KAREN TUMAZOS
TRAVEL CONECTIONS (PRIVATE) LIMITED
and
STEWART CRANSWICK

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 3 March 2011 and 1 June 2011

S. Hwacha, for applicant
Advocate *E Mushore*, for the respondents

MTSHIYA J: This is an opposed application. The background to this application is the following.

The applicant was employed by the first respondent as a General Manager. She left the employ of the first respondent on 30 September 2007. There are still issues yet to be resolved by the labour Court relating to the circumstances under which she left employment.

In addition to her employment the applicant avers that there was an agreement between her and the first respondent whereby she was entitled to a percentage share of the profits for each financial year. The applicant alleges that she was not paid her profit share for the years 2006 and 2007. These facts can best be brought forward by reproducing them as narrated by the applicant in her founding affidavit. She states, in part;

> "7.1. The first respondent and I had an agreement under which and over and above my normal salary and benefits, I was entitled to a percentage share of the profits for each financial year.
>
> 7.2. It is not in disputed (*sic*) by respondents that I was not paid my profit share for the years 2006 and for 2007.
>
> 7.3. The reason for non payment of the profit share which has been given by Mr Cranswick, in an email to me in September 2007, is the claim that "numerous accounting issues and irregularities to be worked through"
>
> In other words, the respondents have not paid me the agreed percentage share of the profit
>
> for the " reason" that there must first be a debatement of the account"

It is on the basis of the above facts that on 27 October 2008 the applicant filed this application for a debatement of accounts of the first respondent in the following terms:-

"1. The first respondent is ordered and directed to pay the applicant the sum of USD 110 022 together with interest at the applicable rate from the date of these proceedings.

2. In the event that the first respondent fails to pay the sum of USD 110 022 as ordered, first respondent is ordered to render an account of all the business of Travel Connections (Private) Limited including specifically the foreign currency profit and loss accounts for 2006 and 2007 within 14 days of the date of the service of the order.

3. It is ordered that the parties shall debate the accounts rendered in terms of para 2 above, within 14 days of the date of delivery of the accounts to applicant's legal practitioners.

4. If agreement is reached, the first respondent shall pay to the applicant a profit share of one third ($_{1/3}$) of the profits for 2006 and 2007, within 3 days of the date of agreement.

5. In the event that the accounts are not agreed within 14 days, it is ordered that either party shall be at liberty to approach Messrs Deloitte and Touch Chartered Accounts to appoint a Chartered Accountant from within their firm to act as referee and intervener.

6. The intervener appointed shall and is hereby fully empowered with unlimited access to all accounting, financial and all other documents as may be necessary for him/her to give effect to this order. Such power shall include, but not be limited to, access to any and all financial and banking records, whether in Zimbabwe or abroad, and direct access to any foreign transactions, information, or accounts in the custody or control of the first and second respondents or records held by the Reserve Bank of Zimbabwe, which have a bearing on the profit and loss of the first respondent for 2006 and 2007. In discharging this order, the intervener shall be empowered to subpoena the parties, witnesses and to gather such oral evidence as may be necessary.

7. The intervener/referee shall upon due investigation, examination, assessment and consideration of the matter make a report to the parties, with a copy to this court, and determine the profit for 2008 and 2007 within 21 days from the date of appointment.

8. It is ordered that upon determination of the profit for 2006 and 2007 by the intervener, the first respondent shall pay to the applicant a $_{1/3}$ of the profit of the first respondent for 2006 and 2007.

9. The applicant shall be entitled to file a chamber application to register the decision/quantification fixed by the referee/intervener as an order of the court for the purpose of execution.

10. In the event that either party is in default of any of the time limits fixed in this order, where such limits have not been mutually extended by order of this court, the party not in default shall be entitled to apply by chamber application, on notice, for default judgment or other relief as may be appropriate.

11. The respondents are ordered to pay the costs of the application".

I believe that in order for this court to properly consider whether or not to grant the relief in the manner sought above, this court must first determine whether or not there was indeed a profit sharing agreement between the first respondent and the applicant. It is only on the basis of a finding on that issue in favour of the applicant that the relief sought can then be granted.

In the opposing affidavit, filed under a Power of Attorney granted to Cherylynn Jean Watson by the second respondent (i.e the Managing Director of first respondent) the following is stated on behalf of the respondents:-

> "9. This is denied. The applicant was overally responsible for the first respondent's operations in Zimbabwe and Zambia for the duration of her employ with the first respondent. Included as part of her functions was the control of all financial matters including the preparation of financial statements and accounts. It is not necessary, in order to asses whether or not the applicant is owed any money by the first respondent, to order the debatement of the first respondent's foreign currency or any accounts nor obtain the services of an intervener or referee, as the applicant was responsible for the preparation of the financial accounts and supervision of the auditors that audited all the accounts of the first respondent's group operations. The audited accounts for the Group prepared under the supervision of the applicant show that the Group did not make any profits in the years in respect of which she seeks a profit share payment.
>
> Further, I aver that there was never a profit sharing agreement concluded and or signed between the applicant and the first respondent. The applicant initiated several discussions with the second respondent pertaining to her request for a share of the profits of the first respondent as she believed she had brought a lot of business into first respondent's group. The last of these discussions culminated in a note that was written by the second respondent illustrating the proposal applicant was making for the profit sharing. Attached hereto as Annexure 'E' is the said note, which applicant would have the court believe is the profit sharing consultancy agreement.
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> 10. **Ad Paragraph 9**
>
> This is denied. These alleged facts are disputed.
>
> 10.1 **Ad sub-paragraph 7.1** – This is denied. There was never an agreement
>
> between the applicant and the first respondent in terms of which applicant was entitled to a percentage share of the profits for each year.
>
> 10.2 **Ad sub-paragraph 7.2** – This is agreed as there was no share profit agreement between the parties and even if it is found that there was an agreement for profit sharing, the first respondent reported a net loss position for both the 2006 and 2007 financial years. As such therefore no payment would have been due to the applicant, but instead she would be liable to pay the first respondent for her part of the losses".

The applicant raised the point that Cherylynn Jean Watson (Watson) who

was the Group Financial Manager of the first respondent could not properly swear to the opposing affidavit since she had no knowledge of any facts which could assist the court and that the respondents had 'failed to comprehend the nature of and purpose of an application for debatement of account. The applicant averred that due to her entitlement 'to a percentage share of the profits for each financial year, the first respondent had a fiduciary obligation to debate or disclose the accounts or profits of the disputed periods.

The respondent's position was that Cherylynn Jean Watson's opposing affidavit was valid because in her capacity as Group Financial Manager the matters she deposed to were clearly within her purview. I share that view and in so doing I derive comfort from r 227(4)(a) of the High Court Rules, 1971 which provides as follows:-

> "(4) An affidavit filed with a written application –
>
> (a) Shall be made by the applicant or respondent as the case may be, or by a person who can swear to the facts or averments set out therein;...." (My own underlining)

It was not disputed that Watson was indeed the first respondent's Group Financial Manager who supervised the auditing of all group companies .

I am satisfied that in that position she had the capacity to swear to the opposing affidavit.

I also note that whilst praying for the dismissal of the opposing affidavit, the applicant has, in support of her case, heavily relied on the same affidavit.

In view of the foregoing, I am unable to uphold the point *in limine*. The opposing affidavit is properly filed.

In supplementary heads of argument filed on 8 February 2011 the respondents argued this was a labour matter which should be dealt with under s 89 of the labour Act [*Cap 28:01*]. It was submitted that this was so because the applicant had indicated that she had instituted proceedings in the Ministry of Public Service, Labour and Social Welfare to deal with the unlawful termination of her contract of employment. *Advocate Mushore*, for the respondents, submitted that the basis of the relief sought derived from an employer/employee relationship. The applicant was seeking a determination of what her terminal benefits were. The matter, it was argued, was pending at the Ministry of Public Service, Labour and Social Welfare.

Mr *Hwacha*, for the applicant, argued that the profit sharing agreement was not part of the applicant's conditions of service. This, it was argued, was a separate contract from the employment

contract. To the extent that the applicant's claim is firmly based on the fact that there was between her and the first respondent a distinct profit sharing agreement. I would agree with Mr *Hwacha*'s submission. The applicant is not raising an employment dispute. She is making a claim on an agreement which, although probably influenced by virtue of her employment, had nothing to do with her contract of employment. The fact that her contract of employment might have placed her in an advantageous position into being granted a profit sharing agreement, does not, in my view, convert this into a labour dispute.

The thrust of the applicant's argument is that there was a profit sharing agreement between her and the first respondent. The first respondent had failed to honour her entitlements for the years 2006 and 2007. There was therefore need for a debatement of account in order to establish what she ought to have been paid.

In her heads of argument Advocate *Mushore* correctly notes:

> "The issue that has been brought before this Honourable Court relates to relief brought in instances where a partnership contract exists and an issue of accounting arises for example upon dissolution of partnership. The issue of debatement is for example a *sequitor* to the fiduciary duty between parties who are in a partnership".

The above realisation, in my view, is an acceptance of the fact that this is not a labour matter. Accordingly this court can deal with the issue. In proving her claim the applicant relies on a number of documents but places greater emphasis on the one document provided by respondents' in the opposing affidavit. Hence in her answering affidavit she states as follows:-

> "The respondents themselves have annexed the document marked 'E'. It is written to me by the second respondent and shows clearly that there was a profit sharing arrangement. Annexure "E" reads:-
>
> 'All up to date (K.T) (Karen Tumazos). As of 1/7/05:3 thousand per month for SC (Stewart Cranswick) and K.T. (Karen Tumazos) to 31/12/05: 4 thousand per month for 06.
>
> P/share (profit share) of 1/3 attributable each and 1/3 for reserves"
>
> There is nothing unclear in the above. That my salary and Mr Cranwisk's salary would be pegged at three thousand US dollars to the end of December 2005 and upped to four thousand US dollars for 2006. That each of us would be paid 1/3 of the profit with the other third going to reserves".
>
> In order to buttress the above, the applicant, in her heads of argument, quotes the following statements from Mr Cranswick:-
>
> "As far as your payment goes:

(a) **There are accounting issues with the account returning to Rodger that I have told you about and have to go over and rectify**
(b) **I have only just received the i.f.o you sent**
(c) **You make no mention in the reports of AF guarantee issues and it was clearly recorded that this would be collected prior to bonus"**
(Annexure 1)

'If you are to get one (profit share), its won't be for a while as there are numerous accounting issues and irregularities to be worked through'
(Annexure J)

'there are some serious accounting issues still outstanding'
(Annexure K)"

The above statements, as indicated, are selectively pulled out from different documents. On the basis of the above, the applicant submitted that the actual terms of the profit sharing agreement arrangement and the applicant's entitlements resulting therefrom had been clearly spelt out.

Apart from having argued that the applicant's relief lay in the Labour Court, the respondent also submitted as follows:-

> *"In casu*, the relationship that is evident from the pleadings and the relief sought is based on a calculation of terminal benefits due or not due to applicant arising from her relationship with first respondent (labour matter) and not from a contract of partnership. A party who relies on a partnership contract must allege and prove **a contract** with the following essentials"-
>
> (a) Each party must undertake to bring into the partnership money, labour and skill;
> (b) A business is to be carried on for the joint benefit of all the parties; and
> (c) The common object is to make a profit".

Indeed as already pointed out, the relief sought herein can only be granted if there is proof of the existence of a clear contract of profit sharing. This was strongly disputed by the respondents who argued that in the absence of a proper agreement, the applicant could not rely on 'scribbled notes' produced by the respondents. It was submitted that whilst the applicant might have received certain payments, which could either be bonus or profit share, that alone did not prove the existence of a proper profit sharing agreement with clearly defined terms.

An indepth analysis of the facts in the papers before me and a careful consideration of the submissions from both parties make it very difficult for me to conclude that there was ever a proper and clearly defined profit sharing agreement between the first respondent and the applicant. I want to believe that such an arrangement, if at all it had existed, would have been formalised. Instead, what I have before me is a request to put together scribbled pieces of paper and then come up with

a formal agreement. It is extremely difficult to do that without full knowledge of what led to the writing of those various pieces of paper that the applicant wants me to believe constitute evidence of the profit sharing agreement. Acceptance of the applicant's request in the manner suggested, would in my view, place the court in a situation where it will be crafting a contract for the parties. That not be. In any case the pieces of 'correspondence' relied on by the applicant are proof of 'correspondence between the second respondent and the applicant. I am mindful of the fact that the second respondent was only the Managing Director of first respondent. However, for the purposes of establishing a binding agreement between the applicant and the first respondent, the need for a Board resolution would, in my view, arise. It cannot, in the absence of evidence, just be assumed that the second respondent had authority to enter into certain binding arrangements with the applicant on behalf of the first respondent. The alleged contract was meant to be between the applicant and the first respondent. In para 8 of the founding affidavit the applicant presents her case as follows:-

> "8. I approach this honourable court for an order directing and authorising a debatement of the foreign currency accounts of Travel Connections (Private) Limited, for the appointment of an intervener or referee, and for payment of all foreign currency due to me from Travel Connections on account of the profit sharing consultancy agreement which I had with Travel Connections (Private) Limited prior to the unlawful termination of my employment".

The documents relied upon as evidence of the existence of a profit sharing agreement

Clearly appear to emanate directly from the second respondent. There is nothing to tell us that in so doing the second respondent was mandated by the first respondent to negotiate an agreement with the applicant – moreso in foreign currency.

In view of the foregoing, I am unable to find that there was a profit sharing agreement between the applicant and the first respondent. I therefore agree with the respondents that:

> "The applicant has failed to establish that she has a right to receive the accounts in respect of which she seeks debatement, and the basis of such right;
>
> She has not furnished the court with a contract or some other document or proof which establishes that indeed she was entitled to the profit share claimed, either by contract or fiduciary relationship or otherwise".

As earlier opined, the above finding means that the basis upon which the relief sought would have been granted, falls away. Accordingly the application should fail.

The application is dismissed with costs.

Dube, *Manikai & Hwacha*, applicant's legal practitioners
Gula-Ndebele & Partners, respondent's legal practitioners