

ZIMBABWE BROADCASTING CORPORATION
versus
CUTHBERT ELKANA DUBE
and
HAPPISON MUCHECHETERE
and
ELLIOT KASU
and
ALLAN CHIWESHE
and
RALPH NYAMBUDZI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 September 2019 & 25 September 2019

Chamber application

Advocate R. M Fitches, for the applicant
L Madhuku, for the 1st & 2nd respondents
P Kawonde, for the 3rd & 5th respondents
M Tshuma, for the 4th respondent

TAGU J: The applicant has brought a chamber application in terms of High Court Rule 226 (2) (c) as read with *proviso* to High Court Rule 241 of the High Court Rules, 1971 for an order in terms of s 19A of the High Court Act [*Chapter 7:06*] to the effect that the civil trial proceedings between the parties in Case No. HC 2770/15 be referred to the Chief Executive Officer of the Institute of Chartered Accountants of Zimbabwe (ICAZ) for inquiry and report.

The facts are that the parties are litigants in trial cause, case number HC 2770/15 initially heard on Wednesday, 13 February 2019 before MATHONSI J (as he then was). As adumbrated in Counsel's opening address, the said trial cause arose as a result of applicant having incurred severe monetary losses between 1 January 2009 to 31 December 2013 during which period respondents

held respective corporate positions with applicant, as averred in applicant's supporting affidavits. Pursuant thereto an Audit Report was commissioned in engaging the services of an independent private Accounting firm. The said Report comprising 269 pages was availed to applicant in July 2014. The Report was predicated upon lengthy supporting source documents, comprising 104 items, being 76 Exhibits amounting to 291 pages. Other documents include applicant's management accounts for the years 2009 to 2015. It is the applicant's case that the said Report implicated respondents in the said losses and corporate irregularities as a result of which applicant instituted proceedings against respondents. At the initial hearing of the trial before MATHONSI J (as he then was) on Wednesday 13 February 2019 during applicant's counsel's opening address under High Court Order 49, r 438 (2), the Honourable Court at the behest of first and second respondents' legal practitioner directed written application of the applicability of s 19A of the High Court Act to the said trial cause. Given the lack of consensus it was conceded that the Honourable Court was empowered to give direction by High Court Rule 4C. By consent of the parties the opposed application in Case No. HC 1421/19 which was to deal with the issue was further referred to the trial judge by MUNANGATI- MANONGWA J on 17 July 2019.

The crux of the matter before me, therefore is whether or not the Honourable Court ought to invoke powers given to it by section of a statute that is, section 19A of the High Court Act. Once this preliminary point has been resolved and the section is invoked the matter then devolves procedurally.

The order sought at this stage of the trial being-

"It be and is hereby ordered in terms of section 19A of the High Court Act, Cap 7.06 that the trial proceedings between the parties in case number HC 2770/2015 be referred to the Chief Executive Officer of the Institute of Chartered Accountants of Zimbabwe (ICAZ) for inquiry and report. Costs of this application to be in the cause."

The applicant submitted that it is appropriate for the Honourable Court to invoke section 19A of the High Court Act in the present trial cause for the following reasons:

1. the documents are lengthy and complex;
2. they relate to findings pertaining to the five respondents;
3. they will require extensive examination and deliberation;
4. it will not be convenient for the Honourable Court to conduct such examination; and
5. questions relating wholly or partly to accounts arise by virtue of the said Audit Report.

The deponent to the applicant's founding affidavit RUDO MAGUNDANI submitted further that the identity of the proposed referee be Ms Gloria Zvaravanhu a recently appointed Chief Executive Officer under the auspices of the Institute of Chartered Accountants of Zimbabwe (ICAZ) whose knowledge of the said appointment emanates from an advertisement supplement to the Zimbabwe Independent newspaper edition of 8 to 14 February 2019.

The application was opposed by all the respondents.

THE LAW

Section 19A of the High Court Act Chapter 7.06 is to the following effect:

“19A Reference of question for inquiry and report by referee

- (1) The High Court may refer any question arising in civil proceedings, including-
- (a) Any question requiring extensive examination of documents or any scientific, technical or local investigation which, in the opinion of the High Court, cannot conveniently be conducted by it; or
 - (b) Any question relating wholly or partly to accounts;
- For inquiry and report by a referee appointed generally or specifically by the High Court.”

SUBMISSIONS

In support of his application to refer the matter to a referee Advocate Fitches submitted that the said power is mirrored in section 5 (1) of the High Court Act which deals with the appointment of assessors in civil cases. He cited the section which reads:

“In any civil case before a judge of the High Court the judge may summon to his assistance to act as assessors one or more persons who are willing so to act and who have skill and experience in any matter which may have to be considered in the case.”

He further submitted in his application that this was the approach adopted by the Honourable Mr Justice Bartlett in the High Court case of *Forsyth Trust (Pvt) Ltd v Warren-Codrington* cited as 2000 (2) ZLR 377 (S) at 378H MCNALLY JA stated:

“I should also mention that the case was unusual in that the learned judge very sensibly decided to use the services of an expert assessor. He sat with Mr John Reid-Rowland, a commercial pilot and well –known lawyer.” Again at 383C: “The conclusion reached by the court, and shared by the expert assessor, was that...At 383C-D: “That version seemed to the court and the assessor to be the more likely,...”

However, Mr *Madhuku* for the first and second respondents submitted that section 19A of the High Court Act [*Chapter 7.06*] when read properly cannot arise at this stage of the proceedings.

He submitted further that no question requiring an extensive examination of documents within the contemplation of s 19A has arisen as yet. Logically, according to him a question only arises if it is an issue brought out in evidence that the court considers relevant to the ultimate determination of the dispute between the parties. Only after evidence has been led from a witness or witnesses can such questions emerge. Hence the application is therefore premature and improper since there is nothing in the application demonstrating the inconvenience contemplated in section 19A. For these reasons he submitted that the application be dismissed.

Equally Mr *Kawonde*, for the third and fifth respondents opposed the application and submitted among other things that whilst it is admitted that the audit report is lengthy there is no need to refer this bulky document at all in this trial. He said there are a few documents in the audit report relevant to the trial about to begin. He said there is no role for a referee as envisaged under s 19A of the High Court Act as the matters to be determined require a judicial officer rather than an accountant. He further said there are points of law that stand to be decided in Case No. HC 2770/15. He summed his submission by saying that the appointment of a referee in the above-mentioned case especially at this stage of the trial would almost be tantamount to an ouster of the jurisdiction of this Honourable Court. As was stated by PATEL JA in the case of *National Employment Council for The Construction Industry v Zimbabwe Nantong International (Private) Limited* SC -01-2018 at p 3 thereof where he said this Court is a superior court of inherent jurisdiction and there is presumption against the ouster of its jurisdiction unless this is clearly intended by the legislature. Thus, any statutory or contractual provision that purports to oust its jurisdiction must be restrictively interpreted. He anchored the views of the other counsels that it is premature to resort to section 19A of the High Court Act at this stage of the trial.

Lastly, Mr *Tshuma* for the fourth respondent submitted that he stands by his heads of argument and adopt the submissions by his fellow counsels on the issue. Most importantly he submitted that while section 19A of the High Court Act was enacted to give this court a discretion to refer a matter before it to a referee that discretion to refer the said issue should not be elevated to the norm. Any proposition to the contrary is likely to infringe on a litigant's rights to the fair hearing provisions covered in ss 69 (2) and (3) of the Zimbabwe Constitution. To support his submissions he referred to the case of *Wright v Wright and Anor* Case No. 8980/2005 (accessed through SAFLII), which although mainly dealing with a challenge to the referee's findings and or

report, provides very useful insights and guidelines as to the circumstances under – which the matter could be referred to a referee and also the purpose of the referral to a referee.

At paras 15 & 16 of the judgment, the Kathree-Setiloane held that:

“...a referee appointed in terms of the Act is required only to make a factual finding. A referee, unlike an arbitrator, does not exercise a judicial or quasi-judicial function ... A referee’s report, as contemplated in ... the Act, is a finding of an expert appointed by the court to investigate and provide a report of his or her findings to the court on a question of fact...”

This court went further and stated the purpose of the referral. On para 19 it stated thus, the purpose of referring a matter to a referee in terms of (the Act):

“is that either where there are highly technical aspects where the assistance of a neutral expert is required or where the bulk of the documentation is such that a referee can streamline the process, the report of the referee would not only assist the court but to help limit the length of the proceedings by highlighting (though its analysis of the documents or the factual situation relating to accounts) exactly which aspects or incidents or transactions are in dispute between the parties. The report does not bind the court but assist it by in essence summarizing the results of the referee’s investigations.”

The parties in the above case engaged in discussions and could not agree as to how much Aleck Peter Wright was to pay William Robert Wright. This led to a voluntary submission by the parties to a referee who was to determine a specific factual question of accounts as to the quantum of indebtedness of Mr. Alec Peter Wright to William Robert Wright. He finally submitted that in the present case a perusal of the papers filed by the applicant shows that there is no specific question that needs to be referred to a referee. Like other counsels he submitted that the application be dismissed.

ANALYSIS OF THE CASE

The court agrees with the submissions by all parties that indeed the auditor’s report is voluminous. It is common cause that a number of Exhibits are to be used. However, I agree with the submissions by the counsels for the respondents that even if we are to assume that section 19A applies or is likely to apply in the trial cause in case HC 2770/15 it is premature at this stage to invoke the provisions of section 19A of the High Court Act. I say so for a number of reasons. The plaintiff has not led evidence from any witness. The court has not yet considered examination of documents. In the present application Advocate Fitches for the applicant did not state what question it is that requires referral of the documents to an external examiner. In my view a question has to be stated that has to be referred. This only has to arise after evidence has been led. As of

now we do not know what question has to be answered. It has further not been shown in what manner the court cannot examine the documents. The trial court is presumed to be capable of resolving any legal issues or analyzing any document produced before it. It is not enough to simply say the document likely to be used runs into thousands of pages. Legal practitioners and the court must not be put off by the sheer volume of the exhibit to be used. In light of section 62 of the Constitution of Zimbabwe section 19A of the High Court Act is extra ordinary and must be narrowly construed.

What is critical is that for the court to invoke the provisions of section 19A of the High Court Act, a question or questions that require to be referred to a referee must first arise. A case for 19A must speak for itself. In this case if this court is to refer this matter to a referee or to an expert the question that begs an answer is what issue or question the referee is to answer? I agree with the counsels that to refer the matter at this stage is premature. The applicant ought to have waited, lead evidence and in the process if a question that requires referral to a referee arises then the case can be referred at an appropriate time. The sheer volume of the documents to be used in the trial should not trigger provisions of section 19A. A question has to trigger the need for a referral.

For the above reasons I share the same sentiments by the counsels for respondents that it is premature to refer when no question has been identified. For avoidance of doubt I am not saying provisions of section 19A of the High Court Act are not applicable in this case but for clarity I am saying it is premature to invoke it now when no questions have arisen that require referral. The trial must commence, evidence must be led and in the event a situation arises that requires the court to resort to section 19A then the court can do so. For these reasons the application will fail.

IT IS ORDERED THAT

1. The application to refer proceedings between the parties in case number HC 2770/2015 at this stage to the Chief Executive Officer of the Institute of Chartered Accountants of Zimbabwe (ICAZ) in terms of s 19A of the High Court Act for inquiry and report be and is hereby dismissed.
2. Costs of this application to be in the cause.

Scanlen & Holderness, applicant's legal practitioners

Lovemore Madhuku Lawyers, 1st & 2nd respondents' legal practitioners

Kawonde Legal Services, 3rd & 5th respondents' legal practitioners

Chinamasa, Mudimu & Maguranyanga, 4th respondent's legal practitioners