

CAPEVALLEY PROPERTIES (PVT) LTD
versus
ESTATE AGENTS COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 1 July 2024 & 26 February 2025

Court Application For Review

Mr T.K Hove, for the applicant
Mr S. Hoko, for the respondents

TAKUVA J:

This is an application for review and setting aside of the respondent's decision to publish applicant's name as a bogus agent. The application is made in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] and s 28 of the High Court Act [*Chapter 7:08*]. It is based on the following grounds;

- (a) Respondent did not comply with the principles of natural justice and failed to act in a fair manner by denying applicant right of audience before making a decision to publish applicant's name as a bogus estate agent.
- (b) In its failure to uphold the principles of natural justice respondent committed gross irregularity in its decision.

BACKGROUND FACTS

On 6 July 2023, respondent published on its Facebook account and Twitter handle an article titled "ESTATE AGENTS COUNCIL OF ZIMBABWE (EACZ): BOGUS AGENTS PUBLIC NOTICE ALERT". In the article, applicant was mentioned in the list sub headed "Unregistered Firms and Individuals illegally practicing as estate agents."

Respondent tagged the following media houses in its Twitter post who later republished the article in the Herald, Newsday, Daily News; ZBC Online, 263 Chat, New Zimbabwe &

Chronicle. Applicant unsuccessfully tried to stop respondent from further publishing the article. Respondent did not relent until this application.

APPLICANT'S CASE

It is contented that respondent committed a gross irregularity in its failure to afford applicant the right to make representations on the allegations before publication. To date applicant is not aware of the facts that gave rise to the respondent's belief and conviction that applicant is a bogus estate agent. Further, respondent's failure to seek clarity and representations from applicant is an affront to principles of natural justice and therefore prejudicial to applicant.

Applicant also submitted that respondent's conduct injures the applicant's reputation which is a genuine business concern and has the effect of causing the applicant irreparable financial and reputational risk and this could have been avoided by allowing applicant to make representations before respondent made such an injurious decision.

Applicant's relief for review is in the following terms;

- "1. The application for review be and is hereby granted.
2. The decision of the respondent to publish applicant as a bogus estate agent be and is hereby set aside.
3. Respondent be and is hereby directed to issue a public statement retracting its publication with applicant as a bogus estate agent on its official Facebook, Twitter accounts and website."

RESPONDENT'S CASE

1. The applicant is a delictual claim for defamation disguised as an application for administrative review of the conduct of the respondent.
2. The application is procedurally defective and lacking in merit in that the applicant is unlawfully practicing as an estate agent.
3. The application must be dismissed with costs.

ISSUES

1. Whether the applicant has a legitimate expectation to be consulted before publication of the notice?
2. Whether there is any gross irregularity in the conduct of the respondent?
3. Whether the applicant was entitled to receive the reasons for the publication when it did not request for them?

4. Whether the publication was necessary and was in the interests of justice for the respondent to issue?

ANALYSIS

Respondent argued *in limine* that there is a material dispute of fact in that applicant is of the view that it is a property developer and is not selling residential stands as an estate agent, while the respondent is of the conviction that the applicant is actually practicing as an estate agent who is not registered. In this case, the applicant is of the view that by virtue of the fact that it is not an estate agent, it does not need to be registered with the respondent while the respondent is of the view that it did not defame the applicant at all because it made factual findings that the applicant is practicing as an estate agent when it is not a registered one.

In my view such disputes cannot be resolved on the papers through two contradicting affidavits. There is need for the applicant to call witnesses who will lead evidence to show that the services it provides are in relation to property development only and not to the buying and selling of residential stands. There is need for the leading of evidence to show the scope and extent of applicant's dealings. Respondent attached Annexures "BB" to "MM" which show that *prima facie* the applicant is practicing as an unregistered estate agent. However this evidence falls far short of proving a case on a balance of probabilities.

It is undesirable to deal with an application which has clear disputes of fact. The proper thing to do is to enroll it as an action. See *WILDSEARCH SAFARIS & TOURS v REQUIT (PVT) LTD* HH 375/23, *MHAMBI v DUBE & ANOR* HB 145/2000.

In *casu*, there are material disputes of fact on whether the applicant was defamed or not. Put differently if applicant is actually a property developer, then the applicant has a right to claim that it has been defamed. While on the other hand if the respondent establishes from the facts that the applicant was practicing as an estate agent, then clearly there is no defamation. Such a finding cannot be made on the papers without the benefit of *viva voce* evidence. See *Moyo vs Muleya & Ors* 2001 (1) ZLR 257 (H) where CHINHENGU J held that;

“___ before a final interdict could be granted, the applicant had to establish a clear right. While it was possible to grant an interdict to prevent the publication of defamatory matter, the court had to be satisfied that the matter was defamatory, that no defence could be successfully set up.”

The respondent maintains that what it published was the truth for the benefit of the public. In my view, if the applicant wants this corrected, it must issue Summons. As I indicated before, there are material disputes of fact in this matter. The point *in limine* has merit. It is accordingly upheld. This finding makes it unnecessary to consider the rest of the points *in limine*. However, there is one other issue that must be resolved, namely whether or not applicant knew or ought to have known that there are such disputes of fact.

I take the view that from the totality of the facts including the manner in which the applicant's cause of action has been portrayed, it cannot be said the applicant knew or ought to have known that there exists disputes of fact.

In the circumstances it is ordered that;

1. The matter be and is hereby referred to action procedure.
2. The application shall stand as the summons.
3. The notice of opposition shall stand as a plea.
4. Thereafter the trial shall follow the procedure for a civil trial in terms of this court's rules.

TAKUVA J:

T.K Hove & Partners, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondent's legal practitioners