its obligations in terms of the lease agreement. This is what is stated in the Plaintiff's Declaration in the main matter by the respondent herein. A request for further particulars was filed on behalf of all defendants (applicants herein) on 1 August 2011. This was responded to on 15 November 2011. This was followed on 25 November 2011 by a request for further and better particulars filed on behalf of all defendants again. The response thereto triggered the instant application by all defendants who are the applicants herein.

In *Air Zimbabwe Corporation & Ors* v *ZIMRA* 2003(2) ZLR 11 (H) the following was said;

> "……..I may in passing observe that it is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his adversary's *locus standi* will not succeed."

It appears to me that given the history and background of the legal proceedings involving or among the parties herein, the point *in limine* raised herein by the respondent can properly be relegated to what was described by FLEMMING DJP in *Eskom* v *Soweto City Council* 1992 (2) SA 703 at 705C as "unnecessary and wasteful."

In the result I dismiss the point *in limine* raised with regards to the third and fourth applicants.

THE MERITS

The outstanding claim in the main matter is for payment by the applicants herein of operating costs incurred by the applicants in the course of their occupation of Bay 5, 51A Steven Drive, Beverly West, Msasa, Harare.

In terms of the lease agreement the landlord, respondent herein, was to prepare an estimate of the likely operating costs at certain intervals. The estimates were to be notified to the tenant, the first applicant herein, who *inter alia*, was to pay the operating costs to the landlord within a period of seven days.

It appears from the papers before me that no estimates were duly prepared by the respondent herein. It also appears that this is what caused the applicants to request further particulars as well as further and better particulars. In response to the request for further particulars the respondent herein *inter alia* attached to his response numerous documents which it described as "the rates account for the Colonnade," "self- explanatory transaction schedules showing for operating costs charged for the period January, 2010 to date of summons", "copies of statements for the operating costs incurred at the premises for the period January, 2010 to date" and "copies of the Harare City Council bills and a letter to the first defendant dated 10 October, 2011 in this connection". These annexures are from page 20 to page 72 of the papers.

It appears from a perusal of the papers that the documentation and answers furnished in response to the request for further particulars furnished information regarding the actual costs incurred and not estimates of such costs. In paragraph 5 of the response to the

defendants' request for further particulars, it is stated that in or around August 2009, first respondent objected to plaintiff charging operating costs based on estimates and that plaintiff therefore charged operating costs based on actual bills which were sent to the caretaker of the premises every month for the first defendant's perusal.

Subsequent to the response to their request for further particulars, the applicants herein requested further and better particulars. They aver therein, *inter alia*, that "the transaction schedules, statements and City of Harare accounts attached to plaintiff's. further particulars contain admitted errors, are confusing and do not constitute the list requested." The other further and better particulars requested tend to hinge on the issue of the estimates that the respondent herein was supposed to prepare in terms of the lease agreement.

In his submissions *Mr Pasirayi* said that in this matter "all sorts of paper work were supplied by the respondent to make up for the fact that it never prepared any estimates and any actual accounts, as we now discover. We were not sure of it before. From the papers filed it is clear that our suspicions were correct."

As stated earlier in its response to the request for further particulars, the respondent herein did state in para 5 that pursuant to the defendant's objection to it charging operating costs based on estimates, it thereafter charged operating costs on actual bills. It cannot therefore be a recent discovery by the applicants herein that the respondent conducted its business with them on the basis of actual bills. They must have become aware of this certainly during the period extending from 15 November 2011 when the response was filed to 25 November 2011 when they filed their request for further and better particulars. The applicants in their request for further and better particulars appear to me to be seeking information that they know is either not available or is possibly of no value in relation to the resolution of the claim. No doubt, they need to go through numerous documents in order to ascertain the extent of their indebtedness insofar as operating costs are concerned. They asked the respondent to furnish the requested particulars in a specific format and the format was not used by the respondent. However, what was furnished to them is capable of making the applicants herein formulate their defence and plead to the claim in the main matter both in relation to their liability to pay as well as the extent of their liability.

In his submissions *Mr Pasirayi* described the respondent's attitude as "nit picking". It appears to be so. If as submitted by *Mr Willsmer* rates have in some instance(s) been claimed in respect of premises not occupied by the applicants herein, one would assume that that would form the basis of part of their plea or defence. The same would also apply, in my view,

in relation to the submissions that legal costs have also erroneously been included in the operating costs. Applications for particulars should not amount to a series of interrogatories to the other party: *Trinity Engineering (Pvt) Ltd* v *Commercial Bank of ZimbabweLtd*, 1999 (2) ZLR 417 (H).

For the above reasons the application cannot succeed. Costs will follow the cause. The application is dismissed with costs.

Wintertons, applicants' legal practitioners
Gill, Godlonton and Gerrans, respondent's legal practitioners