HB 313-18
HC 1398/18
XREF HC 874/14
XREF HC 2565/17

GONDWANALAND (PRIVATE) LIMITED
versus
HOPETECH ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 OCTOBER 2018 AND 6 DECEMBER 2018

Opposed Matter

S Hashiti with *Mangena* for the applicant
D Sanhanga for the respondent

MOYO J: This is an application wherein the applicant seeks the following relief:

"Pursuant to and supplementary to this court's order granted on 22 October 2015, by consent under HC 2131/15 (consent order), be and it is hereby ordered that:

1) The parties are directed to, and shall effect and complete the process of discovery and inspection of all documents relating to the stated question as set out in order 3 of the consent order, in terms of the provisions of order 24 of the rules, within 14 days of this order.
2) Thereafter, the parties shall file their respective pre-trial conference memoranda within 7 days of completing the process of discovery.
3) Thereafter any of the parties may set the matter down for a pre-trial conference for the purpose of adopting the issues for trial and all the ancillary matters thereto.

4) For purposes of trial the pleadings shall be those set out in order 4(d) of the consent order, and the statement of agreed and disputed facts which is filed of record in case number HC 874/14.

5) For the avoidance of doubt, in the event that there is any conflict between the terms of this order and the consent order, the terms of this order shall prevail.

6) There be no order as to costs.

The background to this matter is that the two litigants herein have been embroiled in a lengthy dispute that has resulted in numerous litigation being filed by both parties. There has been a series of applications and counter-applications by both parties, resulting in the parties charting the way forward through a consolidation of the numerous applications and an agreement that such matters proceed to trial in a consolidated form.

Pursuant to the decision by both parties to consolidate their numerous cases, counsel representing both camps then sat down and mapped the way forward. Such a way forward was then reduced into a consent order by this court, with the participation of both parties in the formulation of the consent order. The consent order relates to six companies. This is in terms of clause 1 of the consent order.

In terms of clause 3 of the consent order, the question to be decided by the court as per agreement by both parties is "who between the plaintiff and the first defendant is the owner of the shareholding and interest in the companys referenced in the consent order. The matters were all consolidated under HC 874/14 and the citation is given in the consent order. Clause 4 of the consent order prescribes the cause of action between the parties.

The pleadings in HC 700/15, HC 807/15, HC 1082/15, HC 1091/15, HC 2131/15, and HC (H) 5769/15 are by virtue of the consent order to be incorporated into the bundle of documents to be submitted by the parties.

Within 14 days of the determination of the agreed facts and the disputed facts, the parties are to file a summary of evidence to be led in court.

Thereafter the parties would apply for trial dates. The consent order was drafted by the lawyers representing both parties both lawyers being seasoned advocates of considerable experience.

Applicant's case is essentially that the order granted by consent is erroneous in that it did not provide for the discovery of documents. The applicant seeks to have certain documents availed to it. In essence, the applicant seeks a variation to the consent order in the following respects

1) Firstly to introduce the aspect of discovery.
2) Secondly to introduce a pre-trial conference.

This is a material departure from the consent order that was sought by the parties in my view.

I accordingly make the following observations:

(1) Of importance is the fact that these matters all started as applications, before their consolidation into a suit. In other words in a notice of motion parties would have filed all the necessary pieces of evidence they intend to use to support their cases. One then wonders, how the documents the applicant now seeks would have been roped in the form the matters had been initiated.

Again, the lawyers, if there was need for additional documents would certainly have made provisions for such. They however did not, because with all that was before them, the matters could be consolidated and be taken to finality in my view.

(2) In my view, even if this court were to vary a consent order, which is in itself a contract between the parties, it is the parties themselves that must first agree on what they want to do, before the court imposed on them what should be done. The parties agreed to depart from the application procedure, they also agreed on how this would be done, they also agreed on how the matters would be finalized. I do not hold the view that this court can take over an agreement and impose its own terms and conditions on it especially where there is seemingly no breach of rules or impropriety. The matters having started off as applications certainly have evidential documents attached to the pleadings therein which I

believe is precisely the reason why the lawyers did not worry about the discovery of documents in the consent order. It is clear in terms of clause (f) of the consent order that the lawyers also deliberately left out the pre-trial conference stage. This could not have been an error as applicant's counsel would like us to believe, because the order is very detailed on what should happen. An order which does not seek to depart from the rules of procedure would have simply consolidated the applications and referred them to the action route. The rules of procedure would then kick in as per the norm. In this instance, however, the architects of the consent order decided to provide for the entire route to trial and this could not have been an oversight.

A reading of the consent order shows a deliberate plan to chart a special route to trial, perhaps because of the background of the matters which had commenced as applications.

Applicant's counsel submits that respondent's counsel was amenable to discovery as envisaged by the conduct of the parties, but that is not what the consent order provides for, the parties could, by consent vary the consent order, yes, that is allowed, but where there is no consent like in this instance, this court cannot vary the agreement for the parties worse still that the agreement has now been converted into a court order which is binding and should be complied with for as long as it is extant.

3) This application is unprecedented. While it seeks a variation of a court order, it is not clear as to how it is being brought. Is it under rule 449, no, Is it under the common law? We are not told.

The founding affidavit is silent on the platform the applicant uses on to bring such an application. In other words it is not clear what aspect of our procedural law, was used as a vehicle to bring such an application.

4) It also is not clear from applicant's own papers what the documents needed are for. We are not told in specific terms what these documents are and what purpose they serve in this whole matrix. We are not shown what prejudice the applicant will suffer in the absence of the documents in question. This is particularly important considering that the

matters started off as applications so there are documents already filed with the papers before the court. In other words the documents that are material to the disputes between the parties should form part of the pleadings already as the matters started as notices of motion.

I accordingly hold the view that from the papers before me, no case has been made at all for the relief as sought.

It is for these reasons that the application is dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners
Chitewe Law Practice, respondent's legal practitioners