HB 130-15
HC2474-14
XREF HC 1668-11

TROTS INVESTMENTS (PVT) LTD
and
SCHWEGMANN FAMILY TRUST
versus
MAMBIRO FIBRE (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 JUNE AND 25 JUNE 2015

Opposed Application

Mr *J. Sibanda* for the applicants
Mr *N. Mazibuko* for the respondent

MAKONESE J: This is an application for a declaratur and ancillary relief against the respondent, in the alternative the applicants apply for an order allowing them to amend their pleadings in the main action. The relief sought by applicants is couched in the following terms:

"IT BE AND IS HEREBY DECLARED THAT:

1. By offering the respondent through letter dated 30 July 2014 the property known as number 9 Welback Road, Thorngrove, also known as stand 6435A Bulawayo, Township, the second applicant complied with the alleged agreement between the parties for respondent to be offered right of first refusal in respect thereof.

2. The respondent failed to exercise the said option, causing it to lapse.

3. The first applicant is granted leave to put up the property for sale in the open market.

4. The respondent shall allow any prospective purchaser to view the property and shall not hinder any such prospective purchaser from having access to the property.

5. The order of this court in HC2455/11 between the first applicant and respondent hereby lapses.

6. The respondent shall pay the costs of this application.

Alternatively,

1. The first applicant is hereby granted leave to amend its summons and declaration in case number HC 1668/11 as it sees fit to cover any claims arising after the issue of summons and closure of pleadings in case HC 1668/11.

2. The respondent is granted leave to plead such amendment according to law.

3. Either party is granted leave to file further pleadings as are necessary to take into account any such amendment.

4. The parties shall attend a further Pre-Trial Conference prior to applying for a trial date.

5. Respondent pays the costs of this application."

The respondent has opposed the application and in his opposing affidavit, Samuel Lazarus Mambiro states as follows:

> *"Although I have previously pointed out to the applicants in other court cases where we are involved, that there is no legal entity called Mambiro Fibre (Pvt) Ltd, the applicants continue citing Mambiro Fibre (Pvt) Ltd in their papers. To the best of my knowledge, the respondent should be myself trading as Mambiro Fibre and Timber Industries and the fact that applicants have cited a non-existent respondent means that its papers are fatally defective and for that reason alone, the application ought to be dismissed with costs on a punitive scale."*

In response to the point *in limine*, the applicant responded in paragraph 2 of the answering affidavit as follows:

> *"The point is taken. I shall apply at the hearing of this matter to amend the applicants' papers by making the necessary substitution. I submit that no prejudice shall occur to respondent since opposing papers have been filed in any event."*

The applicant filed heads of argument on 4 February 2015, where the issue of the point *in limine* raised by respondent is dealt with. The applicant avers that an application is being made to amend the pleadings by deleting the name of the respondent wherever it appears, and its substitution with the following:

"Samuel Lazarus Mambiro, trading as Fibre and Timber Industries."

In support of its application to amend and substitute the names of the respondent, the applicant placed reliance on the authority of the case of:

Devonia Shipping Ltd v *MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (CPD), at page 369 where it was held by INNES J as follows:

> "A material amendment such as the alteration or correction of the names of the applicant, or the substitution of a new applicant should in my view be granted to the considerations mentioned of the prejudice to the respondent --- the risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as to costs and there is no difference in principle between the two cases."

I must point out from the outset that the case of *Devonia Shipping Ltd (supra)* involved a case where an exparte application was brought to court as a matter of urgency on behalf of *Devonia Shipping Ltd* for the arrest of the vessel Luis, which at the time was berthed in Cape Town Harbour. The heading to the notice of motion gave the name of the applicant as "*Devonia Shipping (Pty) Ltd"*, but the supporting affidavit annexed to the notice of motion stated that the "applicant is *Devonia Shipping Ltd*, a company duly incorporated and registered with limited liability in accordance with the laws of the United Kingdom which carries on business as charterers in London." The vessel Luis was cited as respondent. The court allowed the amendment of the names *Devonia Shipping Ltd* to read "Devonia Shipping Agency Ltd", on the grounds, primarily that there was no prejudice to the respondent. The case referred to by the applicant in the instant case is clearly distinguishable from the facts of the present application.

In this matter, applicants have cited the respondent as "Mambiro Fibre (Pvt) Ltd, supposedly a company duly registered as such as alleged by the applicants. However, it is common cause that there is no such entity as Mambiro Fibre (Pvt) Ltd.

Order 2A Rule 8C of the High Court Rules, 1971, allows the citing of a person on the papers in that person's trade name. The rule provides as follows:

> "Subject to this order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings."

The trading name of the respondent is, in fact, Mambiro Fibre and Timber Industries, with Samuel Lazarus Mambiro being the principal respondent. It is my view that Order 2A Rule 8C of the High Court Rules does not apply for the simple reason that on the papers filed of

record, there is no respondent. For that reason the court application is invalid and null and void *ab initio*. The court application being invalid is therefore not capable of amendment. This issue was canvassed in the case of: *JDM Agro-Consult and Marketing (Pvt) Ltd* v *The Editor, The Herald and Another* 2007 (2) ZLR 71 (H) at page 75 where GOWORA J stated as follows:

> "The entity sued by the plaintiff as the second defendant is the Herald Newspaper. It is not a registered company and does not exist in any other form. Consequently, the plaintiff issued summons against a non-existent being. The amendment to the second defendant's name, therefore, was of no force or effect, as the summons itself was a nullity."

In *Gariya Safaris (Pvt) Ltd* v *Van Wyk*, 1996 (2) ZLR 246 at page 252, MALABA J stated as follows:

> "A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering the names written in the summons as being those of the defendant, the summons is *null and void ab initio."*

See also *Steward Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 655 (S).

The Merits

The background facts are common cause. The first applicant commenced legal proceedings on 17 June 2011 against respondent seeking an order for ejectment from the premises known as number 9 Welback Road, Thorngrove, Bulawayo. Respondent opposed the action and alleged that there was no cause to terminate the lease agreement. The respondent filed a counterclaim. Respondent alleged in the claim in-reconvention that he enjoyed a right of first refusal in respect of the premises in question, which right he alleged he had been given verbally by the then trustee of second applicant (since deceased), his former landlord. Respondent therefore sought an order cancelling the transfer of the property in dispute and for an order that second applicant offer the property to him at the same cost that it had sold it to first applicant. The matter proceeded in the normal course of events up to trial stage. The property which is the subject of the dispute between the parties under case number HC 1668/11 is therefore *res litigiosa* and not subject to be dealt with by either parties unilaterally until the main action has been disposed of by the court.

In the meantime, however, the applicants have purported to give respondent the option to exercise its right of first refusal in terms of the lease agreement with the second applicant without first withdrawing its action under case number HC 1668/11 and acceding to the counter-claim for the reversal of the transfer of the property from first applicant back to the second applicant. In effect, the applicants are trying to have their cake and eat it at the same time.

It is my view that for an offer to be valid, it must be made by an identifiable person or legal entity. From a reading of the papers, it is clear that the offeror was not clearly identified. It could not be both applicants making the offer because they do not own the property jointly. If the offer was being made by second applicant in terms of the lease agreement that it had with respondent, then such an offer would be invalid because the property is presently registered in first applicant's names. It stands to reason that second applicant cannot purport to extend a right of first refusal in respect of a property it no longer owns. If the offeror was first applicant, it would not amount to an offer in terms of the lease agreement which the respondent has with second applicant as there is no privity of contract between first applicant and respondent. Such an offer would have no bearing on the main action between the parties under case number HC 1668/11. For that offer to be valid, first applicant would have to agree to a reversal of the transfer of the property to enable the second applicant to extend the offer in terms of the agreement between the parties. If one were to assume, for argument's sake that the identity of the offeror was not critical to the acceptance of the offer, it would seem that there was an unequivocal acceptance of the figure of US$48 500 as offered by the applicants. The respondents did not counter-offer the amount but merely proposed in their acceptance how the amount would be liquidated. It is beyond dispute that as long as case number HC 1668/11 is pending, the applicants would have no basis for insisting on the relief sought in the Draft Order.

As regards the alternative prayer in the draft order wherein it is proposed to seek an amendment to the papers, the purported amendment is unclear, vague, and embarrassing and prejudicial to the respondents. The applicants ought to have stated explicitly what the nature and form those amendments would take.

In the premises, it is my finding that there is no valid application before the court as no proper respondent has been cited. I have however considered the merits of the matter in order to

adequately dispose of the matter. I am satisfied that applicants have failed to justify the relief sought in the draft order. It is therefore proper to make the following order.

1. The application be and is hereby dismissed with costs on the ordinary scale.

Job Sibanda and Associates, applicants' legal practitioners
Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners