ON POINT RESOURCES (PRIVATE) LIMITED
versus
SONKIN RESOURCES (PRIVATE) LIMITED
and
ENVIROMENT MANAGEMENT AGENCY
and
MINISTER OF ENVIRONMENT, TOURISM AND HOSPITALITY
and
MINISTER OF HOME AFFAIRS AND CULTURE
and
CHIEF IMMIGRATION OFFICER N.O
and
KADOMA MINICIPALITY
and
MINISTRY OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
MINISTER OF INDUSTRY AND COMMERCE
and
ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 12 November 2020 and 10 February 2021

Opposed application

P. Makwara, for applicant
S. Dizwani, for 1st respondent

TAGU J: At the commencement of the hearing the counsel for the first respondent applied for condonation for late filing of its heads of argument. The counsel for the applicant also applied to amend his answering affidavit. Both applications were not opposed by either side and were duly granted.

INTRODUCTION

This is an application for a declaratory order against the first to the seventh respondents that they are in contravention of section 2 of the Indigenization and Empowerment Act [*Chapter 14:33*]. Consequently, the first respondent is to be barred from operating a retail shop in Kadoma

or any other area in Zimbabwe and second to the sixth respondents are to withdraw all licences or permits granted to the first respondent.

The basis of the application is that the applicant is a company registered in terms of the laws of Zimbabwe. Its directors and shareholders are Zimbabweans. The first respondent is also a Zimbabwean company registered in terms of the laws of Zimbabwe. Its three directors and or shareholders are Chinese. The fourth director or shareholder is a Zimbabwean. The applicant's contention in a nut shell is that the fourth director or shareholder of the first respondent Seda Mangirazi is a front or a puppet of the Chinese shareholders since he holds minority shares in the first respondent. It further averred that the first respondent is contravening section 2A of the Indigenization and Empowerment Act as it is operating in the reserved sector selling cyanides a product that the applicant is also operating in.

The applicant is seeking the following relief-

"IT IS DECLARED/ORDERED THAT

1. First Respondent is not wholly owned by Zimbabwean Citizens consequently it is barred from operating in the reserved sector of the economy especially retail and wholesale in Kadoma and Zimbabwe.
2. Second to the Eighth Respondents are ordered to revoke any licences and permits granted to the First Respondent pursuant to its operations in Kadoma and in Zimbabwe in the reserved sector of the economy forthwith.
3. Costs of suit."

The first respondent filed a notice of opposition in which it alleged among other things that it is not operating in the sale of cyanide as alleged. It challenged the applicant to prove its allegations which it says is baseless and defamatory to the first respondent. It said if indeed the first respondent was operating as alleged then the applicant should have reported to law enforcement agents such as the police. It views the applicant's application as frivolous and vexatious. It said it has since applied for permission to operate in the reserved sector of the economy and its application is yet to be decided. It further submitted that the applicant is only fearing competition.

The second, third, fourth, sixth, and ninth respondents did not file any Notices of Opposition to the application.

The fifth respondent who is the Chief Immigration Officer filed his Notice of Opposition. Among other averments the fifth respondent is of the view that the application appears it does not satisfy the legal requirements for a declarature but is one or less of sour grapes between applicant

and the first respondent. It averred that the applicant does not state whether or not the fact that a company is owned by foreign nationals is a foreign company as this impact on the actions of the fifth respondent. It further submitted that the applicant ought to prove the allegations of 'front' or 'puppet' of Seda Mangirazi whom the applicant is saying is being fronted by the first respondent. According to the fifth respondent this matter requires police investigations as opposed to a declarative since it borders more on an alleged criminal conduct. Further, he said it is imperative that the applicant highlights permits issued to Directors or Shareholders of the first respondent to enable the fifth respondent to establish extent of breach if any. The fifth respondent said he is not aware of any legislation to prohibit foreign nationals from competing in business with locals. He said the Competition and Tariff Commission was established to carry out investigations of a related nature. He further said if the first respondent is externalizing funds, they are duty bound to assist the police and other agencies to bring first respondent to accountability. Finally it took judicial notice of the fact that there are foreign owned companies in Zimbabwe such as Pick n Pay operating in the retail sector, hence to declare that their operations are illegal without exercise of due diligence is opposed. He therefore submitted that this application be dismissed.

The seventh respondent who is the Ministry of Local Government, Public Works and National Housing filed its response in which it indicated that it abides by the decision of court.
The eight respondent which is the Ministry of Industry and Commerce filed its Notice of Opposition in which it raised a point *in limine* that this application is misplaced. It said the eighth respondent administers the Indigenization and Economic Empowerment Act [*Chapter 14:33*] which was amended by the Finance Act 1 of 2018. It says section 3A of the Finance Act No. 1 of 2018 lays down the requirements and procedures that are supposed to be followed when a person who is not a Zimbabwean citizen who wish to operate a business in the reserved Sector of the economy to seek permission from the Minister of Industry and Commerce. In *casu* it submitted that the first respondent submitted an application to the eighth respondent to operate in the Reserved Sector under reference number B/130/130/2 and the Ministry is in the process of conducting its due diligence before consideration. So there is no permit or licence that has been granted to the first respondent so far and the application is misplaced.

The applicant is seeking a declaratory against the first respondent that it is not owned by Zimbabwean citizens therefore cannot operate in the reserved sector of the economy. The applicant

has thus proceeded in terms of Section 14 of the High Court Act [*Chapter 7:06*] which provides that:

> "**14 High Court may determine future or contingent rights**
> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

In the present case the applicant averred that it is a company that is owned by Zimbabwean citizens while on the other hand the first respondent is a company owned by Chinese Citizens, therefore applicant is an interested person. It also said that it sells sodium cyanide which the first respondent is also selling. It however, said it has no onus to prove that the first respondent is selling sodium cyanide as such evidence is not necessary because the first respondent is not issuing receipts. It urged the court to determine a future or contingent right. It further conceded that the first respondent has applied to the eighth respondent for an exemption and such exemption has not been granted. According to the applicant the court has to consider whether this is a proper case for the exercise of its discretion. When the court finds favour with the applicant's submissions then in terms of section 5 (2) of the Indigenization and Economic Empowerment Act the eighth respondent has power to order non-renewal of operating licence by government agencies on behalf of the first respondent. It concluded by saying if the declaration is made, then the applicant can compete with indigenous owned Zimbabwean companies on equal footing and not foreign companies who access cheap loans. To the applicant the first respondent violated their permit when they entered Zimbabwe by purporting to be investors when they are retailers.

In terms of the Finance Act, 2018, in particular section 42 thereof, establishes the reserved sector of the economy in which only Zimbabwean indigenous businesses are allowed to operate. It says-

> "reserved sector of the economy means the sector comprising of those kinds of businesses reserved for citizens of Zimbabwe under the First Schedule."

In First Schedule is listed categories of businesses that are reserved for the indigenous Zimbabwean citizens. Category 2 has retail and wholesale trade. Hence applicant and first respondent are said to be operating under that category.

Section 2A of the Indigenization and Economic Empowerment Act [*Chapter 14:33*] precludes foreigners from operating in the reserved sector but are free to operate in other areas. It says-

> "For the avoidance of doubt it is declared that this Act shall not apply to any business in the national economy other than those specified in section 3(1) and those in the reserved sector of the economy and that accordingly any person is free to invest in form, operate and acquire the ownership or control of any business not included in section 3(1) or in the reserved sector."

Section 3A (1) of Indigenization and Economic Empowerment Act says-

> "Subject to subsection (2) and (10), only a business owned by a person who is a citizen of Zimbabwe may operate in the reserved sector of the economy."

In the present case the applicant is applying for a declaratory order on the basis that the first respondent is operating in the reserved sector of the economy. On the other hand the first respondent denied that it is operating in the reserved sector of the economy. In its heads of argument it further submitted that the applicant failed to satisfy the requirements for a declaratory order.

THE LAW

The requirements of a declaratory order are set out in the case of *Johnsen* v *Agriculture Finance Corporation* 1985 ZLR 65 which are-

a) Applicant must be an interested person;
b) The interest must concern existing or future or contingent right;
c) The court must not decide on abstract academic or questions unrelated thereto;
d) The presence of an actual dispute or controversy between the parties is not a perquisite for the exercise of jurisdiction; and
e) Whether it is proper case to exercise discretion.

Having considered the written and oral submissions made by the parties' counsels I am of the view that the application is not a proper case for the exercise of discretion under section 14 of the High Court Act for the following reasons:

The applicant has no direct and substantial interest in this matter as required by law. I say so because the applicant's interest in this matter is a financial and a commercial one as opposed to being a legal interest. In the applicant's founding affidavit, at paragraph 24, the applicant states-

> "On the other hand the Applicant has the capacity to supply chemicals such as cyanide to Zimbabwe."

At paragraph 26 of founding affidavit applicant stated-

> "…the Respondents are depriving citizens of Zimbabwe their statutory rights and privileges which foreigners must not be allowed to compete with Zimbabweans. Foreigners get cheap loans to set businesses in Africa from their native countries. On the other hand, indigenous businesses such as the Applicant have to borrow on the local market where interests are expensive. Thus there will never be a fair competition between indigenous businesses and foreign owned businesses such as the 1st Respondent."

Further, at paragraph 30 of the Heads of Arguments, the Applicant said-

> "Applicant has made a case that it sells sodium cyanide which the 1st Respondent is also selling."

In the case of *Anderson* v *Godik Organisation* 1962 (2) SA 68 (D) at 72B-E it was said it is a well settled principal at law that legal interest (direct and substantial interest) is opposed to financial and commercial interest. Again in *Henri Viljoen (Pty) Ltd* v *Waterbuck Brothers* 1953 (2) SA 151 (O) it was concluded that a direct and substantial interest is an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.

It is apparent therefore, that the applicant seeks to quash an assumed commercial competition by hiding behind a declaratur when in actual fact it lacks the requisite direct and substantial interest in the first respondent. Even if the court were to find that real and substantial interest is not remote in this case, a declaratory order cannot be granted in the absence of evidence that the first respondent is operating a retail shop that sells cyanide and mineral chemicals trading in the reserved sector of the economy. The maxim 'he who alleges must prove" is an extant legal principle that applies in this case. The applicant clearly stated that he has no evidence since the first respondent is not issuing receipts. If that is so, how does the applicant know that the first respondent is trading in or selling cyanide? Where is the licence or permit granted to the first respondent to operate in the reserved sector of the economy? In the case of *S* v *Tambo* 2007 (2) ZLR 33 (H) at 34C-D the court held that:-

> "…The correct judicial assessment of evidence must be based on establishing proved facts, the proof of which must be a result of careful analysis of all the evidence led. The final result must be the product of an impartial and dispassionate assessment of all the evidence placed before the court."

In Principles of Evidence, 4th edition, the authors Schwikkard and van der Merwe similarly stated

> "In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference"

In this case, it is insufficient for the applicant to allege misconduct and fail to prove it. The applicant is alleging that the first respondent is openly operating a retail shop, surely a conduct done openly is one that the applicant should not have difficulty in proving. The first respondent on the other hand has denied operating in the reserved sector of the economy, it has denied the notion that the Zimbabwean directors are puppets of the Chines directors. In my view the first respondent has done nothing that affects any rights of the applicant. In the absence of proof that the first respondent is conducting a retail shop, there is no nexus between the applicant and the first respondent other than fear of competition from a company that has not yet been licenced to operate in the reserved sector of the economy. The application therefore falls short in the ambit of section 14 of the High Court Act. While the applicant has established that it is in the business of wholesale and retail of mineral chemicals such as cyanide, it failed to prove that the first respondent is in the same business. The applicant wants the court to assume so. The court cannot operate on assumption. To that extent the first respondent's operations have not and will not affect any rights that the applicant claims to have under the Indigenization laws until it has been so licenced.

It must also be noted that the Finance Act 2018 has amended essential provisions of the Indigenization and Economic Empowerment Act, [*Chapter 14:33*] following the new dispensation under the leadership of his Excellence, President Emmerson Munangagwa. The amendments therein indemnifies the first respondent from any indigenization policies that could have limited its operation prior to the Finance Act 2018, especially in section 2A. The first respondent will only operate in the reserved sector of the economy upon the issuance of a permit to do so. The counsel for the applicant submitted that in the event the court finds in favour of the applicant the court can still make adjustments to the order being sought. Unfortunately, I am not moved to take that course since the applicant failed to satisfy the requirements of the declarator he is asking. I will dismiss the application with costs.

IT IS ORDERD THAT

1. The application is dismissed.
2. The applicant to pay first respondent's costs on a legal practitioner and client scale.

Madzingira and Nhokwara, applicant's legal practitioners
Hove legal practice, 1st respondent's legal practitioners.