VALLECO INVESTMENTS PRIVATE LIMITED
versus
REGGIE FRANCIS SARUCHERA
(In his capacity as the final judicial manager
of IRAMZIM TEXTILES P/L & TRAVAN BLANKENTS P/L)
and
THE MASTER OF THE HIGH COURT
and
AGRICULTURE AND RURAL DEVELOPMENT AUTHORITY
(Cited herein for information purposes only)

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 3 May 2021 and 22 March 2023

Urgent Chamber Application

Adv *T Zhuwarara*, for the applicant
Adv *G Madzoka, for* the first respondent
No appearance for the second and third respondents

CHINAMORA J:

Introduction

The applicant sought a provisional order which I granted as amended on 3 May 2021. Reasons for my order have been requested in writing for the purposes of an appeal, which has since been lodged. The provisional order sought was to effectively grant the applicant unrestricted access to the unoccupied portion of Modzone Farm. Below are the reasons behind my decision.

Background facts

On 7 January 2019, Irazim Textiles (Pvt) Ltd and Travan Blankets (Pvt) Ltd (under final judicial management) represented by the first respondent entered into a lease agreement with the third respondent. That lease agreement was entered into on the basis that the applicant would invest US$ 7 million in the two companies which were under judicial management. Thereafter, the applicant would assume the rights and obligations arising to the lessee in the lease agreement. A material term of the lease was that its tenure would be a period of 10 years subject to renewal. In

addition, the lessee was liable to pay a monthly rental of US$30,000-00 subject to review by the parties once every two years with a maximum percentage review of 10%.

The applicant's case

Pursuant to the lease agreement, the applicant was granted possession of 20% of the leased premises. A small portion of the remaining 80% was leased by the first respondent to third parties, while the greater portion of the 80% remained unoccupied. It is in respect of the unoccupied portion that the applicant sought occupation. It is applicant's case that it has been paying rent and all costs connected with the lease agreement to the third respondent. The applicant submits that the first respondent, despite demand, refused to relinquish and handover the entire factory premises to the applicant. The basis for the first respondent's refusal is that his judicial management fees in the sum of US$170,166-33 in respect of the two companies have not been paid. At this juncture, it is important to note that the issue of unpaid fees is before this court under HC 1249/20.

The applicant argued that it had procured various equipment, machinery and raw materials for the textile factory which was held at Chinese ports incurring huge costs in demurrage, storage and holding over charges. Further, the applicant alleged that it has been unable to ship the equipment to Zimbabwe as a result of shortage of space. In fact, by letter dated 1 April 2021, the applicant had requested access and use of the entire factory space, but the first respondent refused to relinquish the entire factory. Therefore, the applicant contended that it has been denied the factory space which it is entitled to, thereby placing its investment in jeopardy. Additionally, the applicant submitted that it has not been able to install part of the plant and machinery for the blanket making side of the investment, and also failed to install the yarning plant for processing locally procured cotton. Finally, the applicant asserts that it is ready to install a textile manufacturing plant but cannot do so owing to limited factory space. It is for these reasons that the applicant approached this court seeking the relief in the draft order.

The first respondent's case

The first respondent opposed the application. Preliminary points were taken, namely, that the matter is not urgent; leave to sue was not obtained; the court has no jurisdiction; and the relief sought is incompetent and irregular. On the merits, the first respondent denied that the applicant is the beneficial holder of all rights in the lease agreement in question. It is the first respondent's case that the lease agreement was between the two companies and the third respondent. Contrary to the

applicant's contention, the first respondent stated that the scheme of arrangement makes it a party to the lease agreement. In this respect, the first respondent argued that approximately 36800 square metres is part of the Travan Blankets (Pvt) Ltd side of the leased premises. The applicant occupies approximately 83% of the space, while the balance of 6000 square metres is available for occupation. Furthermore, approximately 87979 square metres is part of the Irazim Textiles (Pvt) Ltd side of the leased premises. Of that total, the applicant occupies a total of 29910 square metres and 41964 square metres is available for occupation. The first respondent alleges that all the applicant needs to do is to follow the procedures that have been applied in the previous allocation of space to it. In my view, the applicant is not opposed to the applicant occupying the unoccupied section, however, subject to satisfying the procedure available. Let me examine the points *in limine*.

Preliminary points

Urgency

In *Mushore* v *Mbanga and Ors* HH 381-16 the court held that there are two paramount factors when considering the issue of urgency, that of time and consequences. The court analysed these aspects as follows:

> "By 'time' was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action…By 'consequences' was meant the effect of a failure to act promptly when harm is apprehended. It … also meant … the consequences that would be suffered if a court declined to hear the matter on an urgent basis."

See also *Gwarada* v *Johnson and Ors* 2009 (2) ZLR 159.

In *casu*, the applicant related at length to the consequences it would suffer if the matter was not heard on an urgent basis. In particular, para(s) 101 (a) to (f), applicant makes a case that it has procured various equipment, machinery and raw materials for the textile factory which is held up in storage in Chinese ports and it is incurring heavy costs in demurrage, storage and holding over costs. The applicant has been unable to ship equipment to Zimbabwe as a result of shortage of space and it has been unable to install various plant and processing machinery. All applicant is seeking to do is to resuscitate the industry thereby creating employment and generate the much-needed foreign currency through exports. The first respondent's conduct, in my view, is placing applicant's investment in jeopardy, especially having regard to the vision 2030 which is meant to

attract investment and creation of foreign exchange in order to boost the Zimbabwean economy. This matter, in my view, ought to be treated as urgent.

Leave to sue not obtained

The first respondent argues that this application was instituted without leave of the court in light of the judicial management order in respect of Irazim Textiles (Pvt) Ltd and Travan Blankets (Pvt) Ltd. The said order provides as follows:

> "All actions and applications and the execution of all writs, summons and other process against the 2nd and 3rd respondent shall be stayed and not proceeded with without leave of this court."

When the application *in casu* was filed, the Insolvency Act [*Chapter 6:07*] had introduced the concept of business rescue. The key aim was to do away with judicial management, which was perceived as having failed to achieve the objective of turning around distressed companies. See *Metallon Gold Zimbabwe (Pvt) Ltd and Ors* v *Shatirwa Investments (Pvt) Ltd and Anor* SC 107-21. I observe that, as with judicial management, corporate rescue effectively imposes a general moratorium on commencement or continuation of legal proceedings, and enforcement of actions, against the company or in relation to property owned by the company or lawfully in its possession, in any forum, for the duration of the corporate rescue proceedings. See *Metallion Gold case.*

It is settled law that where a company is under judicial management, all processes which defeat the purpose of judicial management should be avoided. However, as the first respondent has submitted in his opposing affidavit, he is not opposed to the applicant occupying the unoccupied section, but makes it subject to satisfying the procedure available. In light of the qualified concession, in my view, there is no need for leave since the first respondent is prepared to let applicant occupy the disputed section. It is my further view that leave is required where the action or legal proceedings have the effect of diminishing the assets of the company under judicial management. This is not the case in the present matter. The applicant through the scheme of arrangement between it and Irazim and Travan seeks to use the unoccupied space for the benefit of these two companies. In view of this, the preliminary point lacks merit and ought to be dismissed.

The court has no jurisdiction

The first respondent contended that the applicant ought to have invoked the arbitration clause in the lease agreement and referred the matter to arbitration before approaching this court. There is no doubt that this court, more often than not, declines its jurisdiction where an arbitration

clause in an agreement requires the parties to defer to arbitration in the event of a dispute. However, *in casu*, the agreement that is being relied upon by the first respondent is not between the applicant and the two companies under judicial management. The agreement is between the two companies under judicial management and the third respondent. Clearly, the applicant is not a party to the agreement which incorporates the arbitration clause. Furthermore, the dispute is not between the applicant and the third respondent, but is between the applicant and the first respondent. The circumstances giving rise to the present dispute falls outside the purview of the lease agreement relied on by the first respondent. As a result, the preliminary point lacks merit and is dismissed.

The relief sought is incompetent and irregular

The first respondent raised a preliminary point that the relief sought in the interim is final in nature and that the interim relief and the final relief are the same. It is correct that the court should not grant interim relief which is similar to or has the same effect as the final relief prayed for. However, such a defect does not render the application fatally defective, since Rule 60 (9) of the High Court Rules permit a court, after hearing argument, to grant an order as varied or amended. This issue has previously confronted this court and was settled by KWENDA J in *Chiswa* v *Maxess Marketing (Pvt) Ltd & Ors* HH 116-20 in the following words:

> "My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal".

In light of the instructive remarks of my brother judge, the draft order can be amended to make it clear that what is granted is interim protection whilst the final order sought would be subject of argument on the return dated. For this reason, the point *in limine* is dismissed.

On the merits

It is settled law that to succeed in an application for an interim interdict, the applicant must demonstrate a clear right or a *prima facie* right though open to some doubt; irreparable harm; the unavailability of an alternative remedy; and that the balance of convenience favours the granting of the application. See *Setlogelo* v *Setlogelo* 1914 AD 221, which is the *locus classicus*.

Dealing with the first requirement, it must be recalled that the applicant and the first respondent entered into a scheme of arrangement in which the parties undertook to co-operate and work exclusively with each other. The purpose of the scheme being for to carry out necessary and

agreed preparatory work in relation to finalization of the investment transaction. The parties also undertook to co-operate in good faith with each other to conclude the investment transaction which would result in settlement of amounts owed to creditors, one-off payments to employees not required for continuing operations, refurbishment and replacement of plant and equipment, injection of working capital and removing the two companies from judicial management. In addition, the applicant is the sole beneficiary of the lease agreement between Irazim and Travan (under judicial management) and the third respondent. It is against this factual reality that I find that the applicant has established a clear right.

As already indicated above, the applicant will suffer irreparable harm. The applicant in its founding affidavit alleges that it risks losing its property which is currently held in storage, the applicant is losing money through storage costs and other incidental costs. I notice that under the scheme of arrangement, the applicant had undertaken to pay a once of payment to workers who are no longer needed for future operations. Taking into account these factors, I am satisfied that the applicant has demonstrated that irreparable harm would accrue to it if the relief sought is not granted. It is also on this basis that I find that there is no other alternative effective remedy available to the applicant except the granting of the order as sought or as amended.

Taking into account the above, it is my view that the balance of convenience favours the granting of this application. I do not believe that the first respondent would suffer as much prejudice as would be suffered by the applicant if the latter was granted access to the leased premises. In fact, it is relevant to note that the first respondent confirmed that the factory space is presently unoccupied. Similarly noteworthy is that the first respondent has not objected to occupation of the premises by the applicant. Rather, the first respondent's concern is simply that the applicant should follow laid down procedures. In the circumstances, there is no demonstrable harm that first respondent has placed before the court if applicant was allowed access to the premises pending the return date. As I said, the order required amendment to correctly capture the desired relief. It is on that basis that I granted the relief set out below.

Disposition

It is ordered that:

1. The points *in limine* raised by the first respondent are hereby dismissed.
2. In respect of the merits, it is ordered as follows:

Pending the return date and any order granted on that date, the first respondent be and is hereby directed, forthwith, to grant the applicant unimpeded access to the unoccupied portion of Modzone Farm.

3. The applicant's legal practitioners are hereby authorized to serve this order on the respondents.

Mutumbwa, Mugabe & Partners, applicant's legal practitioners
Wintertons, first respondent's legal practitioners