

JOHN EDWARD CHIBWE  
versus  
ZIMBABWE SUGAR SALES (PVT) LTD  
and  
HIPPO VALLEY ESTATE LIMITED  
and  
TONGAAT HULLET LIMITED  
and  
PRICE WATERHOUSE COOPERS ADVISORY SERVICES (PTY) LTD  
and  
PRICE WATER HOUSE COOPERS SOUTH AFRICA

HIGH COURT OF ZIMBABWE  
MHURI J  
HARARE, 1 November 2022 & 6 April 2023

### **Opposed Application**

*Advocate M Ndlovu*, for the applicant  
*Advocate T Mpfu*, for respondents

**MHURI J:** Applicant filed an application for a declarator in which he is seeking that the forensic audit report conducted by the 4<sup>th</sup> and 5<sup>th</sup> respondents on the affairs of 1<sup>st</sup> and 2<sup>nd</sup> respondents be declared unlawful and that 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents bear costs of the application on the higher scale.

At the commencement of this hearing, respondents' counsel raised 5 preliminary points, which are that:

1. Applicant is making out a new case in the answering affidavit
2. There are material disputes of facts
3. 5<sup>th</sup> respondent does not exist in the manner it was cited
4. 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents are South African companies which cannot be sued in this jurisdiction unless there is an order founding or confirming jurisdiction
5. There is no cause cognisable under section 14 of the High Court Act

On the basis of these points *in limine*, Respondents moved for the dismissal of the applicant's application. Applicant opposes the points *in limine* and moves that they be dismissed.

Before delving into points raised by respondents, applicant's Counsel made remarks in relation to the Respondents heads of argument to the effect that the heads are a thesis spanning from page 920 to 963 (43pages). They do not comply with the Rules and the law in that they are not brief and to the point. They do not cite any authorities at all.

I agree with the applicant's Counsel's remarks. The heads of arguments are in essence not heads of argument as required by law but are submissions, a thesis, as observed by applicant. Forty three (43) pages with no authority cited in support of its case. The Supreme Court had an occasion to comment on the length of heads of argument in the case of:

*Zimbabwe Homeless Peoples Federation & Another v Minister of Local Government & National Housing & Others* SC 78/2021. See also *Milton Gardens Association & Anor v Mvembe &Ors* HH 94/16.

Coming back to the points *in limine*, applicant has approached this Court taking issue with the forensic investigation report and seeking a declarator in terms of section 14 of the High Court Act (CAP 7:06) to the effect that the forensic audit investigation conducted by the 4<sup>th</sup> Respondent and the resultant report be declared unlawful and be annulled. A reading of the answering affidavit clearly shows that applicant was responding to the issues raised in the opposing affidavits and reiterating his position on the forensic investigation report. He stated in paragraph 36 of his answering affidavit:

"I will confine this application to the relevant issue, which is my challenge of the 4<sup>th</sup> and 5<sup>th</sup> Respondents' audit process and resultant audit report."

Indeed, it is a trite legal position that it is not permissible to set out a new case in the answering affidavit. *Unitime Investments (Private) Ltd vs Assetfin (Private)Ltd & Others* HH 393/22.

*In casu*, as I have stated, applicant was responding to issues raised in the opposing affidavits. Respondents in their submissions did not point to a paragraph where applicant raised a new *causa*. To that end, this point is not upheld.

Further, I do not accept the respondent's other point that arises from the answering affidavit to the effect that because of its length the answering affidavit raises material disputes of facts. It is noted that the opposing affidavits are equally lengthy (76 pages). The answering affidavit (89 pages) was responding to the issues raised in the opposing affidavits. Applicant is taking issue with the process and the resultant forensic investigation report. The investigation was carried out by the 4<sup>th</sup> and 5<sup>th</sup> respondents at the instance of 3<sup>rd</sup> respondent and it touched

on applicant. As submitted by applicant's Counsel which submission I agree with, that there is no dispute let alone material dispute of facts. This point is not upheld.

Equally I find the point on there being no cause cognisable under section 14 of the High Court Act without merit. It is not in dispute that applicant has a disciplinary matter pending at the Labour Court. It is trite that the Labour Court has no jurisdiction to issue a declarator. The High Court as a Court with inherent jurisdiction is endowed with such jurisdiction. What applicant has placed before this Court is an application for a declarator in terms of section 14 of the High Court Act. He is seeking that the forensic audit report done by the 4<sup>th</sup> and 5<sup>th</sup> respondents which implicates him be declared unlawful and a nullity. He also challenges the process, in that it violated the laws of the Zimbabwe and on that note it was submitted that this Court has the powers to enquire into the process and report and make a determination. I agree with the applicant's submissions and in the result decline to uphold the point *in limine*.

The 5<sup>th</sup> respondent is cited as Price water house Coopers South Africa. Respondents' argument is that in the manner it was cited, as a firm, 5<sup>th</sup> respondent does not exist. It ought to have been cited as a corporate entity. The difference between firm and a corporation is not subject of argument *in casu*. It is however not disputed by applicant that 5<sup>th</sup> respondent was not properly cited. It however contends that it was a misdescription and not a mis citation. It further contended that if 5<sup>th</sup> respondent did not exist it ought not to have opposed the application. I am not persuaded by the applicant's arguments in this regard. A corporation and a firm are two distinct entities, so citing one as the other gives a totally different complexion altogether. It therefore cannot be a misdescription but a mis citation as the entity so mis-cited does not exist. It is also noted that applicant thereafter submitted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were cited for convenience purpose only as the main matter is really against 1<sup>st</sup> and 2<sup>nd</sup> respondents.

That being the case, the point raised by respondents as regards 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents is with merit and I uphold it. This goes also to the issue raised that applicant ought to have found or confirmed jurisdiction first before proceeding against these 3 respondents since they are South African companies.

Overally, having found against all except two of the points *in limine* raised, it is ordered that the:

- 1) Points *in limine* 1, 2 and 5 be and are hereby dismissed
- 2) Points *in limine* 3 and 4 be and are hereby upheld
- 3) The application proceeds on the merits.

The Registrar to reset the application for continuation on the merits.

*JITI LAW CHAMBERS*, applicant's legal practitioners

*GILL GODLONTON & GERRANS*, respondent's legal practitioners