

COSMAS ZEZERE

versus

EARTHWALES (PRIVATE) LIMITED

And

VAMBAI SHENJERE

HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

MANZUNZU J

HARARE, 28 July 2023 & 17 January 2024

COURT APPLICATION

S V Tendere, for the applicant

I Gonese, for the 1st respondent

MANZUNZU J

INTRODUCTION

This is an application in terms of section 14 of the High Court Act, Chapter 7:06 seeking a declaratory order in the following terms;

- “1. The application is hereby granted.*
- 2. It is hereby declared that the partnership agreement entered into by and between the parties authorizing applicant and 2nd respondent to use 1st respondent’s company credentials is valid and binding.*
- 3. 1st respondent shall pay costs of suit at the legal practitioner and client scale.”*

The application is opposed by the 1st respondent.

APPLICANT’S CASE

The applicant’s case is that in July 2022, him, together with 2nd respondent entered into a verbal partnership agreement with the 1st respondent. The material term of the agreement was that the applicant and 2nd respondent will use the name and registration papers of the 1st respondent to enter into a contract with Crafts Properties (Private) Limited for a land development project in Kadoma.

The verbal partnership agreement is said to be confirmed by the 1st respondent in a letter dated 27 September 2022. In October 2022, while the 2nd respondent was in prison, the 1st

respondent purported to cancel the agreement which cancellation is viewed by the applicant as invalid. The applicant seeks an order that the alleged agreement declared valid.

1ST RESPONDENT'S CASE.

The respondent, apart from denying the existence of a partnership agreement, has raised two preliminary points which are subject of this judgment.

I will now deal with preliminary points hereunder.

a) Material Disputes of Fact

several authorities have settled what amounts to material disputes of fact in a case. It arises when the court is faced with two conflicting stories, which in the absence of further oral evidence, the court cannot decide where the truth lies. The court is put in a position where it will say, 'it is not safe to decide for either side unless more evidence is led.' The case cannot be decided on the four corners of the record without more.

In *Supa Plant Investments Pvt Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F-G the court remarked; "*A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.*"

This court in furtherance of the above remarks stated in *Grain Marketing Board v Mandizha* HH14/16 that;

"Put differently, it is my view that, the phrase material dispute of facts, in the application procedure, refers to the untenable position where averments are made in an affidavit, which averments have a direct bearing on the outcome of the matter, yet the papers which will be before the court, from the founding affidavit, the opposing affidavit, the answering affidavit, the annexures attached, the heads of argument, the parties oral address at the hearing of the matter, leave the court riddled with doubt and uncertainty as to the veracity of the averments, to the extent that it ought to have been clear to the applicant, at the outset, that the court would be unable to come to a conclusive decision, on the merits of the application."

Mr Gonese who argued this point for the 1st respondent, drew the court's attention to the shortcomings of the founding affidavit which he said failed to lay a foundation for one to see if there was a partnership agreement and if so, what were the terms. There is therefore a contestation between the parties which cannot be resolved on paper. For example, what did each party contribute and how were the profits to be shared? The applicant failed to state the nature of the business relationship between the parties. There is a contestation between the parties which cannot be resolved on paper, he further submitted. He said the situation is worsened by the absence of any evidence from the 2nd respondent.

Ms Tendere for the applicant could not validly challenge this position. While she insisted on the existence of a partnership agreement, she failed to show any factual basis in support. She relied on a letter by the 1st respondent which confirmed that the applicant and 2nd respondent were authorized to use the 1st respondent's name to enter into an agreement with Craft

Properties. One cannot draw an inference of a partnership from that letter. It is surprising how counsel, despite a proper acknowledgement of the position of the law, remained adamant that there was evidence of a partnership in clear circumstances of the absence of evidence to prove such. Such an approach does not assist the court. A partnership agreement does not exist by repeatedly saying it exists in the absence of evidence to prove its existence.

This is one case that cries for more evidence for the court to determine whether or not there was a partnership agreement. The founding affidavit is inadequate. The material dispute of facts does exist. The preliminary point must succeed.

b) Whether the relief sought is incompetent

Section 14 of the High Court Act under which this relief is being sought provides that, Section 14 of the High Court Act under which this application has been brought reads:

"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."

The law governing applications for declaratory orders in terms of this section is well settled. The applicant must show that he/she is:

- An interested person
- That there is a right or obligation which becomes the object of inquiry
- That he is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter
- That there is an interested party upon which the declaration will be binding, and
- That consideration of public policy favours the issuance of the declaratur

See *Movement for Democratic Change v The President of the Republic of Zimbabwe & Ors*, HH 28/07; *RK Footwear Manufacturers (Pvt) Ltd v Boka Book Sales (Pvt) Ltd* 1986 (2) ZLR 209; *Family Benefit Friendly Society v Commissioner of Inland Revenue & Anor* 1995 (4) SA 120 (T).

Courts do follow a two stage approach;

1. Does the applicant have an interest in an existing, future, or contingent right?
2. If so, is it appropriate to exercise the court's discretion in favour of making the declaratory order sought?

In *Johnson v AFC* 1995 (1) ZLR 65 (H) at p 72 E-F the court had this to say;

"The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject E matter of the suit which could be prejudicially affected by the judgment of the court. The interest must

concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of F jurisdiction. See Ex p Chief Immigration Officer 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337(S) and the cases cited."

A person seeking a declaration of rights must set forth his/her contention as to what the alleged right is. This requirement ensures that an applicant does not seek a declaration of non-existent rights or consideration of rights in the abstract.

In *casu* the applicant content his rights are derived from a partnership agreement.

Mr Gonese submitted that the applicant cannot rely on a disputed right which may only be established upon further evidence being adduced. In other words, he says no rights can be derived from a disputed agreement. Further, there were no specific rights to be enforced in the absence of a clear agreement.

Ms Tendere maintained her earlier stance that the rights intended to be declared are derived from a partnership agreement. A finding has been made that there are material disputes of fact which cannot be resolved without further evidence. No rights can therefore be derived from the disputed facts. The case cannot be a proper one for the court to exercise its discretion under section 14 of the High Court Act. This is a matter which ought to have been brought as an action.

Mr Gonese asked for costs on a higher scale on the basis that the applicant should have foreseen that this matter should have proceeded by way of summons. I do not think this is a proper case to impose punitive costs. The applicant believed that the application procedure could resolve the matter.

CONCLUSION

The applicant adopted the wrong procedure in bringing this case. There are material disputes of fact. It serves no purpose to have the matter struck off the roll. The proper course is to dismiss the application.

DISPOSITION

- 1.The preliminary points be and are hereby upheld.
2. The application is hereby dismissed with costs.

Munangati and Associates, the applicant's legal practitioners
Lawman Law Chambers, the 1st respondent's legal practitioners