TENDAI TARINDA

Versus

CAKE FAIRY (PRIVATE) LIMITED

KATHY MWANZA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 11 & 27 FEBRUARY 2020

Opposed Application

*B Khuphe with C M Jakachira***,** for the applicant
T Masiye, for the 2nd respondent

KABASA J: This is an application for the placement of the first respondent under Provisional Judicial Management in terms of section 207 as read with section 206 (g) of the Companies Act (Chapter 24:03).

The background to this matter is this. The applicant and 2nd respondent were in an unregistered customary law union when the 1st respondent was incorporated. The applicant is a co-director, with the parties each owning a 50% stake in the company. The applicant and 2nd respondent's relationship has hit turbulent times and the 2nd respondent has issued summons seeking confirmation of the dissolution of the tacit universal partnership. The action also seeks the distribution of the parties' assets. The action, filed under case number HC 2085/19 sets out the property to be shared in the declaration. I will refer to only part of that declaration which is relevant to the present proceedings as will more fully appear later on in this judgment. That part reads:-

> "Plaintiff and defendant have over the years acquired the following property in a partnership, jointly and severally:

50% shares in Cake Fairy (Private) Limited registered in the name of the plaintiff
50% shares in Cake Fairy (Private) Limited registered in the name of the defendant
50% shares in favour of plaintiff in Equitrail Africa (Private) Limited, a company registered in the Republic of South Africa.
50% shares in favour of defendant in Equitrail Africa (Private) Limited aforementioned.
60% shares in favour of defendant in Equitrail Africa Zimbabwe (Private) Limited, a company registered in terms of the laws of Zimbabwe.
100% shares in Sakhaya Freight registered in South Africa."

The 2nd respondent who is the plaintiff in HC 2085/19 is claiming a 100% shares held by Cake Fairy (Private) Limited."

Due to the souring of their relationship, on the 9th August 2019 a protection order was granted against the applicant and the order was by consent. The protection order, *inter alia*, ordered the applicant not to visit 2nd respondent's place of work, which is the premises where 1st respondent operates from.

The applicant avers that since he is barred from accessing 1st respondent, the 2nd respondent is managing the company exclusively and has since opened a new company in the same line of business in Harare. The 2nd respondent has no other known source of income to establish the new business save for the earnings from 1st respondent. The applicant therefore fears that the 1st respondent's funds and assets may be diverted to the new business to his detriment.

The applicant therefore seeks the winding up of 1st respondent to avoid being defrauded by the 2nd respondent.

This matter was initially brought as an urgent chamber application and the 2nd respondent successfully took a point *in limine* in that the matter was not urgent. A second point *in limine* was not adjudicated on after the learned Judge held that the matter was not urgent. This point *in limine* has inevitably been left for me to decide.

Following MOYO J's determination that the matter was not urgent, the applicant enrolled the matter on the opposed roll. Counsel for the 2nd respondent took points *in limine*, the first being on *lis pendens* and the other seeking the expunging of the applicant's

answering affidavit in which reliance was being made on the provisions of the Insolvency Act (Chapter 6:07), arguing that where members of a company are deadlocked and cannot break it the court can grant an order for liquidation. Counsel's argument being that an applicant's case is made in the founding affidavit and such founding affidavit relied on the Companies Act for the relief applicant seeks, introducing the provisions of the Insolvency Act (Chapter 6:07) was therefore improper.

This judgment is concerned with the points *in limine*. The consideration of the merits will only be dependent on the court's decision as regards the points *in limine*.

Lis Pendens

Earlier on in this judgment I made reference to the action in HC 2085/19 wherein the 2nd respondent is seeking the confirmation of the dissolution of the parties' tacit universal partnership and the sharing of the property acquired during the subsistence of the partnership.

Counsel for the 2nd respondent contends that it is undesirable for the court to entertain this application before the disposal of the action in HC 2085/19. The thrust of the argument is that if the court determines the present application and grants the order for liquidation, the action in HC 2085/19 will be rendered meaningless as the very shares in 1st respondent are the subject matter for distribution. HC 2085/19 will therefore be a mere academic exercise which will serve no purpose.

Mr Jakachira held a different view. He argued that the two actions are not the same. The present application is being brought under a different legal provision to the action in HC 2085/19 and so ought to be decided as a separate and distinct matter.

What is *lis pendens* and when is such a plea available to a defendant?

I can do no better than quote the learned authors Herbstein and Van Winsen in the *Civil Practicce of the High Courts and the Supreme Court of Appeal of South Africa, Fifth Editio*n at 605 thereof:-

> "*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court.

It matters not, in my view, that the matters have been brought by way of application and the other by way of action. It is not so much the vehicle by which the matters have been brought to court but the nature of the issues and relief sought, that is the substance and not the form.

That said, the learned authors, go on to say:-

> "In *Nestle (SA) (Pty) Ltd* v *Mars Incorporated* (2001) 4 ALL SA 315 (SCA), it was stated as follows:
> The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of these elements there is no potential for a duplication of actions."

In casu the same parties are involved, the fate of the 1st respondent is a common feature in both matters and a decision made in HC 2085/19 will end the dispute authoritatively. Why do I say so? I say so because the applicant *in casu* premises his claim on the fact that he is a co-director and has a 50% stake in the 1st respondent. This is the stake he would like to have in seeking the winding up of the 1st respondent. In HC 2085/19 the 2nd respondent is saying we own a number of businesses and I would like to be awarded the shares in 1st respondent for the reason articulated in the declaration. If the court in HC 2085/19 is persuaded by the 2nd respondent's argument and awards her the 100% shares in the 1st respondent that decision is final and authoritatively disposes of the dispute between the parties. If, on the other hand, the court decides that the parties should share equally as denoted by the 50-50 share regime currently obtaining, it means the applicant will get the relief he seeks in bringing this application.

Again that decision will authoritatively resolve the dispute between the parties. Whichever way one looks at it there is finality in litigation with the resolution of HC 2085/19. The fact that there are other assets sought to be shared does not change anything. What is important to consider is the fact that the 1st respondent is one of the assets sought to be shared under HC 2085/19.

In saying this I do not lose sight of the fact that a plea of *lis pendens* is not an absolute bar to the proceedings I am seized with. On page 606, the learned authors Herbstein and Van Winsen put it thus:-

> "A plea of *lis pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. The court reserves a discretion in the matter even if all the essentials of the plea are present, and may in spite of that fact consider whether it is more just and equitable or convenient that it (the action against which the special plea is advanced) should be allowed to proceed. It often happens that the court will decide that the *lis* which was first commenced should be the one to proceed but this is not an immutable rule."

It is important to note the following:-

1. There is no evidence of impropriety on the part of the 2nd respondent in running the 1st respondent. It is merely an unsubstantiated suspicion.
2. The applicant considers the 1st respondent as the only means by which the 2nd respondent can have financial muscle.
3. The applicant's inability to access the premises of the 1st respondent is premised on a court order which was granted by consent and not the machinations of the 2nd respondent.
4. The 2nd respondent is willing to have applicant's proxy to attend at 1st respondent to monitor the activities thereat at start of business and end of business on a daily basis to allay any fears of fraudulent activity.
5. 2nd respondent will be shooting herself in the foot if she runs down 1st respondent as that is the company she is seeking to be awarded in HC 2085/19.
6. HC 2085/19 was commenced first and the applicant is aware of the suggested property distribution.

In light of the foregoing, the discretion reposed in the court ought to be exercised judiciously.

Counsel for the 2nd respondent referred the court to the case of *Caesarstone Sdot – Yam Ltd* v *The World of Marble and Granite* CC (741/12) (293) ZASCA 129. I do not intend to go into the facts of that matter for purposes of this judgment. Suffice to say in the exercise of the discretion reposed in the court, the following excerpt from the Caesaristone case is apposite:-

> "As its name indicates, a plea of *lis alibi pendens* is based on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions."

What is to be gained by bringing two actions that essentially speak to the same issue? My answer will be there is nothing to be gained and such a course is only inconvenient to not only the party who instituted a similar action first but to the court. It smacks of some kind of a gamble, where a litigant makes the conscious decision that "I will also bring an action similar in nature to the one brought against me and should mine carry the day, I will have successfully pulled the rug from underneath my adversary." This is not what litigation should be about. Litigation should be there to resolve real issues and not to score points against each other.

It amounts to a duplication of actions where one party seeks more or less the same remedy to that which the other party seeks in a different action.

The Concise Oxford Dictionary, eleventh edition defines similar as:

> "of the same kind in appearance, character, or quantity, without being identical"

An action which seeks to wind up a company so that a party gets what they perceive as their share and another action that seeks to achieve a sharing of the property with one party arguing for an award of the whole is to me similar, it is of the same character in terms of what is sought to be achieved. Both actions stem from the breakdown of the parties' relationship.

Vexatious in the Concise Oxford Dictionary is defined as "causing annoyance or worry, law (of an action) brought without sufficient grounds for winning, purely to cause annoyance to the defendants."

The court was referred to the cases of *Michaelson* v *Lowenstein* 1905 TS 325, *Corderoy* v *Union Government (Ministers of France*) 1918 AD 512, on the proposition that on the face of it, it is vexatious to bring two different proceedings in respect of the same subject matter.

I would say the application for the placement of 1st respondent under Provisional Judicial Management is vexatious in the circumstances. It is meant to rattle the 2nd respondent and put spanners in an action that is already before the courts, an action which was instituted first and which ought to be allowed to run its course and be determined.

In *University of Botswana* v *Kole* 2012 2 BCR 278 HC, the court dealt with the requirements of *lis pendens*. I propose to quote the headnote verbatim as it captures salient issues which apply with equal force *in casu.*

> "The defendant was sponsored by her employer, the plaintiff, to complete her university studies in the USA. According to the plaintiff, the defendant breached her contract of employment by failing to return to work after the completion of her studies. The plaintiff terminated her employment and claimed repayment of the sponsorship moneys. The defendant denied breaching her contract, alleging that she failed to return to work because she was unlawfully dismissed by the plaintiff. In fact, she contended the matter was *lis alibi pendens* as she had lodged a claim in the Industrial Court for reinstatement following her unlawful dismissal.
>
> *Held* (1) A successful plea of *lis pendens* required the same parties, same cause of action and same subject matter in the two actions.
> 2. Determination of the plaintiff's claim would necessarily involve a finding on whether the defendant was unlawfully dismissed.

3. The proceedings in the two courts involved the same parties, same cause of action and same subject matter and the special plea had to be upheld."

The learned Judge in that case had this to say:-

"I am satisfied that fairness and convenience dictate that it is undesirable that the same issue should be the subject of litigation in two different courts even if both have jurisdiction to deal with the matter, unless good reason is shown that the court where the action was first commenced should not be allowed to carry on with the proceedings."

I would say the same *in casu*, it is undesirable that the issue of the fate of the 1st respondent should unnecessarily be litigated in two different fora. It is neither fair nor convenient and there is no good reason proffered why the action first commenced should not be allowed to carry on to finality.

The first point *in limine* was therefore properly taken and must succeed.

I deal with the second point only for completeness' sake. This is so because the first point *in limine* disposes of the matter The applicant's case was premised on the provisions of the Companies Act (Chapter 24:03) specifically section 207 and read with section 206 (g). The 2nd respondent answered to the application as per the applicant's founding affidavit. There was no reference to the Insolvency Act, Chapter 6:07.

Mrs Khuphe contended that the principles espoused in the Companies Act are the same as regards the issue of deadlock as provided for in section 5 (c) (i) of the Insolvency Act.

The point, as contended by *Mr Masiye*, is that the Companies Act under which the applicant's case is hinged speaks to the applicant being a contributory and it is in that capacity that the action was brought whereas the Insolvency Act speaks to the company being a debtor. Section 14 of the Insolvency Act specifically provides that:-

"The court may grant a provisional order for the liquidation of the estate of a debtor if the court is satisfied on the face of the documents that the applicable requirements of section 4, 5 or 6 have been complied with."

It is therefore the subject matter of the particular provision that the court looks at and applies such principles under the over arching umbrella of the particular statute.

The applicant could have brought the action under the Insolvency Act if that was the appropriate piece of legislation applicable to the circumstances. Introducing the Insolvency Act in an answering affidavit is therefore tantamount to building up a case which ought to have been built in the founding affidavit. An answering affidavit, as the term denotes, answers to the opposing affidavit and does not seek to introduce new issues. *(Jozistat (Pty) Ltd and Topazisky Trading 217 (Pty) Ltd and Another* (2011/29988) (2011) ZAGP JHC 91).

In *Bramwell Bushu* v *Grain Marketing Board and 2 Others* HH 326-17 CHITAPI J put it thus:-

> "It is trite that an application stands or falls on the founding affidavit. The following is stated in Herbstein and Van Winsen:- *The Civil Practice of the High Courts and the Supreme Courts of Appeal South Africa 5th Edition* at pp 440-441:-
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> "The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts that the respondent is called up either to affirm or deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a replying affidavit……..
>
> When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is."
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> So it is *in casu*, it is to the applicant's founding affidavit that I look and the basis for the application is rooted in the Companies Act, the reference to the Insolvency Act in the answering affidavit is therefore misplaced and ought to be expunged.
>
> The second point *in limine* is accordingly upheld.

The prayer is for the dismissal of the application with punitive costs. Punitive costs are to be sparingly awarded. The court's censure ought to be visited against a litigant whose conduct deserves such censure. Whilst the parties' acrimonious relationship appears to have been the driving force in the mounting of this application, given the history or background of the matter, I do not hold that the applicant should be penalised by an award of punitive costs. It was within his rights to seek to enforce what he believed was his right to.

I am not persuaded to accept that this is a matter deserving of censure. Costs being in the discretion of the court, I will shy away from awarding punitive costs. As regards dismissal of the application, this in my view will be the appropriate order as the matter in HC 2085/19 will authoritatively dispose of the dispute. This application should therefore not be stayed.

In the result, I make the following order:-

1. The application be and is hereby dismissed.
2. The applicant shall pay costs at the ordinary scale.

Liberty Mcijo & Associates, applicant's legal practitioners
Masiye-Moyo & Associates, 2nd respondent's legal practitioners