KUMBIRAI RUGUVA

VERSUS

STAR LOTTO ZIMBABWE (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO31 JANUARY AND 20 FEBRUARY 2014

G. Sengweni for the applicant
O.T. Gasva for the respondent

Opposed matter

MOYO J: This is an application for an order compelling payment of the sum of $306 000-00 by Respondent to the Applicant together with costs of suit.

The facts of the matter are that the Applicant was the winner of the Star Lotto Jackpot prize of $306000-00 on the 14th of August 2013. Applicant alleges that after winning the Lotto and complying with Respondent's terms and conditions, Respondent then insisted that Applicant comes up with a "suitable" investment plan prior to it (Respondent) meeting its obligations in paying the prize.

Apparently Applicant did try to lay out an investment plan which investment plan was rejected by Respondent. Respondent's Counsel concedes that the investment plan is not part of the terms and conditions of the Lotto.

Respondent on the other hand contends that Applicant did not comply with the terms and conditions of the Lotto hence he is not entitled to the payment of the prize.

Respondent raised a point *in limine* to the effect that, Respondent company is "Star Lotto Zimbabwe Pvt Ltd" and not "Star Lotto Pvt Ltd" as originally cited by the Applicant in this application. Respondent contends that there is no Respondent before this court hence the application should be dismissed. Applicant after learning of the misdescription of the Respondent, filed an amendment prior to the hearing of this matter.

Of concern however, in this regard is that the Respondent in its agreement with the Applicant dated 21 August 2013, and Annexed as "B" to the Applicant's papers, referred to itself

as Star Lotto Pvt Ltd. On the page where a Michael Horwitz signed on behalf of the Respondent, the Respondent's name is also given as Star Lotto Pvt Ltd just above Michael's signature. The Respondent entered into an agreement for non-disclosure with Applicant, pursuant to the winning of the prize by Applicant and presented themselves in that agreement, as Star Lotto Pvt Ltd. Following non-payment and numerous efforts to pursue the payment, Applicant then sought to compel payment from Respondent through this application and he cited the Respondent in the same manner that Respondent had called themselves in the non disclosure agreement. Can Respondent then turn around and say that in fact they are not Star Lotto Pvt Ltd in these proceedings when they themselves had conducted business in that name?

I am persuaded by GOWORA J's findings in *Old Mutual Asset Management Pvt Ltd v F & R Travel Tours and Car sales* in HH 53/07 wherein she stated thus:-

> "It is trite that an amendment even where it is intended to substitute a party, will be granted unless the application to amend is *mala fide* or would cause prejudice to the other side which can not be cured by costs."

I am further persuaded by the South African case of *Four Tower Investments Pty Ltd v Andre's Motors* 2005 (3) SA 39 (NPD). In that case a full bench on appeal held that:

> "an application for amendment will always be allowed unless it is *mala fide* or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement."

South African cases on this point stipulate that where the misdescription of a party consists of using the wrong name for the party concerned, an amendment is permissible since this is not tantamount to a substitution of that party and in effect the right party is brought to court but such a party is not properly described or named in the proceedings. Refer to the case of *Four Tower Investments supra* and in addition the case of *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 at page 369F –I per INNES J wherein the learned judge stated as follows:-

> "The general rule is that an amendment of a notice of motion as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is *mala fide* or unless the amendment would cause prejudice to the other side which cannot be compensated by an order for costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion which it is sought to amend was filed ---. A material amendment such as the alteration or correction of the name of the Applicant, or the substitution of a new Applicant, should in my view usually be granted subject to the considerations mentioned

> of prejudice to the Respondent. ---. The risk of prejudice will usually be less in the case where the correct Applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different Applicant. The criterion in both cases, however is prejudice which can not be remedied by an order as to costs and there is no difference in principle between the two parties."

In the case before me, clearly the right party was brought to court with a wrong description by the omission of "Zimbabwe" in its name. In fact the Respondent itself entered into an agreement prior to the institution of this application and omitted the word "Zimbabwe" from its own name. I am of the view that Applicant's bid to amend its papers and correctly describe Respondent is not *mala fide* at all as in fact the Respondent contributed to the situation that Applicant now finds himself in. Again, there cannot be any prejudice at all since the correct party has been brought to court. On the basis of the cases I have alluded to I am not of the view that the proceedings before me are a nullity for want of Respondent's proper description.

I accordingly allow the amendment for the aforegoing reasons.

On the merits of the matter, the Respondent contends that the Applicant did not comply with all the formalities of filling in the forms for claiming the prize money. Applicant contends that he was assisted by an employee of the Respondent and that he duly completed the forms where he was asked to complete and simply left out that information that he was advised to leave out as per Respondent's employee's instructions. Whilst there is a factual dispute here as to what transpired during the filling in of the relevant forms, coming in handy are the exchanges made through emails between the Applicant and Respondent's representatives. These are annexed as Annexure "C" to the Applicant's answering affidavit. The Applicant on the 16th of September 2013 sent an email to one Joseph Savanhu, complaining about the non-payment of the prize.

Joseph Savanhu then forwarded Applicant's email to Miguel Landa, Michael Horwitz, Brian Croock new, Michael Voetsman and copied same to the Applicant.

A Brian Croock then responded to Applicant and copied his response to the other parties as well. His response in the email is as follows:-

> "Whilst we do understand your frustration, there is however a formal process that needs to be followed. As I clearly explained at the dinner there needs to be a comprehensive plan presented to the board on how the funds are to be invested. A proper audit has to be done in order to rule out the possibility of fraud (This has been concluded).
> Unfortunately the board is not comfortable with the proposal made by yourself. I will shortly provide you with a proposal of our requirements and suggestions.

> Please understand that whilst this may be a tedious process, it is in the interest of both yourself and the company to ensure that your winnings are prudently invested."

Nowhere in this email does Respondent's representative allude to the issue of non compliance with terms and conditions by the Applicant. He in fact dwells on the issue of an investment proposal, which Applicant also alleges is the hinderance to the payment of his dues. This email says it all, the reason for non payment is the lack of a prudent investment plan by Applicant in the eyes of the Respondent. Respondent's counsel conceded that the investment plan was in fact not part of the terms and conditions of the Lotto prize. It follows therefore that reference to the filling in of the forms is just a bid by the Respondent to clutch at straws in a bid to avoid paying Applicant his dues.

I accordingly find that Respondent should pay Applicant his dues as there is no basis whatsoever for refusing to do so.

Counsel for the Applicant conceded that the issue of collection commission could not be justified and he abandoned that claim.

I accordingly order as follows:

1) Respondent be and is hereby ordered to pay Applicant the sum of US$306 000-00 being the Star Lotto Jackpot prize of 14 August 2013.
2) Respondent pays the costs of suit.

T. Hara & partners, applicant's legal practitioners
Chirimuuta & associates/c/o Job Sibanda & associates respondent's legal practitioners