COSIA ENTERPRISES (PRIVATE) LIMITED
versus
YIPSONG PLANT AND EQUIPMENT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 15 & 20 June 2022

COURT APPLICATION

K Moyo, for the applicant
T J Muhonde, for the respondent

MANZUNZU J

INTRODUCTION

This court application, as is now almost always the case in court applications, is characterised with preliminary points. For convenience I allowed the preliminary points to be argued together with the merits. The case is premised on a simple contract of sale.

The relief sought by the applicant is couched in the following terms;

> "IT IS ORDERED THAT: -
> 1. The cancellation of the agreement entered into by the parties on the 23rd of September 2018 be and is hereby confirmed.
> 2. Respondent returns one (1) Sany 210C excavator and one (1) Sany 205C excavator to the applicant in the condition they were at the time of the conclusion of the agreement within seven (7) days of the granting of this order.
> 3. If respondent fails to comply with the order in paragraph 2 above, the respondent shall pay to applicant the sum equivalent to the value of the two excavators in paragraph 2 above.
> 4. Respondent pays costs of suit at a higher scale."

The application is opposed by the respondent on the grounds which I shall deal with later in this judgment.

BACKGROUND

On 23 September 2018 there was a written agreement of sale of two excavators between Cosia Enterprises as the seller and Yipsong Machinery (Private) Co, Ltd as the buyer. The

purchase price was agreed to at USD75 000. It was further agreed the purchase price will be paid in monthly instalments with the last payment on 30 January 2019.

It is applicant's case that the agreement was between the applicant and the respondent, Yipsong Plant and Equipment (Private) Limited without explaining the difference in names of the respondent and the party to the agreement of sale. The agreement of sale relied upon by the applicant, which is annexure B to the founding affidavit shows that the buyer is Yipsong Machinery (Private) Co, Ltd.

The applicant said the respondent paid only USD53 500 of the purchase price. On 11 November 2021 the applicant gave notice of termination of the agreement alleging a material breach of the agreement and demanded the return of the excavators and offered to restitute the USD53 500. The respondent replied to applicant's letter and denied any material breach of the agreement and tendered payment of ZW$6 090. To that end the respondent alleged there was no basis to cancel the agreement by the applicant.

The respondent raised four preliminary points which I will deal with hereunder.

NO CAUSE OF ACTION AGAINST THE RESPONDENT.

The respondent said the applicant sued the wrong respondent simply because it was not a party to the agreement. As a result the application is said to be fatally defective and as such invalid. The respondent urged the court to dismiss the application with costs on a higher scale. In the answering affidavit the applicant said that the citation of the respondent was ratified by the respondent in the previous applications HC 1510/21 and HC 3655/21 both of which were withdrawn by the applicant. The applicant goes further to explain the history of each of the withdrawn applications. It must be noted that copies of HC 1510/21 and HC 3655/21are attachments to the notice of opposition and are not part of the applicant's founding affidavit. The applicant makes no mention of the two cases except in the answering affidavit.

A look at the agreement will show that the purchaser was Yipsong Machinery (Private) Co, Ltd.

Mr *Muhonde* for the respondent submitted that it was apparent from the agreement of sale that the respondent did not enter into an agreement with the applicant neither has applicant explained in the founding affidavit the variance in names. He further argued that the purchaser and the respondent are two different entities. In the absence of an explanation the application must be treated as having cited a wrong respondent which is fatal to the application, he further

argued. On the basis of this, the applicant in one breathe says the application must be dismissed but in another breathe says the matter must be struck off the roll.

In the event the matter is dismissed or struck off, the respondent asked for costs on a higher scale given the history of the case in that this is the third application brought by the applicant on the same cause of action.

The applicant's argument is that the respondent ratified the agreement in the proceedings of the withdrawn applications. This is said to be so because the respondent did not deny liability but only challenged the balance of payment and the currency in which it was to be paid. Ms *Moyo* for the applicant heavily relied upon a letter by the respondent in response to the notice of termination of the agreement. She drew the attention of the court to specific paragraphs of the letter to demonstrate the point that the respondent ratified the agreement.

That may be so but the question is, has the applicant made a case in the founding affidavit. It is a trite position of the law that an application stands or falls on its founding affidavit. See *Herbstein & van Winsen the Civil Practice of the Superior Courts in South Africa 3rd ed page* 80 where the authors stated that:

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out." (emphasis is mine).

In terms of r 59(1) of the High Court Rules, 2021 it is stated that every application shall be supported by an affidavit setting out the facts upon which the applicant relies for relief. Surely one of the facts relied upon by the applicant is that it is suing the correct respondent. Where it is apparent, like in the present case, there was a duty upon the applicant, through the founding affidavit, to explain why the respondent is the correct party to be sued despite the absence of its name in the agreement of sale. The applicant took a lackadaisical approach in drafting the pleadings. This reminds me of the remarks by MAKARAU J, as she then was, in *Chifamba* v *Mutasa & Ors HH 16/08* that,

> "… Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such."

There is merit in the preliminary point raised by the respondent. The point *in limine* also disposes of the matter. This means there is no need to proceed with the other points *in limine* or the merits.

The applicant's behaviour which borders on abuse of court process calls for costs on a higher scale. I say so because in HC 1510/21 the applicant faced with a notice of opposition decided to withdraw the application and tendered costs. Similarly in HC 3655/21 faced with opposition, the applicant withdrew and tendered costs. Costs in both applications were taxed but the applicant did not immediately pay. Instead the present application was lodged. One of the fronts against which this application was opposed was that the application should not proceed until costs in the withdrawn applications is paid. At the hearing on 15 June 2022 Ms *Moyo* tendered over the bar what she termed proof of payment of the costs. Punitive costs are called for.

DISPOSITION

1. The application be and is hereby dismissed with costs on a legal practitioner and client scale.

Muza and Nyapadi, Applicant's legal practitioners
Muhonde attorneys, respondent's legal practitioners