ZUVA PETROLEUM TWO (PRIVATE) LIMITED
FORMERLY BP & SHELL MARKETING SERVICES (PVT) LTD
versus
SUMMERCANDE TRADING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 & 11 October 2017

Opposed Application

E Jera, for the applicant
RS Fashi, for the respondent

TSANGA J: The head case of *Rogers* v *Rogers* 2008 (1) ZLR 330 (S) lays out when the court will exercise its power in terms of r 79 (2) of the High Court Rules, 1971 to stop an action which is frivolous and vexatious. The remedy will be granted sparingly as it is an extraordinary one whose effect is to interfere with the right of access to court.

As to the determinants of when a matter is frivolous or vexatious that case sets out as follows:

> "The word "frivolous" in its natural and ordinary meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in the legal sense "frivolous or vexatious "when it is obviously unsustainable, manifestly groundless and utterly hopeless and without foundation. A plaintiff who commences an action in a court of law when he has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and unsustainable."

This is an application brought in terms of r 75 of the High Court rules to dismiss a matter, namely HC 5306/09 on the grounds that it is frivolous and vexatious. The respondent is opposed to the application. On 6 December 2004 during the now defunct Zimbabwean dollar era, the applicant ordered a densitometer from the respondent which was to be delivered within 2 or 3 weeks. Payment was upon delivery. It was to cost the sum of Z$170 000 000.00 although the quote was subject to change as the price was only valid for 24 hours.

It is common cause that the machine was not delivered until more than a year later on the 1st of January 2006. The applicant had in the meantime sought to cancel the purchase in late 2005 prior to its arrival but the machine according to the respondent was already on its way. The machine was delivered to the applicant's lawyers and at the time payment of Z$ 6 074 453 003.84 was sought. There was a dispute over the price and the densitometer remained uncollected by the respondent. Following unsuccessful discussions between the parties as to how much was to be paid, in 2009 the respondent issued summons which were only served in 2011. It sought the payment of R140 000.00 as the payment price due for the supply of the densitometer and also the sum of US$600 000.00 being income lost as a result of the purported breach of the agreement.

It is also common cause that the matter has not been prosecuted to its conclusion leading to the issuance of this application by the applicant in June 2017. The respondent says it was of the view that its erstwhile lawyers were on top of the matter only to learn that they had not been doing anything to advance the case. There has been delay in prosecuting the claim but it is important to bear in mind that the basis of this application is that the matter is frivolous and vexatious. It is therefore this aspect that I will canvass.

The applicant's main thrust in seeking dismissal is that there was never any agreement between the parties that was in rands and that as such the claim in the summons lacks a cause of action. It says the agreement was in Zimbabwean dollars and that at the time any agreement in rands would have been illegal. It is trite that at the time the summons were issued the Zimbabwean dollar was no longer in use. In the case of *Stuart* v *National Railways Of Zimbabwe* HB 7-14 the court allowed summons to be amended to reflect the US$ currency that was now in use. There was deemed to be no prejudice in having the amount stated in the operative currency which was now US$. As NDOU J put it:

> "In February, 2009, it is common cause that the Zimbabwe dollar ceased to be used in trade. The Government introduced a system of multi-currency. The court can safely take judicial notice of this fact…The bottom line is that no one, including the respondent, is currently using the Zimbabwe dollar as means of trade".

And further:

> "I do not see any prejudice to the respondent that cannot be cured by affording it the opportunity to challenge the evidence adduced by the applicant on the rating of the Zimbabwe dollar vis-à-vis the United States dollar".

Similarly in this instance I do not a see any prejudice that arises from the amount claimed having been put in rands. After all it is trite that the machine itself was ordered from outside the country and it will be part of the evidence to show how much was paid for it at the time. The matter cannot be said to be one which should never have been brought simply because the summons issued in the current context of a multi-currency regime, put the amount claimed in *rands*. There is nothing frivolous about that. If the amount is inflated that can always be challenged in evidence.

As for the claim for $600 000.00 the respondent readily acknowledges the extorbitancy of the claim and the applicant did request further particulars and was told that these were matters of evidence. Suffice it to state that the onus will be on the respondent to prove its claim. In the case of *Zimbabwe Online (Pvt) Ltd* v *Telecontract (Pvt) Ltd* HH 206-12 it was stated that only those particulars which are strictly necessary ought to be supplied and not those where disclosure of evidence is sought. Since the onus is on the claimant, if the claim for damages is not proven then it will be dismissed.

I therefore do not think that this matter satisfies the requirements for dismissal on the grounds that it is a matter which should never have been brought or that it has been brought on insufficient grounds to serve solely as an annoyance to the defendant.

Accordingly the application for dismissal made in terms of r 75 is dismissed with costs.

Moyo & Jera Legal practitioners: applicant's legal practitioners
Nenjy Nyamapfene Legal Practice, respondent's legal practitioners