TAMIRA OVERSEAS S.A.
versus
OLIVER MASOMERA N.O.
and
AQUARIUM TRADING (PVT) LTD
(under final judicial management)
and
TALEB MOHAMED
and
SANDRA MAGDALENE VAN ROOYEN
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 6, 7 & 27 June 2018

Urgent Chamber Application

Advocate C Damiso, for the applicant
S. Makonyere, for the 1st and 2nd respondents
A. Muchadehama, for the 3rd and 4th respondents

CHAREWA J: This is an "urgent chamber application for leave to execute pending appeal" in which the applicant seeks to enforce an anti-dissipation order granted in HC 3631/18 pending the determination of the court in HC 595/17 and HC 1868/17 both of which judgments were reserved on 1 February 2018. 1st - 4th respondents opposed the application.

BACKGROUND

In January 2017, the applicant filed an application in HC 595/17 for the removal of 2nd respondent from judicial management and that it be placed under provisional liquidation on the grounds that it cannot trade as a going concern anymore as it had failed to resuscitate its operations under such judicial management. Further, the 2nd respondent was so heavily indebted to the applicant that it was unable to pay its debts and continued to retain losses of over USD1.7 million and was thus insolvent.

Applicant made a further application in March 2017, in HC 1868/17, seeking interdictory relief barring the 1st respondent from further exercising any functions and duties

of the judicial manager of 2nd respondent and for his removal as such judicial manager on the grounds that

1. he was never appointed as a judicial manager of 2nd respondent by the Court in terms of s305 of the Companies Act, but was only appointed as a provisional judicial manager in terms of s302;
2. he never furnished the Master with acceptable security for his appointment;
3. he has failed to exercise his duties as "judicial manager" in terms of s306; and
4. has acted with bias against the applicant.

On 23 April 2018, the applicant filed an urgent chamber application in HC3631/18 seeking to interdict the 1st respondent from continuing to act as 2nd respondent's judicial manager pending the determination of the first two applications: whether 2nd respondent should be removed from judicial management and be placed under liquidation instead; and whether 1st respondent should be removed as the judicial manager of 2nd respondent. The basis of this urgent chamber application was that 1st respondent had taken advantage of the time lag in the determination of HC 595/17 and HC 1868/17 to unlawfully deplete the 2nd respondent's resources to the prejudice of the applicant and further rendering any decision in HC 595/17 and 1868/17 a *brutum fulmen*.

This court found in applicant's favour and made an order in HC 3631/18 granting a temporary interdict to the applicant as prayed for. The respondents noted an appeal against the provisional order, in SC 390/18, whereupon applicant filed this application to enforce the temporary interdict pending the determination of the appeal.

PARTIES' SUBMISSIONS

In limine

1st and 2nd respondents raise three points *in limine*:

1. That applicant's representative, Mrs Joshi, has no authority to represent it as she only has a power of attorney, rather than a board resolution;
2. Further, 2nd respondent being a company in liquidation, applicant has no leave of the court to sue it and its claim as against 2nd respondent should be dismissed;
3. And finally, that the application advances no reasons for the order sought which is therefore uncertain and is capable of diverse interpretations.

In response, the applicant submits that it is common cause that Mrs Joshi has represented applicant in previous cases on the same matter. Further there is no rule that the

representative capacity of a company must always be by a board resolution, as long as it is clear that the company has properly authorised someone to represent it.

Further, no leave is required in a matter such as this, which is merely an interlocutory matter to cases already before the court. Besides there is no requirement to seek leave as there are no financial implications to protect as required by the Companies Act.

Finally, applicant submits that the order sought was precise: the execution of the order in HC 3631/18 by freezing any actions of 1st respondent until the decisions of the court in HC 595/17 and 1868/17 are rendered.

Therefore the points *in limine* raised by 1st and 2nd respondent are improperly taken and should be dismissed.

I must state that I am not persuaded by the 1st and 2nd respondents' points *in limine*. Firstly, with regard to Mrs Joshi's authority to represent the applicant, I take judicial notice that she has represented the applicant in all the matters referenced in this case. Further, the reason why courts require to see the authorisation of an individual to represent a company is to ensure that it is the company which is litigating rather than an unauthorised person because a company can only be represented by a person properly authorised.[1] 1st and 2nd respondent did not refer the court to any hard and fast rule or case law that such authorisation must only take the form of a board resolution. In my view, where the board of a company issues a power of attorney to an individual to represent it in any litigation, the effect is the same as a board resolution: such person is authorised to depose to affidavits on behalf of a company.

Neither do I agree with 1st and 2nd respondent that applicant requires leave to sue the 2nd respondent. In the first place, this matter is an off shoot of matters already before the courts and in which 2nd respondent is a party. It makes no sense to require the applicant to obtain leave in the circumstances, particularly, as rightly pointed out by the applicant, there are no adverse financial implications arising out of this suit. Rather, this suit seeks to preserve the assets of 2nd respondent pending determination by the court of matters already before it, an outcome in consonant with the requirements of the Companies Act.

Finally, I see nothing imprecise in the order which the applicant seeks. The applicant is merely saying, "I have approached this court for 2nd respondent to be placed under liquidation to safeguard my interests and for the judicial manager to be removed as I believe his conduct to be inimical to such interests. Pending the decision of the court in this earlier litigation, I have

[1] *Tapson Madzivire & Ors v Misheck Brian Zvarivadza & Others* SC 10/2006

obtained an order barring 1st respondent from depleting the 2nd respondent's assets. Now that an appeal has been noted against the non-dissipation order, I pray that this court orders respondents to maintain the status quo prevailing at the time of the non-dissipation order until the appeal is heard and determined." Nothing could be clearer.

Consequently, the points *in limine* are dismissed in their entirety.

Urgency

The applicant submits that the application meets the requirements of urgency in that: the need to act arose when applicant became aware of the Notice of Appeal on 24 May 2018. Applicant therefore acted with urgency in filing this application on 5 June 2018, in that it acted as soon as it received the notice of appeal, which is when the need to act arose, thus treating the matter as urgent.

Further applicant seeks to avert irreparable harm as 1st respondent will continue to deplete the 2nd respondent's resources pending appeal. Applicant submits that, by noting an appeal, the respondents had engineered a situation to circumvent the provisional interdict and permit the 1st defendant to continue to dissipate the 2nd respondent's assets, thus placing applicant in exactly the same situation it was before the order in HC 3631/18. Further, this conduct of 1st respondent is highly prejudicial to applicant's interests which it sought to protect by applying for liquidation of 2nd respondent and for removal of 1st respondent from continuing to act, in a prodigal manner, as judicial manager.

Applicant further submits that it had no other remedy than to seek enforcement of the non-dissipation order pending the determination of respondent's appeal.

On their part, 1st and 2nd respondents argue that applicant makes no submissions at all on the urgency of this matter in the founding affidavit. Further, the application does not state when the need to act arose. *Ergo*, the matter is not urgent.

3rd and 4th respondents submit that applicants failed to act when the need to do so arose in that 1st and 2nd defendant's notice of appeal was served on applicants on 14 May 2018, but applicant sat on its laurels for 22 days until it eventually filed this application. Further, a period of 12 days elapsed between the time applicant received 3rd and 4th respondent's notice of appeal before the current application was filed. Therefore applicant did not treat this matter as urgent. In any event, the noting of an appeal does not create urgency, and apart from an unfounded fear of prejudice, no adverse consequences of noting the appeal are advanced to allow this matter to jump the queue.

I do not agree with respondents' submissions or their interpretation of the law with regard to urgency. Firstly, urgency is never simply a matter of time lapse. The circumstances of any case will always circumscribe when a particular lapse of time is reasonable or unreasonable so as to nullify any requests for the matter to be allowed to jump the queue and be dealt with as a matter of priority over other matters. In some circumstances, a delay of one day is sufficient to negate urgency, while in others a time lapse of a much longer period will not do the same.

Therefore, while I agree that a litigant must act as soon as the need to do so arises, I do not think that in the circumstances of this case it would not have made sense for applicant to rush to institute this urgent application as soon as 1st and 2nd respondents notice of appeal was filed, only to institute another urgent application upon receipt of 3rd and 4th respondents notice of appeal or seek to make amendments to the first application. It seems to me that it was entirely pragmatic to wait until the positions of all the respondents were clear before filing this application.

Further, I do not consider the delay of 12 calendar days between the filing and serving of 3rd and 4th respondents' notice of appeal and the institution of this application unreasonable. Applicant had to weigh the effect of the notice of appeal and the desirability of seeking to enforce the anti-dissipation order pending appeal, after assessing whether 1st respondent intended to continue dispersing the assets of 2nd respondent pending appeal. After all, if there was no indication that 1st respondent would continue to do what he had been interdicted from doing, there was no need for this application to be made.

While it is true that the noting of an appeal does not *per se* create urgency, the intention behind such a move may do so. It is the incidence of acts, events or circumstances that create a threat to one's interests that create urgency. The applicant's papers clearly show that it believes that respondents only filed the appeal in order to continue dispersing 2nd respondent's assets, thus establishing urgency. Consequently, it is self-evident that that the need to act then arose from the date of service of the notice of appeal.

Further, I note that respondents did not address the issue of irreparable harm to the applicant's interests as grounding urgency, or that applicant had any alternative remedy save to seek the enforcement of the provisional interdict pending appeal.

Finally, I do not agree that no averments of urgency are made in the application. The narrative in the certificate of urgency read together with clauses 21-23 of the founding affidavit allude to the urgency of the matter. That the averments of urgency are not pleaded in a manner

which finds favour with the respondents does not detract from the urgency of the matter: applicant obtained, on an urgent basis, an order barring the dissipation of the assets of 2nd respondent pending determination of matters already before the court. That respondents appealed against that order, making it possible to circumvent its effect obviously gave rise to greater urgency in the current application.

It is trite that all a party is required to show is that, the matter cannot wait when the need to act arises, irreparable harm will ensue if the matter is not dealt with immediately, applicant treated the matter as urgent and there is no suitable alternative remedy[2]. In the circumstances of this case, I find that applicant satisfied these requirements. I therefore conclude that urgency is sufficiently established.

Merits

On the merits, applicant asserts that the respondent's appeal was not *bona fide* but was noted to create an environment to cause it irreparable harm. In any case no leave was sought or obtained to appeal against a provisional interdict which is of an interlocutory nature. Besides, such appeal has no prospects of success as there is no basis for a contrary finding to that made in HC3631/18. In any event, the balance of convenience favours the applicant, which stands to suffer irreparable harm if the non-dissipation order is not enforced, as the 1st respondent will continue to act in a manner prejudicial to applicant's interests in circumstances where the respondents will suffer no prejudice at all from the enforcement of the non-dissipation order. In fact, 2nd respondent stands to benefit therefrom as its assets will be preserved. Therefore real and substantial justice can only be achieved upon the granting of the order sought.

1st and 2nd respondents submit that the application does not specifically address the requirements for an application for leave to execute pending appeal. Further, the order sought is incompetent and imprecise as it does not specify the acts which 1st respondent must refrain from doing in order not to increase 2nd respondent's financial obligations. In addition applicant has not traversed any specific acts of plunder, thus disclosing no cause of action. In any case, 1st respondent has been paying $30 000 a month towards reducing applicant's exposure to 2nd respondent thus making this application unnecessary. Thus it is not true that applicant will suffer any prejudice pending appeal. Therefore applicant really has no cause of action and the application should be dismissed with costs.

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[2] *Oscar Kurasha* v *Tsitsi Chipendo & 6 Ors* HH 538-15 at p 3

Finally, 1st and 2nd respondent submit that they are entitled to note an appeal against a provisional interdict without first seeking leave in terms of s43 of the High Court Act as an interdict is final in nature.

For their part, 3rd and 4th respondents not only associated themselves with 1st and 2nd respondents' submissions, but also went on to argue that a litigant has an absolute right to appeal and is therefore entitled to appeal against an interdict without seeking leave. Further, applicant has not satisfied the requirements to execute pending appeal. Besides the order being appealed against is so vague as to be meaningless, thus pointing to good prospects of success on appeal.

ANALYSIS

Requirements for leave to execute pending appeal

It is trite that in an application for leave to execute pending appeal the court must consider the following:

1. The possibility of irreparable harm to the appellant should leave to execute be granted;
2. The possibility of irreparable harm to the applicant should leave to execute be denied;
3. The balance of hardship or convenience to either party should there be a potential for irreparable harm; and
4. Prospects of success on appeal.[3]

Irreparable harm and balance of hardship/convenience

In the instant case, respondents did not make any submissions at all regarding the harm they might suffer should leave to execute the judgment appealed against be granted. On the other hand, applicant submitted that if 1st respondent was allowed to continue acting as judicial manager pending appeal, it would suffer irreparable loss as dissipation of the assets of 2nd respondent would continue to its detriment. Applicant did not dispute that it is receiving $30 000 per month towards reducing its exposure to 2nd respondent. However, the court notes that simple arithmetic shows that, at this rate, it would take in excess of 9 years for 1st respondent to clear the more than $3,000,000 that 2nd respondent owes to applicant. No averment was made

[3] *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S) @281A-D

that there were any prospects to increase the payments. In the circumstances, applicant's application to suspend judicial management and put 2nd respondent into liquidation does not appear unreasonable. Clearly, the fear of dissipation of assets leading to irreparable harm to applicant is well founded. It seems to me therefore that the balance of convenience favours that there should be a freeze in the judicial management of 2nd respondent pending appeal.

Prospects of success

Applicant submits that the appeal by the respondents has no prospects of success at all, but was filed merely to allow the continued dissipation of 2nd respondent's assets. This is because the order appealed against only allowed a window of opportunity for this court to hand down its decisions regarding the applications for the removal of the judicial manager and for the liquidation of 2nd respondent, without substantially affecting the rights of the parties.

The applicant further submitted that the court did not misdirect itself with respect to the issue of security, or in holding that the matter was urgent and was not *lis pendent* or that the requirements of an interdict had been met.

1st and 2nd respondents made no submissions at all regarding the prospects of success of their appeal, thus supporting the suspicion that the appeal was only filed to allow 1st respondent to continue doing those acts, prejudicial to applicant's interests, which he had been interdicted from doing.

3rd and 4th respondents did not address the prospects of success on the grounds of appeal based on security, urgency, *lis pendens* or that the requirements of an interdict had been met. They were of the view that prospects of success on appeal exist as the order being appealed against was vague and meaningless.

While it is not the duty of this court to decide whether the order appealed against is subject to being overturned or not, it seems to me that that order is sufficiently clear and unambiguous. It merely requires 1st respondent to refrain from conducting the affairs of 2nd respondent in any manner that increases 2nd respondent's financial obligations. Clearly, it would have been unreasonable to expect the order to enumerate and list all such activities as they are not finite. They are dependent on the circumstances of each act that 1st respondent has to carry out as judicial manager. As a result I do not rate respondents prospects of success very highly in trying to impugn the judgment appealed against.

Cause of action

It seems to me that, in arguing that by not disclosing specific acts of plunder there is therefore no cause of action for this application, respondents misconstrued the basis of the

current application. All the applicant is saying, in my view, is: "I obtained an order provisionally barring respondents from dissipating the assets of second responding pending the determination of my applications filed before this court. The act of noting an appeal circumvents that interdict I was granted and permits the respondents to do what I fear will cause me prejudice. Therefore, may the court allow me the protection of that interdict pending the disposal of respondents' appeal".

In the circumstances, I find that the argument that there is no cause of action is improperly taken.

Right to appeal

There is no dispute that a litigant has a right to appeal. That such a right is absolute as stated by respondents is something I do not favour, particularly when it is clear that the law (in this case s 43 of the High Court Act) puts limitations as to the exercise of that right, but that is not an issue *germane* to the resolution of this matter. The issue before me is whether, in the exercise of his right to appeal by an appellant, a respondent does not have a commensurate right to insist on the observance of limitations to that right of appeal as prescribed by law. In this case, the law, as prescribed by s 43(2) of the High Court Act provides that one must seek and obtain the leave of the court to note an appeal against interlocutory orders.

It is trite that ordinarily leave is not required to note an appeal against judgments of a final nature. Further, it is also trite that any interim interdict is interlocutory as it is designed to maintain the status quo. For that very reason, leave to appeal against it is required in terms of s 43(2).[4] However, it is also trite that interlocutory orders which effect is final and definitive are appealable without leave.[5] Therefore the nature of finality or otherwise of an order or judgment remains the central consideration in determining whether the order or judgment is appealable with or without leave.[6]

The question is therefore whether the order granting a provisional interdict in favour of applicant in HC 3631/18 is a final order as envisaged in s 43. I think not. Clearly, this was an order merely intended to temporarily preserve the status quo until the determination of the court in HC 1868/17 and HC 595/17. I am indebted to Mr Muchadehama who drew my attention to

[4] *Ben Jesse v Chioza* 1996 (1) ZLR 116 (SC) @ 120

[5] *Dorbrock Holdings (Pvt) Ltd v Turner & Sons (Pvt) Ltd and Anthony Turner* SC 69/07

[6] *Netone Cellular (Private) Limited and Reward Kangai v Econet Wireless (Private) Limited and Zimbabwe Revenue Authority* SC 36/2017.

the matter of *Mine Mills Trading (Private) Limited +2* v *NJZ Resources (HK) Limited* SC 40/2014, where a similar provisional anti-dissipation order, as in this case had been granted. On appealing without seeking leave, the Supreme Court was of the view that the judgment of the court *a quo* could only be appealed in compliance with s43 of the High Court Act, and as no application for leave had been made in the court *a quo* the appeal was fatally defective.

In the premises, I find that the applicant has properly raised the issue that there is little prospect of success on appeal as the notice of appeal was instituted without the necessary leave of the court *a quo*.

For these reasons, I find that the matter is urgent and applicant is entitled to the protection of the interim interdict in HC 3631/18 pending determination of the appeal in SC 390/18.

Disposition

Consequently, it is ordered that the interim order in HC 3631/18 remains in full force and effect pending the determination of Case Number S.C. 390/18. The respondents, jointly and severally, the one paying and the others to be absolved, shall pay the costs of suit.

GN Mlotshwa and Company, applicant's legal practitioners
Makonyere Legal Practitioners, 1st and 2nd respondent's legal practitioners
Mbidzo Muchadehama and Makoni, 3rd and 4th respondents' legal practitioners