

DAVID WHITEHEAD TEXTILES LIMITED

Versus

NATIONAL BLANKETS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 1 JULY AND 5 AUGUST 2010

C Nhemwa for applicant
V Majoko for respondent

Opposed Court Application

KAMOCHA J: This is an application in terms of rule 235 of the rules of court wherein the applicant is seeking the following:

“It is ordered that:

- (1) The affidavit of Shungu Andrew Toendepi is hereby admitted as part of the record in case number HC 1475/09 with the annexures attached hereto; and
- (2) The costs of this application be costs in the main application.”

Actually the affidavit that the applicant seeks to admit is that of Mr Earnest Chivaura not that of Toendepi.

The applicant indicated at the hearing that it would no longer persist with seeking the admission of the draft report of Mr Madondo who was alleged to have turned hostile to the applicant.

The applicant averred that the reason why it was seeking to file an additional affidavit and documents was that at the time the opposing papers were filed, they had been battling for time to put their case together because not only was the application issued in Bulawayo when they were based in Harare, but they also had come across the affidavit of Mr Earnest Chivaura who was very privy to the facts of the matter which he had prepared and handed over to it but because of its content, it did not use it in its application. This is difficult to follow.

Be that as it may, applicant went on to allege that it was only after it had filed opposing papers that it became aware of the existence of that affidavit which Chivaura had deposed to setting out the factual position of the matter. It was that affidavit along with other documents

that applicant sought to introduce as part of the record especially the agreement entered into between Intaglio Enterprises (Pvt) Ltd and Guscole Investments (Pvt) Limited (David Whitehead Consortium's vehicle) under which the shares held by Intaglio Enterprises were sold to Guscole Investments.

Applicant believed that it would be in the interest of justice and indeed for the benefit of the court, that the documents be made available to the court. The respondent had been made aware of the existence of the documents and had been advised in advance that this application would be made to the court seeking their admission. Applicant submitted that no prejudice would be occasioned by the introduction of the documents.

The respondent vehemently opposed the application to file an additional affidavit and documents because the applicant always had the said affidavit by Chivaura in its possession. It had it before it filed its opposing papers. Hence, it was not true for the applicant's deponent to suggest in paragraph 4 of his founding affidavit that it was only after filing opposing papers that applicant became aware of Chivaura's affidavit. The correct position was that the respondent filed its main application which it served on the present applicant on 24 September 2009. The following day i.e. 25 September 2009 the present applicant wrote a letter to Madondo concerning the application. Madondo referred the letter and application to Mutamangira & Associates legal practitioners who on 2 October 2009 wrote and encouraged the applicant to oppose the main application.

The applicant had received Chivaura's affidavit by 2 October 2009 which it forwarded to the respondent by 5 October 2009. The applicant's deponent only swore to his founding affidavit on 9 October 2009 – 7 days after applicant had it. Chivaura's affidavit was in fact deposited on 30 September 2009. Consequently the applicant's explanation for failure to file the said affidavit with the opposing papers is clearly false and misleading. That is particularly so when regard is had to the supporting affidavit of Toendepi who deliberately conceals the fact that he was the one who had faxed Chivaura's affidavit to Mujuru the respondent's deponent on 5 October.

Similarly applicant failed to explain why the agreement between Intaglio Enterprises and Guscole Investments was not filed together with all the other documents filed in opposition. The said parties entered into that agreement in 2007. There is no truth in the assertion that applicant only became aware of the agreement after filing opposing papers.

Rule 235 of the rules of court was designed to assist a respondent who only becomes aware of additional information after the filing of opposing papers. The applicant in this case has always been aware of the additional affidavit and agreement it seeks to file belatedly.

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There was no acceptable explanation why they did not file them timeously. The explanation it proffered was in fact false and misleading. The application must, in the result fail.

The applicant launched this application which it premised on falsehoods. The respondent has been put into unnecessary expenses. It is entitled to recover its costs in respect of this application in full.

Consequently it is ordered that this interlocutory application be and is hereby dismissed with costs on an attorney and client scale.

Nhemwa & Associates, applicant's legal practitioners
Majoko & Majoko, respondent's legal practitioners