CRAITIN CHEMICALS (PRIVATE) LIMITED
versus
SUSTAINABLE AFFORESTATION ASSOCIATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 31 January and 6 February 2019

Opposed application

K.T. Tsvaira, for the applicant
Ms *S. Chidemo*, for the respondent

MATHONSI J: When a litigant approaches the court on an *ex parte* basis, that is without giving notice to interested parties, that litigant is seeking an indulgence from the court to be granted relied based on trust that what the litigant is telling is the truth. The litigant is asking the court to exercise a discretion to overlook the *audi alteram partem* rule, which is the cornerstone of our adjudicating process, and grant relief which may well affect the legal interests of others without according those others an opportunity to make representations. It is for that reason that our law requires a litigant approaching the court for relief *ex parte* to do so honestly, truthfully and to observe the utmost good faith.

Those lofty ideals can only be met if the litigant, not only sets out facts relevant to its case but all material facts with a bearing on the case. It is a breach of the duty of utmost good faith and a betrayal of the court's trust for the *ex parte* applicant to withhold vital information tending to have a bearing on the decision whether or not to grant the relief sought. In this case the applicant, a company in distress, is guilty of serious violations of the trust that exists between an *ex parte* applicant and the court. It sought and obtained relief by withholding facts which would have impacted on the decision whether or not to grant a provisional judicial management order in terms of s 299 of the Companies Act [*Chapter 24:03*] and up to now it remains completely unapologetic about it.

The background shows that the applicant is simply a bad debtor. On 5 December 2016 the respondent obtained an order from this court in HC 1008/16 against the applicant for payment of the sum of $65 990-00 together which interest and costs of suit on the superior

scale. When execution of that court order was attempted only an insignificant amount was realised from the sale of the applicants property before the Sheriff rendered a *nulla bona* return, that the applicant did not have any other attachable property as could be sold to satisfy the value of the judgment.

In due course, and on 30 April 2018, the respondent filed a court application, in terms of s 207 (1) of the Act, case number HC 3884/18, citing the present applicant as the respondent and seeking an order for its liquidation on the ground that it was unable to pay its debts. The respondent outlined the travails it had gone through trying to recover the value of the judgment granted in its favour and asserted that as the debt remained unpaid and the applicant did not have sufficient property which could be sold to satisfy the judgment, the applicant was unable to pay its debts and should be wound up.

On 14 May 2018 the applicant filed opposition to that application stating in the opposing affidavit deposed to by its director Robert Morley Tindwa, the same person who deposed to the founding affidavit in the present application, that instead of liquidating the company, it should be placed under judicial management. The reason for the applicant's optimism was premised on the same facts set out in the present application namely that the company's business is set for a boost, new experienced management was being brought on board and that the company had received significant orders from potential customers. I must state that the application for liquidation is still pending and is yet to be determined by this court.

Notwithstanding that fact and indeed the nature of the applicant's defence in that application, on 4 June 2018 the applicant filed an *ex parte* application in this court for a provisional judicial management order. In his founding affidavit the ubiquitous Robert Morley Tindwa stated in almost the same language employed in his opposing affidavit in the application for liquidation, that the applicant is currently unable to pay its debts owing to lack of "better management" among other things. He also stated that the company owed the respondent money as a result of which the respondent had obtained judgment and issued a writ. Tindwa however then committed the unforgivable sin of deliberately not disclosing to the court that there was already a pending application for the liquidation of the company which was opposed solely on the basis that instead of liquidating the company the court should place it under judicial management.

It is a material non-disclosure because had the court been aware of that set of facts surely it would not have granted an order for provisional judicial management because a

determination on whether or not to do so was already pending before the same court. In fact there is substance in the submissions made by Ms *Chidemo* for the respondent that even the defence of *lis alibi pendens* is sustainable in that the matter is already pending under a different case number. For one to sustain that defence essentially 4 requirements must be satisfied namely, that:

a) litigation is pending elsewhere;
b) between the same parties;
c) based on the same cause of action; and
d) in respect of the same subject matter.

See *Mundangepfupfu & Anor* v *Chisepo* HH 185-17.

However, I do not intend to resolve this matter on the basis of *lis alibi pendens* even though I underscore the fact that this court has a duty to regulate its own processes and would not allow chaos to creep into the system as a result of recalcitrant litigants like the applicant. This is because there is a bigger fish to fry calling for censure by this court. It is that the court will always discourage *ex parte* applications punctuated by material non-disclosure of facts. I endorse NDOU J's approval in *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at 554 A – C of the following passage in Herbstein van Winsen's book *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 367:

> "Although generally, an applicant is entitled to embody in his affidavits only allegations relevant to the establishment of his right, when he is bringing an *ex parte* application in which relief is claimed against another party he must make full disclosure of all the material facts that might affect the granting or otherwise of an order *ex parte*. The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether willfully and *mala fide* or negligently which might have influenced the decision of the court whether to make an order or not the court has a discretion to set it aside with costs on the ground of non-disclosure."

I reiterate that the courts frown at court orders obtained *ex parte* on the basis of incomplete information and will not hesitate to discharge such orders with attendant punitive costs as a seal of disapproval and in order to discourage litigants from resort to pulling the wool over the court's eye to gain undue advantage.

Mr *Tsvaira* for the applicant submitted that although the applicant was aware that its liquidation was sought and that the matter was pending, it was within its rights to "take the short route" and instead seek provisional judicial management. As to why the fact of the pending liquidation application was not disclosed for the court to make an informed decision

based on complete facts, Mr *Tsvaira* was tongue tied. It is owing to such display of impunity that l said the applicant remains unapologetic and believes it was entitled to side – foot the pending liquidation application by pulling a fast one as they say in colloquial language.

The issue of the applicant's inability to pay its debts was already before the court at the instance of the respondent at the time the applicant ventured to the precincts of this court with an *ex parte* application designed to defeat the pending litigation. As the applicant was aware of that it stole surreptitiously on an *ex parte* basis ignoring the need to give notice to the respondent and snatched a judgment. The applicant cornered the court to make a decision on incomplete facts and in the process breached the trust given to it by the court as it granted it provisional relief. The betrayal of trust is that should exist between an *ex parte* applicant and the court cannot be tolerated because it shows that the litigant is not only dishonest but wants to take advantage of the court.

Now that it has come to the notice of the court that it was hoodwinked into granting a provisional judicial management order based on incomplete facts, what remains is to decide how to react to that. In my view, ill-gotten court orders should be set aside so as to restore the dignity of the court. That conclusion also accords with the overriding principle that this court has a duty to regulate its processes. The question of whether to grant liquidation or judicial management should be determined in the main application which is HC 3584/18 with the applicant's present side-show out of the way.

Having come to that conclusion l find Ms *Chidemo's* challenge relating to the failure to comply with the provisions of s 305 (1) of the Companies Act [*Chapter 24:03*], this being the return day of the provisional judicial management order, unnecessary. It has been overtaken by events.

Accordingly it is ordered that;

1. The application is hereby dismissed.
2. The provisional order for judicial management granted on 13 June 2018 is hereby discharged.
3. The applicant shall bear the costs of the application on a legal practitioner and client scale.

Mundia and Mudhara, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners