

RADAR PROPERTIES
versus
ESTATES AGENTS COUNCIL OF ZIMBABWE
and
ZIMBABWE NEWSPAPERS (1980) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 28 February 2024 & 19 February 2025

Court Application

S. Bhebhe, for the applicant
S. Hoko, for the 1st respondent
No appearance for the 2nd respondent

TAKUVA J:

This is an application for a Declaratur and Consequential relief. The relief is couched in the following terms;

1. “The first respondent’s inclusion of RADAR PROPERTIES (Pvt) Ltd in a Publication of the Public Notice Alert titled ‘ESTATE AGENTS COUNCIL OF ZIMBABAWWE (EACZ); BOGUS AGENTS PUBLIC NOTICE ALERT’ dated 6 July 2023 in the second respondent’s NEWSPAPER was and continues to be unlawful.
2. The first respondent’s allegations about the applicant, Radar Properties (Pvt) Ltd in the public notice titled ‘ESTATE AGENTS COUNCIL OF ZIMBABWE (EACZ); BOGUS AGENTS PUBLIC NOTICE ALERT’ dated 6 July 2023 are false and defamatory.
3. The respondents shall within forty eight (48) hours of the grant of this Order, remove the Public Notice Alert titled ‘AGENTS COUNCIL OF ZIMBABWE (EACZ); BOGUS AGENTS PUBLIC NOTICE ALERT’ dated 6 July 2023 containing the applicant’s name from all their media platforms on the internet, including respondent’s social media accounts, including but not limited to Facebook, Instagram, Linked In, Twitter and all websites associated with the respondents. Failing such removal, the Sheriff be and is hereby directed and authorised to procure the removal of the said Public Notice from respondent’s social media accounts and websites at the first respondent’s cost.
4. First respondent shall within forty eight (48) hours of the grant of this order publish at its own cost on all media platforms including the Herald Newspaper in Zimbabwe (print and online versions), on or in which the Public Notice Alert dated 6 July has been published;
 - (i) a notice unconditionally retracting and apologizing for the allegations made about the applicant in the said Public Notice Alert; and
 - (ii) a copy of this order.

5. The first respondent shall, within forty eight (48) hours of the grant of this order, deliver a signed official headed letter of retraction and unconditional apology for the allegations made about the applicant in the said Public Notice Alert on terms approved by the applicant.
6. The first respondent is hereby interdicted and prohibited from publishing any statement that says or implies that the applicant is illegally practicing as an unregistered estate agent in respect of all immovable property that it lawfully owns; develops and sells including but not limited to the property formally known as the REMAINING EXTENT OF WILLSGROVE and informally as the KINGS CITY DEVELOPMENT.
7. The first respondent and second respondent (if the latter opposes the relief sought) shall bear the costs on higher scale of attorney and client.”

BACKGROUND FACTS

1. The applicant is a property development company. The second respondent is a regulatory body established in terms of the Estate Agents Act [*Chapter 27:17*] to provide for the registration of estate agents and the regulation of the practice of estate agents in Zimbabwe.
2. On 6th of July 2023, the first respondent caused to be published (in print and online versions) through the second respondent in its Herald newspaper, a notice headed “Estate Agents Council of Zimbabwe: BOGUS AGENT PUBLIC NOTICE ALERT under the list of what first respondent called “Unregistered Firms and Individuals practicing as ESTATE AGENTS”, first respondent included the applicant.
3. First respondent has official internet social media accounts on various platforms and has its own website. The Public Notice was further published by the respondent and other publishers on the internet as follows;
 - (a) First respondent’s Facebook page
 - (b) First respondent’s Instagram page
 - (c) First respondent’s Linked In page
 - (d) First respondent’s Twitter page
 - (e) On second respondent’s website page
 - (f) On the ZIMLIVE.COM News Website page

The applicant’s case is that first respondent’s Public Notice of 6th July 2023 is;

1. False and misleading in that the applicant is the registered owner of the land upon which the KINGS CITY DEVELOPMENT is situated.

2. The Public Notice has caused great embarrassment not only to the applicant and its partners, stakeholders, clients and regulatory authorities but has also damaged the applicant's reputation and good name. Damage arises from cost sales, cancelled sales
3. Unfair, unreasonable and unlawful to the extent to which it represents the actions of an Administrative Authority bound by section 3 of the Administrative Justice Act [Chapter 10:28] which requires that before such drastic action as labelling the applicant a bogus agent is taken, natural justice be adhered to including by a simple enquiry into the applicant's activities.
4. The listing of applicant's name in the Notice is false and perser defamatory of the applicant in that it is intended to mean that;
 - 4.1. The applicant is not the owner of the properties that it is developing and selling.
 - 4.2. The applicant is not entitled to develop and sell its own immovable property.
 - 4.3. The applicant is defrauding its buyers and the general public.
 - 4.4. The applicant is an unethical, corrupt, fraudulent and unprofessional land developer, a "land baron".
5. The applicant denies that it is;
 1. A bogus land developer or land baron
 2. It is required to be registered as an Estate Agent to market and sell its own properties, or
 3. It is practicing as an estate agent in respect of anyone else's property.

Aggrieved by the first respondent's conduct as outlined above, the applicant has filed this application urging this court to grant the order referred to *supra*. Applicant believes that it is entitled to such an order.

The application was opposed by the first respondent. The following are the issues for determination;

1. Whether the application for a declaratory order is properly before the court;
2. Whether the applicant was supposed to bring this defamation claim through summons since material disputes of fact exist?

3. Whether the applicant was supposed to approach the court through the Administrative Justice Act [*Chapter 10:28*] in light of its averments.
4. Whether the applicant had a right to be heard/consulted before the publication was made?
5. Whether the first respondent acted in the public interest to protect the profession?
6. Whether the applicant satisfies the requirements of a final interdict?

The first respondent raised the following points in limine;

- (a) the application for a declaratory order is not properly before the court.
- (b) whether the applicant was supposed to bring this defamation claim through summons since material disputes of fact exists?
- (c) the applicant should have approached the court through the Administrative Justice Act.

Of these, the one on material disputes of fact is worth considering.

The Law

The learned authors Herbstein and van WINSEN in their book, *THE CIVIL PRACTICE OF THE SUPERIOR COURTS in SOUTH AFRICA*, 3rd ed on p 61 states that it is trite that the court can only entertain proceedings on motion where there is no genuine dispute of fact. The question of whether there is real and genuine dispute of fact is for the court to decide. As aptly defined by MAKARAU J (as she then was) in *SUPA PLANT INVESTMENT (Pvt) Ltd v EDGAR CHIDAVAENZI* HH 92/09;

“A material dispute of fact arises when such material facts put 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.”

See also *MHAMBI vs DUBE & ANOR* HB 145/2000 *MASUKUSA v NATIONAL FOODS LTD & ANOR*, 19839 ZLR 232 (H) at 23B C – D.

The crucial question is, therefore whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute arises, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of *viva voce* evidence. *ROOM HIRE CO (Pty) Ltd v JEPE STREET MANSIONS (Pty) Ltd* 1949 (3) SA 11557_ _ _ _

In *casu*, it is clear in my view that there are material disputes of facts. The findings made by the first respondent that the applicant is practicing as an unregistered estate agent, are based on Annexure “BB” of its opposing affidavit which *prima facie* shows that the applicant is advertising as a registered real estate agent.

On the other hand, the applicant in paragraph 15 of its FOUNDING AFFIDAVIT refutes the allegation that it is practicing as an estate agent and emphasizes this position in Annexure M of its Founding Affidavit. It should be noted that applicant blames Property Book for what eventually led first respondent to believe that applicant was advertising as an estate agent. The applicant in paragraphs 7 – 3 to 7.9 of its Answering Affidavit gives a long explanation and account of events on what transpired between it and Property Book. The applicant blames errors by Property Book that led to the applicant being advertised as a real estate agent. It is this categorization that led to the first respondent’s notice. Property Book not being a party to these proceedings has not answered these allegations.

Clearly, the parties have two contrasting positions that are material and significant. Contrasting affidavits cannot assist the court to resolve such a dispute. The court cannot take a robust approach and resolve the dispute on the papers. There is need for the applicant to lead *viva voce* evidence through its witnesses to prove that it is not an estate agent or that it is simply a land developer. Respondent should have an opportunity to rebut this evidence and also lead its own evidence. The absence of evidence from Property Book hampers this court’s ability to come to a conclusion based on the facts and evidence.

The applicant submitted that there are no disputes of facts and that it is a red herring. I disagree for the simple reason that in paragraph 2 of the Draft Order, applicant urges the court to find that the allegations by the first respondent are false and defamatory. The court is being asked to decide whether the applicant is an Estate Agent or Property Developer? Also the court is being asked to decide whether applicant was defamed or not. The parties have presented two contradictory versions. It is this dispute that cannot be resolved on the papers.

In my view, it cannot be said that this is a matter in which it can be said the applicant was aware of the material disputes of facts at the time it filed this application. For that reason, it is ordered that;

1. The applicant be and is hereby directed to proceed by way of action procedure.

2. The Founding Affidavit shall stand as the summons.
3. The Notice of Opposition shall stand as the plea.

4. Thereafter the trial shall proceed in terms of the rules of this court.

TAKUVA J:

Kantor & Immerman Legal Practitioners, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners