FRANCIS CHANDIDA
versus
ANTONY FARAI ADAAREVA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 1 March and 10 March 2022

Opposed Application

Mr ZT Zvobgo, for the applicant
Mr ET Moyo, for the respondent

DEME J: The applicant approached this court in terms of r 31 of the High Court Rules, 2021 where he is seeking the dismissal of the respondent's action instituted under case number HC 7235/20 on the basis that it is frivolous and vexatious. In particular, the applicant is seeking the following relief:

"1. The instant application be and hereby succeeds.
2. The respondent's claim for payment of US$25 000, interest thereon and costs of suit against the applicant in the action proceedings instituted under Harare High Court case number HC7235/20 be and is hereby dismissed on the grounds that the claim is frivolous and vexatious.
3. A judgment of absolution from the instance be and is hereby entered in respect of the summons claim instituted by the Respondent against the Applicant under Harare High Court case number HC7235/20.
4. The respondent shall pay the applicant's costs of suit on the legal practitioner and client scale for both present application and as well as the dismissed claim under HC 7235/20".

I will proceed to summarise the facts of this matter. According to the applicant, the respondent was formerly employed by Lotsgrain (Private) Limited, (hereinafter called "the company") while the applicant was the director of the same company. The applicant further averred that the company used to pay for the school fees of the respondent's child to Eaglesvale School in Harare. The applicant attached two documents as proof of payment of school fees for the respondent's child.

The applicant also maintained that he authorised the payment of the respondent's salary on several occasions at the bank. He attached some copies of the letters addressed to MBCA Bank authorising the bank manager to transfer the salary from the company's account into the bank account of the respondent.

It is the applicant's case that the respondent and the company decided to mutually part ways in March 2019. The applicant further affirmed that he, on behalf of the company, discussed with the respondent his, the respondent's, severance package payable to the respondent for all the years that he had worked for the company. According to the applicant, an agreement was reached to the effect that the company would pay severance package to the respondent in the sum of US$25 000 payable at the end of April 2019.

The applicant also alleged that at the time the respondent left, the company was in a difficult financial position. The applicant further declared that the respondent had contributed to the problems of the company's financial troubles. In light of this, the applicant claimed that it became difficult for the company to raise the respondent's severance package.

The respondent's legal practitioners wrote to the applicant demanding, on behalf of the respondent, the payment of the severance package in the sum of US$25 000. The applicant further alleged that he responded to the letter of demand where he highlighted that they were in the process of sending the respondent their proposal of payment, among other issues which he raised in his letter of response. According to the applicant, he used the plural pronoun i.e. "we", in the response, as he wrote the letter on behalf of the company's management. The applicant further averred that in the letter, he suggested that they were prepared to sign any document which would personally bind them as guarantors for the payment of the funds for the severance package in question. It is the applicant's case that the respondent's legal practitioners never prepared any document pursuant to this proposal.

According to the applicant, a payment of US$2 500 was made to the respondent on 4 December 2020 before an additional sum of US$1 500 was paid on 4 January 2021. According to the applicant, the nation went into total lockdown thereafter which complicated the company's financial position. The applicant further affirmed that the company was no longer able to make further payments to the respondent as a result of the total lockdown. The applicant further alleged that he advised the respondent that they were going to resume with their payment plan some time in April 2021 after clearing other debt of Dairibord Zimbabwe.

On 14 April 2021, the applicant was served with a copy of summons instituted by the respondent under case number HC 7235/21 wherein the respondent was

claiming, against the applicant personally, payment of the severance package in the total sum of US$25 000.

It is the applicant's averment that all the communications which he did with the respondent, he did the same on behalf of the company and not in his personal capacity. The applicant further alleged that the respondent was fully aware of this position. The applicant further averred that the summons was malicious, frivolous and vexatious.

After entering Notice of Appearance to defend under case number HC 7235/21, his legal practitioners wrote to the respondent's legal practitioners advising them that the claim for the severance package ought to have been instituted against the company, the respondent's former employer and not against the applicant. In response, the respondent's legal practitioners replied by highlighting that they took this action since the applicant had signed an acknowledgement of debt personally. The applicant requested the copy of the acknowledgement signed by the applicant. According to the applicant, the respondent's legal practitioners did not furnish his legal practitioners with a copy of the acknowledgement and instead filed Notice to Plead and Intention to Bar calling upon the applicant to plead. The applicant further alleged that he filed his Plea through his legal practitioners wherein he insisted that the claim ought to have been made against the company and not against him personally. Whereupon, the respondent, through his legal practitioners, filed Replication and Summary of Evidence.

The applicant also alleged that the respondent's action against him is frivolous and vexatious on the basis that it is manifestly insufficient. According to the applicant, the respondent's claim is so hopelessly meritless to the extent that there is no rational basis for forcing him to go through the motions of a full trial. It is the applicant's case that the respondent's claim glaringly lacks any substance and sufficient evidence to establish a proper cause of action against him. According to the applicant, the respondent cited a wrong party in HC 7235/21 which makes his claim frivolous and vexatious. Consequently, the applicant motivated this court to dismiss the respondent action under case number HC 7235/21.

The present application is opposed by the respondent. According to the respondent, he was not an employee of the company as alleged by the applicant. He further alleged that the parties hereto used various companies, including Lotsgrain (Pvt) Ltd, for purposes of conducting business.

The respondent further highlighted that when the applicant negotiated with him for the severance package, he did not do so on behalf of the company. He further alleged that the parties to the present application were partners in the business arrangement. According to the respondent, the agreement for the severance package was not between the company and the respondent. Rather, this agreement was between the respondent and the applicant.

It is the respondent's case that the applicant never highlighted that the acknowledgement of debt that he signed was made on behalf of the company. The respondent further averred that the applicant never indicated that all the part payments made to the respondent's legal practitioners were made on behalf of the company. He further alleged that the receipts for the part payments made had the applicant's name and not the company's name. He also affirmed that the mentioning of the company is an afterthought. The respondent also asserted that the applicant's mentioning of the company is an attempt to deflect the responsibility of payment to his company. The respondent also claimed that the Whatsapp communications which he exchanged with the applicant did not indicate that the payments were going to be made by the company. According to the respondent, the applicant used singular pronoun, in certain instances, suggesting that it was the applicant who was going to make payments to the respondent.

The respondent maintained that his claim under case number HC 7235/21 is not frivolous and vexatious. He also averred that there are triable issues in his case. The relief sought by the applicant is established in terms of r 31 of the High Court Rules, 2021 which provides as follows:

> "31.(1) Where a defendant has filed a plea, he or she may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his or her belief the action is frivolous or vexatious and setting out the grounds for such belief and a deponent may attach to his or her affidavit documents which verify his or her belief that the action is frivolous or vexatious and whereupon the court may—
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> (a) grant the application in which event it shall dismiss the action and enter judgment of absolution from the instance; or
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> (b) dismiss the application in which event the action shall proceed as if no application was made; and
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> (c) make such order as to costs as it considers necessary in the circumstances.
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> (2) Where on the hearing of an application made under this rule in a case in which there is more than one defendant, it appears that as against one defendant the action is

> frivolous or vexatious, but it does not so appear as against another defendant, the court may order that as against one defendant the action be dismissed and judgment of absolution from the instance with costs be entered, but that against another defendant the plaintiff, be at liberty to proceed with the action.
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> (3) Where the defendant has filed a plea and the plaintiff has not, after 1 month of the filing of such plea, taken any further step to prosecute the action, the defendant may, on notice to the applicant, make a court application for the dismissal of the action for want of prosecution and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, setting out the grounds for seeking that relief and on hearing an application the court may either grant the application or dismiss it and make such order as to costs as it considers necessary in the circumstances.
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> (4) Subject to this rule, the rules relating to the filing of court applications, shall apply to an application under this rule and to any opposition thereto."

A number of cases have dealt with the manner in which the court may determine the present application. In the case of *City of Harare* v *Masamba*[1], the court made the following remarks:

> "Courts of justice are open to all. Section 69 (3) of the Constitution says that every person has the right of access to the courts, or to some other tribunal or forum established by law, for the resolution of any dispute. But this right is not absolute. In exceptional cases the courts will draw the line. They will shut their doors. They have an inherent right and power to prevent an abuse of their processes. They have inherent powers to protect their integrity. Frivolous, vexatious or burdensome litigation; incessant lawsuits that chum out pesky bills of costs which remain unpaid, dirty hands; abuse of judicial officers in any manner; contempt of court; non-disclosure of material facts, and so on, are some of the intolerable infractions that may lead the courts to shut their doors. The closure may be temporary. But it can be perpetual. It all depends on the circumstances. The doors may not be re-opened without leave."

In defining "frivolous" and "vexatious", GUBBAY CJ, in the case of *Martin* v *Attorney General & Anor*[2], made the following observations:

> "In the context of s 24(2) the word "frivolous" connotes, in its ordinary and natural meaning, the raising of a question marked by a lack of seriousness; one inconsistent with logic and good sense, and clearly so groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it. The word "vexatious", in contra–distinction, is used in the sense of the question being put forward for the purpose of causing annoyance to the opposing party in the full appreciation that it cannot succeed; it is not raised bona fide and a referral would be to permit the opponent to be vexed under a form of legal process that was baseless …."

In the case of *Mbangani* v *Mabhena*[3], the court held that the present application can be made where the plaintiff's action is totally baseless, hollow, and is a clear waste of time

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[1] ***HH 330-16.***

[2] **1993 (1) ZLR 153 (S).**

and such case is a case that is dead before it has even started. Further, GARWE JCC, in the case of *S* v *Sibanda*[4] quoted with approval the case of *Jennifer Williams & Anor* v *P. Msipha NO & Ors* [5], where the court made the following remarks:

> "… The opinion which the person presiding in the lower court is required to form is a particular opinion in the sense that he or she is expected to form it by reference to specific criteria. The raising of a question in a court of law is an action or legal proceeding which includes all material facts required to be proved by the party raising the question to entitle him or her to relief …
>
> The judicial officer is required to have knowledge of the ordinary and natural meaning of the words "frivolous and vexatious," which constitutes the standard which he or she must conscientiously and objectively apply to the facts on which the question as to the contravention of the fundamental human right or freedom is raised."

It is the respondent's case that he and the applicant were partners in their business arrangement. He further argued that Lotsgrain (Pvt) Ltd was one of the companies which they used to conduct their various businesses. It is common cause that the applicant and respondent were earning the same salary, in the majority of cases. The table below summarises the salaries for the applicant and the respondent on different occasions.

DATE OF PAYMENT	**PERSONS PAID**	**AMOUNT PAID PER INDIVIDUAL**
31 May 2016	Applicant and Respondent	US$ 600
27 April 2016	Applicant and Respondent	US$
29 March 2016	Applicant and Respondent	US$ 500
1 March 2016	Applicant and Respondent	US$ 500
19 January (Year not specified)	Applicant and Respondent	$350
30 June 2016	Respondent	US$ 600

[3] **HB 93-18.**

[4] **CCZ 4-17.**

[5] SC 22/10.

In the absence of sufficient explanation as to why the applicant and the respondent were getting the same salary, the respondent's assertion to the effect that the parties hereto were partners in their arrangements of business appears to be reasonably arguable. The applicant simply highlighted that the respondent is the former employee of the company without furnishing the court with further details. Such lack of clarity raises triable issues.

Further, one wonders why the applicant chose not to use the letterhead for the company when he was responding to the letter authored by the respondent's legal practitioners. That, again, makes the respondent's case arguable.

It is the applicant's case that the use of the plural pronoun "we" suggests that he was representing the management of the company. However, there is nothing that prevents partners from using the same plural pronoun when responding to the letter of demand.

Further, the respondent argued that the applicant used the singular pronoun "I" in certain communications which suggests that it was the applicant who owed the respondent and not the company. In the Whatsapp communication addressed to the respondent, the applicant said:

> "Morning?? Jus finishing with Dairibord ths month end then I start with you in April, should be done in 2 to 3 mnths maximum…"

In the letter which is called "acknowledgement of debt" by the respondent, the applicant also used singular pronoun. For example, in that letter, the applicant stated:

> "I received a letter dated 9th of September for final demand on behalf of Farai Adaareva.
> I feel your client should have liased with me on a round table meeting which could have included your presence judging from the relationship we had but on the clearing his said balance we will make a proposal."

The use of the singular and plural pronouns interchangeably makes the respondent's case reasonably arguable. The two receipts, attached to the application, for the part payments made reflect the applicant's name as the person having made such payment. The acknowledgement of receipt for 4 December 2020 reads as follows:

> "I, Ruth Takaendesa, hereby acknowledge having received the sum of USD2 500 (Two Thousand Five hundred United States Dollars) cash from Francis Chandida for travelling expenses."

The receipt dated 4 January 2021, where the payment of US$1 500 was acknowledged by Ruth Takaendesa, was also authored in a similar fashion bearing the applicant's name as person who made the payment. According to the respondent, if the payments were made by the company, there was need to specify this. The applicant insisted that he made such

payments on behalf of the company. In my view, this lack of clarity makes the present application weaker while at the same time making the respondent's action arguable.

It is common cause that the agreement for the severance package was never reduced into writing. The parties to such agreement, therefore, remain unknown. The identity of actual parties to the contract for the payment of the severance package are in dispute. Only a trial can unearth parties to such agreement.

The case of the respondent cannot be said to be palpably meritless, in my view. One cannot describe the respondent's action as a dead case neither can one define it as one that shows lack of seriousness. Further, the evidence placed before the court by the applicant does not suggest that the respondent's action is manifestly groundless, in my opinion.

Thus, after conscientiously and objectively assessing the present application, I have come to the conclusion that in the absence of trial, it is difficult to formulate an opinion that the respondent's action is frivolous and vexatious. These issues can only be fully ventilated at the trial. In the circumstances, I find no favour with the present application. With respect to costs, I am of the view that it is in the interest of justice that such costs be in the cause.

Consequently, it is ordered as follows:

(a) The application be and is hereby dismissed.

(b) Costs of this application shall be in the cause.

Zvobgo and Attorneys, applicant's legal practitioners.
Scanlen and Holderness, respondent's legal practitioners.