

PETER VALENTINE  
versus  
MYDALE INTERNATIONAL MARKETING (PVT) LTD  
and  
VENTURAS SAMUKANGE

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 1 April & 12 May 2021

### **Opposed application**

*S. T. Mutema*, for the applicant  
*J. Wood*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondents

TAGU J: This is a Court Application for dismissal of respondent's action under case number HC 6448/18 made in terms of r 75(1) of the High Court Rules of 1971 coupled with a claim for a declaratory order on the ground that their claim is frivolous and vexatious.

The facts of this case are rather complex and confusing in that on 19 July 2018 the Respondents Mydale International Marketing (Private) Limited and Venturus and Samukange issued Summons under case HC 6448/18 against F. M. Katsande, Peter Valentine, Registrar of the High Court and the Sheriff for Zimbabwe claiming repayment of the sum of US\$28 500.00 being in respect of wrongful appropriation of trust funds and US\$4 684.00 being in respect of loss suffered by Venturus and Samukange and which amounts the Defendants neglected and or refused to pay. But on 30 March 2009 under HC 1049/09 this Court had ordered Messers Byron Venturas & Partners (Private) Limited to within 24 hours surrender to the Registrar of the High Court, Harare US\$28 500 pending the determination of any dispute over ownership of Mydale International Marketing (Private) Limited. Then on 20 June 2012 Venturus and Samukange had been ordered to release the funds to the Registrar in an application for leave to execute pending appeal to the Supreme Court (SC 82/09) under case HC 1687/10. The Registrar was duly ordered

in the same judgment to release the said funds to Mydale International Marking (Private) Ltd. In another court order under HH 370/16 Katsande Legal Practitioners and F Katsande were ordered to release the sum of US\$28 500 they had received in Trust into account of Messrs Stansilous and Associates within 48 hours of the order. The applicant Peter Valentine in paragraph 5 of his founding affidavit said the Registrar then in another Court Order released the funds to him thereby bringing the matter to finality. He therefore, submitted that the Summons under HC 6448/18 is a pure example of a claim made in direct abuse of this court's process and cannot escape being deemed frivolous and vexatious. He said he filed his plea to case HC 6448/18 to the effect that Venturas Samukange has no locus standi to act for the first plaintiff Mydale International Marketing (Private) Ltd, that the question as to whether or not he had the right to receive the US\$28 500 in issue from The Registrar of the High Court is *res judicata* having been disposed of in HC 5654/16, and to his belief the claim is frivolous and vexatious.

The Applicant is seeking the following reliefs:-

“IT IS ORDERED

1. The application for the dismissal of respondents' action under case number HC 6448/18 be and is hereby granted;
2. The 1<sup>st</sup> respondent's resolution authorizing the applicant to be its representative from the 19<sup>th</sup> of January 2009 onwards be and is hereby declared valid and binding.
3. The applicant be and is hereby declared to have been dully authorized to represent the 1<sup>st</sup> respondent as from 19 January following;
4. The order under HC 2470/13 be and is hereby declared to have been fraudulently obtained and must be set aside.
5. The 2<sup>nd</sup> respondent shall pay cost of suit on a legal practitioner and client scale.”

The respondents opposed the application and raised three points *in limine*. The first point is that the matter is not properly before the court. The second point is that three of the defendants have not been cited. The third point being that paragraphs 2 to 4 of the order sought is incompetent. I will dispose of each point *in limine* before dealing with the merits of the application.

MATTER NOT PROPERLY BEFORE THE COURT

The Respondents' contention was that the matter is improperly before the court as the Applicant proceeded in terms of r 75(1) as read with Order 32 of the High Court Rules 1971. The Respondents read r 75(1) which says-

“75. Application for dismissal of action

- (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.”

It was submitted that only one defendant has brought this application. The defendants having filed their plea in terms of r 119 and special pleas, the special pleas should be set down in terms of r 133. This has not been done in this case hence the application is premature and should be struck off the roll.

The court noted that the applicant, who is a defendant in the main matter raised in his plea special pleas of lack of locus standi as well as res judicata. The applicant proceeded to file the present application before the special pleas were set down. I therefore agree with the respondents that this application has been brought prematurely hence is not properly before the court. I uphold the first point *in limine*.

#### THREE OF DEFENDANTS NOT CITED

A reading of case HC 6448/18 clearly shows that there are three defendants but only one defendant has brought an application for dismissal of the action. The other defendants have not been cited yet they also appear in all the cases cited above. While non-citation of other parties is not fatal to the application in terms of r 87 of this honourable court, I find that the non-citation of the other parties that the applicant wants dismissed is material and fatal to the application. I therefore uphold the point *in limine*.

#### PARAGRAPHS 2 TO 4 INCOMPETENT

The Respondent's concern is that paragraphs 2 to 4 of the order shows that the Applicant is seeking declaratory orders and this is not the purpose of r 75(1). This court cannot grant a declaratory order under r 75(1) of the Rules of this Honourable Court. It is therefore incompetent to combine an application for dismissal of action on the basis that the action is frivolous and or vexatious and then proceed to grant declarators. I therefore uphold the point *in limine*.

#### IT IS ORDERED THAT

1. Points *in limine* are upheld.
2. The matter is struck off the roll

3. No order as to costs

*Stansilous & Associates*, applicant's legal practitioners  
*Venturas & Samukange*, respondents' legal practitioners