Judgment No. HB 154/11
Case No. HC 1475/09
X REF HC 1105/10; 15/10; 944/10

NATIONAL BLANKETS LIMITED

Versus

DAVID WHITEHEAD TEXTILES LIMITED

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 17 SEPTEMBER 2010 & 20 OCTOBER 2011

V Majoko for applicant
C Nhemwa for respondent

Opposed Court Application

KAMOCHA J: The applicant in this matter was seeking an order of this court in the following terms:-

"It is ordered that:-

1) Respondent, at its costs, do (sic) all things and sign all such documents as may be necessary to transfer to applicant a portion of stand 5453A Salisbury Township as approved by the City of Harare under authority of sub-divisional permit N.O. SD 1337/02.
2) Should respondent fail, for whatever reason, to give effect to this order within 7 days from the date of service on it of this order, then the deputy sheriff be and is hereby directed and authorized to sign all such documents as may be necessary to give effect to the transaction.
3) Respondent pay the costs of this application on the scale as between attorney and client save that respondent will be entitled to recover such costs from George Maulidi."

The background information of this matter is that National Blankets Limited and David Whitehead Textiles Limited were at one time subsidiaries of Lonrho Africa which owned 88.06% of the shares in David Whitehead Textiles Limited through a company known as Textile Investments Company. David Whitehead in turn owned 100% of the shares in National Blankets Limited.

According to Jeremy Musgrave, who deposed to an affidavit on behalf of the applicant, in 2001 Lonrho made a decision to disinvest from Zimbabwe and decided to sell its interest in both National Blankets Limited and David Whitehead Textiles Limited.

A National Blankets consortium headed by the deponent was formed which made a bid for national Blankets and had no interest in David Whitehead. However, because Lonrho was in a hurry to finalize its business it was agreed that the national Blanket consortium would make a bid for both National Blankets and David Whitehead. It was further agreed with Lonrho that national Blankets would purchase the entire interest of Lonrho in Textile Investment Company which held 88.06% of the shares in David Whitehead thereby becoming its controlling shareholder.

The management of both National Blankets Limited and David Whitehead Textiles Limited hereinafter referred to as "National Blankets" and "David Whitehead" respectively had formed consortiums to purchase Lonrho's shares in the respective entities. National Blankets formed a company known as Intaglio which was the vehicle through which it put a bid for Lonrho's shares while David Whitehead vehicle through which it put a bid for Lonrho's shares was called Guscole Investments (Pvt) Limited.

It was alleged that after acquiring Lonrho's shares in Textile Investment Company Intaglio entered into negotiations in terms of which Intaglio was to dispose of its interest in Textile Investment Company to Guscole Investments (Pvt) Limited.

At the end of the negotiations Ernst & Young Accountant were engaged to carry out the separation of the two companies. Part of the unbundling involved the transfer to national Blankets of a portion of land in Workington, Harare. The property in question was a portion of stand 5453 A Salisbury Township. It was necessary to apply for sub divisional authority from the City of Harare.

The parties allegedly agreed that the unbundling would proceed and the transfer of the portion of land would be attended to in due course. In August 2002 applications were made to City of Harare and permission to subdivide stand 5453A Salisbury Township was granted. The portion to be transferred to national Blankets was named as stand 19100 Harare Township.

It was alleged that survey diagrams were prepared and approved by the Surveyor General and David Whitehead allegedly instructed legal practitioners Gill, Godlonton & Gerrans to attend to the transfer to national Blankets of stand 19100 Harare Township.

Musgrave contended that the fact that National Blankets continued and continues to occupy the said premises rent-free and has in fact let a portion of the premises while David Whitehead paid all service charges levied by the utility providers for the property pointed to the fact that the transaction was entered into. That was so because the transfer to national Blankets had been delayed due to David Whitehead dire financial status.

In 2006 and before transfer to applicant could be effected David Whitehead was placed under judicial management with Cecil Madondo of Tudor House Consultants (Pvt) Ltd as judicial manager.

In 2007 Triumphant Enterprises (Pvt) Ltd acquired controlling shares in National Blankets which for years through correspondence had sought to be advised of the progress that was being made about transferring stand 19100 to it. It was each time being advised the transfer process was in progress and cited a number of reasons for the delay.

Due to what National Blankets "applicant" believed to be in ordinate delays in transferring the property it then launched this application seeking specific performance by David Whitehead.

The application was vehemently opposed by David Whitehead "respondent" which raised a point *in limine* wherein it alleged that there were glaring irreconcilable disputes of facts in the matter. The defendant contended that the applicant had submitted at least four argumentative affidavits from no less than three deponents in an endeavour to support its application. Surely, there was need for the veracity of such conflicting affidavits to be tested by the court. Moreso, when the applicant was unable to produce documentary evidence to clearly demonstrate the existence of the transaction. The case was loudly calling for *viva voce* evidence from the authors of the conflicting statements to explain the glaring discrepancies under cross examination. The court was denied the opportunity to have the conflicting statements relating to the transaction clarified through *viva voce* evidence from the deponents of the statements.

Further, the deponent of the applicant's founding affidavit averred that the parties held meetings between themselves whereat respondent's representatives denied knowledge of the existence of the said transaction. In particular, George Maulidi professed ignorance of the said transaction. The fact that the applicant was unable to produce a single document where the alleged transaction was recorded exacerbated the confusion in the matter.

In light of the foregoing the respondent concluded that the applicant knew or ought to have known that there were glaring serious disputes of facts but nevertheless instituted this court application and moved that this court should not stand over the matter for trial for oral evidence to be heard but should simply dismiss the application with costs on a punitive scale. This court was referred to the case of *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 234D-E where McNALLY J (as he then was) quoted with approval the South African case of *Tamarillo (Pty) Ltd* v *B N Aitken (Pty) Ltd* 1982 (1) SA 398 at 430G – H where MILLER JA had this to say:

"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application."

Jeremy Musgrave stated in paragraph 36 of the applicant's founding affidavit that:-

"To applicant delegates' utter shock and disbelief, at the meeting George Maulidi the author of the letters I have referred to professed ignorance of the transaction.

Upon being asked to explain why he had written the letters he had in support of the transfer to applicant he claimed to have acted on instructions given by Chinyame and was otherwise unaware of the reason behind the transfer.

This is surprising because in his letter to Miss Coyne dated 22nd October 2003, he said David Whitehead Textiles and national Blankets demerged in October, 2001 and it was resolved that the above property be split … and requested the split be effected "soonest".

It therefore admits of no doubt that Jeremy Musgrave and his delegation knew that the transaction was being hotly disputed and ought to have known that a full trial was the only way applicant could prove its claim.

Yet it was submitted on behalf of the applicant that the following factors taken either singly or cumulative point to the transaction having been entered into:-

i) The affidavits of Jeremy Musgrave;
ii) The supporting affidavit of Vernon Lapham;
iii) The supporting affidavit of Edwin Chimanye;
iv) The supporting statement of Daphne Ritson;
v) The application to the City of Harare by the respondent for a sub divisional permit;
vi) Letter by Maulidi to Gill, Godlonton & Gerrans giving instructions for the transfer to applicant and confirming there was such a resolution;
vii) Letter by E Chivaura confirming the transaction;
viii) Use and occupation of the property rent-free by applicant at all material times;
ix) Failure by respondent to demonstrate by what transaction, if not this transaction of how respondent ceased being a 88.06% subsidiary of the applicant.

The applicant attacked the averments made by Zivaishe Mangena who deposed to the opposing affidavit on behalf of the respondent. The applicant complained that Mangena had very limited knowledge about the transaction due to the fact that he had come onto the scene some 6 years after the transaction had been allegedly entered into. The applicant is correct in that submission.

Mangena, however, made one valid point. He said he had gone through all the company records but was unable to see a company resolution to transfer the said piece of land and there was no record of any consideration having been paid for it. Whatever arrangement applicant had with the former executives of the respondent, was not shown in the company records and was not supported by any resolution and hence illegal.

I pause to observe that the applicant was unable to produce any company resolution. The respondent cited the provisions of section 183 (1) (b) of the Companies Act [Chapter 24:03] which restrict the sale of undertaking by directors which recites thus:-

> "183 (1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in a general meeting –
>
> (a) ...
> (b) To dispose of the undertaking of the company or of the whole or the greater part of the assets of the company."

See also *Mason* vs *Timore Trading Service (Pvt) Ltd and Ors* 2004 (2) ZLR 347 where it was held that, "under section 183 (1) (b) of the Companies Act [Chapter 20:03], the directors of a company are not empowered, without the approval of the company in a general meeting, to dispose of the company's undertakings or of the whole or greater part of the assets of the company.

The applicant still contended that the letter by Maulidi of 22 October 2003 to Gill Godlonton & Gerrans suggested that there was a resolution but failed to produce and file such a resolution. This court finds no proof of any resolution. If it had been there it would have been easily produced. Such resolutions should be reflected in the minutes of the proceedings of the meeting at which the resolution was passed in terms of section 138 of the Companies Act [Chapter 24:03]. The applicant would have produced the minutes of such a meeting and a copy of such resolution. It admits of no doubt that there was no resolution of the board of directors of the respondent at the time of the alleged transaction approving the transaction and authorizing a party to negotiate and sign the required documents. Neither was there a special resolution of the shareholders of the company in terms of section 183 (1) (b) of the Act.

It was argued on behalf of the respondent that the averments of Jeremy Musgrave do not disclose the nature of the alleged transaction. He produced no written proof of the alleged transaction when a transaction of such a magnitude was reasonably expected to have been reduced to writing despite the fact that there is no law which mandates an agreement of sale of property to be reduced to writing.

Edwin Chimanye like Jeremy Musgrave had no written proof of the transaction but wanted the court to rely on the "so many pointers to the transactions."

Vernon Lapham does not seem to assist the applicant as he wrote in his letter dated 3 August 2009 marked to the attention of Jeremy Musgrave "Unfortunately I have not been able to locate detailed information relating to this transaction and hence this letter sets out my recollection and hence may be somewhat vague …"

Daphne Ritson was not of any assistance either as she stated in her e-mail to Jeremy Musgrave of Friday 28 August 2009:-

> "I have been through my file and cannot find any written reference to the agreement to split the property.
>
> I do however, remember hearing that it was part of the deal that you would keep the part of the Southerton property, at that stage occupied by NBL."

While Maulidi purported to instruct the respondent's legal practitioners by letter dated 22 October 2003 to effect the split "soonest" the legal practitioners addressed Mr Majoko by e-mail on 31 March 2009 wherein they said:- "Please also verify with your client what form this transfer will take, that is, if it is a sale, donation or scheme of reconstruction."

Messrs Majoko & Majoko did not respond to the e-mail explaining the form the transfer would take. Their clients seem to have been unable to provide evidence showing what form the transfer would take. No evidence was proffered to show whether it was a sale, donation or scheme of reconstruction. That question remains unanswered as the evidence of Jeremy Musgrave does not disclose the nature of the alleged transaction. When dealing with the letters of E Chivaura and G Maulidi coupled with correspondence from Gill, Godlonton and Gerrans it was submitted on behalf of the respondent that those documents only served to reflect a fraud on the respondent as the documents amounted to an attempt to transfer a property without the authority of the company i.e. no recorded company resolution.

In response to the assertion that the use and occupation of the property rent-free by applicant at all material times pointed to the claim that the transaction had been entered into,

the respondent stated that apart from the fact that the applicant did not have any written proof to support its claim what applicant did was a fraud on the respondent. It was submitted that the fraud became apparent when paragraph 5 (ix) of the applicant's heads of argument is considered. It was alleged that a close reading of that clause revealed that applicant claimed that stand 19100 Harare Township was part of the payment towards the purchase of 88.06% of the shareholding of respondent by Guscole Investments (Pvt) Ltd which amounted to assistance by respondent to Guscole Investments to purchase respondent's shares in contravention of section 73 of the Companies Act [Chapter 24:03]. The respondent concluded that the fact that the alleged transaction was illegal probably explained the reason it was not included in the agreement of sale.

I pause to observe that the evidence placed before the court falls far short of proving the existence of the alleged transaction. This court has found that there was no written company resolution to authorize the alleged transaction. It is also the finding of this court that the applicant was unable to produce any recorded information relating to the alleged transaction. The court was being urged to rely on factors which pointed to the transaction having been entered into. Quite clearly the applicant was ignoring the fact that Vernon Lapham and Daphne Ritson were unable to find any written reference to the agreement to split the property. Abundant confusion surrounds the alleged agreement to split the property.

Finally, the respondent submitted that the transaction would have been, in any event, null and void *ab initio* even if the applicant had proved the existence of the alleged agreement as it would have been in contravention of the provisions of section 39 of the Regional and Town Planning Act [Chapter 29:12] section 39 recites thus:

"39. <u>No subdivision or consolidation without permit</u>

1) Subject to subsection (2) no person shall –
   (a) Subdivide any property; or
   (b) Enter into any agreement –
      i) For the change of ownership of any portion of a property; or
      ii) …
      iii) …
      iv) …
      or
   (c) Consolidate two or more properties into one property;
   except in accordance with a permit granted in terms of section forty."

It is common cause that the alleged agreement to split the said property was allegedly entered into in October 2001. Se G Maulidi's letter dated 22 October 2003 at page 31 of the application and paragraph 36 of Jeremy Musgrave founding affidavit.

The permit to subdivide the property was only granted on 15 August 2002 and is filed of record as annexure "B" at page 29 of the application.

The agreement *in casu* was entered into before a permit was granted in terms of section 40. Section 39 (1)(b) *supra* prohibits the entering into such an agreement as was stated in *X-Trend-A-Home (Pvt) Ltd* vs *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S). The respondent is therefore correct in submitting that even if it had been proved that the alleged transaction had been entered into it would have been null and void *ab initio* as it would have fallen foul of section 39(1)(b) *supra*.

Conclusion

This application must fail because of the following findings by the court:-

1) This matter should not have been brought to court by way of a court application as there were glaring serious disputes of fact;
2) The applicant failed to provide written proof of any company resolution giving authority to negotiate the alleged transaction;
3) The applicant failed to provide any written reference to the agreement to split the property;
4) The applicant failed to show what form the transfer would take i.e. was it a sale, donation or scheme of reconstruction;
5) The alleged transaction falls foul of the provisions of section 39(1)(b) of the Regional and Town Planning Act [Chapter 29:12].
6) The evidence placed before the court was contradictory for the court to make a reasonable judgment. For instance Vernon Lapham was unable to locate detailed information relating to the transaction and confessed that his recollection would be somewhat vague while Daphne Ritson stated that she had been through her file and could not find any written reference to the agreement to split the property.

In the light of the foregoing findings I hold the view that this is a proper case where an award for costs on an attorney and client scale is appropriate.

In the result I would dismiss the application with costs on an attorney and client scale.

Majoko & Majoko, applicant's legal practitioners
C. Nhemwa & Associates, respondent's legal practitioners