HC 5880/03

TENDAYI WESTERHOF
versus
ZIMBABWE BANKING CORPORATION
and
CLEMENS WESTERHOF

HIGH COURT OF HARARE
CHINHENGO J
HARARE, 30 June, 1 and 9 July 2003

Urgent Application for a Provisional Order

Moyo, for the applicant
J Mutizwa, (in attendance)

CHINHENGO J: The applicant and the second respondent are husband and wife. Divorce proceedings between them are pending before this court in case No. HC 6131/02. Whilst the applicant stated in her founding affidavit that she and the second respondent are not living together, she did not tell the court where the second respondent resides. It was at the hearing of this matter that her legal practitioner disclosed that the second respondent is now resident in South Africa.

The applicant and the second respondent are directors of a company known as Westerhof Enterprises (Private) Limited of which the applicant is apparently the sole shareholder. Westerhof Enterprises (Private) Limited ("the company") operates a modelling agency known as Glamour. The company banks with the first respondent ("Zimbank") and the applicant and second respondent are signatories to the bank account.

The applicant averred that prior to her separation from the second respondent and in order to enable the company to carry on with its financial transactions, the second respondent signed several blank cheques which she only had to fill in and countersign in order to access the company's funds. When these blank cheques run out, the applicant asked the second respondent through his legal practitioners to sign other blank cheques and he apparently neglected or refused to do so. The applicant averred that she is now "unable to pay the company bills and meet its financial obligations" and that she is "being threatened with legal action by one of the models at Glamour whose salary I have been unable to pay due to my failure to access the company's funds". She said that Zimbank has refused to allow her to encash cheques signed by her alone.

She has accordingly applied for a provisional order in terms of which in the interim she be permitted to operate the banking account without the need to obtain the second respondent's signature on the cheques.

The second respondent is apparently represented by Messrs Chihambakwe, Mutizwa and Partners in the divorce proceedings. Mr *Mutizwa* attended the hearing before me in chambers. He advised that he had no instructions to represent the second respondent in this application.

I was concerned with two issues arising from this application. The first is with regard to the paucity of information placed before me by the applicant. A supporting affidavit in any application constitutes the pleadings and the evidence in the matter and it should contain all that would have been necessary at a trial. It must not lack facts which would be necessary for the court to make a determination in the applicant's favour. See *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469. The applicant must, in order to establish his right fully disclose to the court all material facts which have a bearing on the granting or refusal of the order sought. If the applicant holds back any material facts whether wilfully or negligently and those facts have a bearing on the decision which the court must make the applicant may fail to obtain the relief he seeks. An applicant must, if material, also attach documentary evidence to his affidavit.

In this case it seemed to me that that the applicant has not made a full disclosure of the material facts which would enable me to make a proper determination of the application. It was necessary for the applicant to attach documentary evidence to prove and to satisfy the court that she was facing real problems in transacting the financial business of the company. The bold averments that she is unable to pay the company's bills or meet its other financial obligations or that she is unable to pay the salary of one employee who has threatened her with legal action are insufficient to satisfy me that she faces real problems in carrying out the business of the company. All that the applicant should have done is to attach copies of the bills which she is unable to pay and letters of demand or other correspondence from the disgruntled employee. This application is, no doubt, important to both the applicant and the respondent in that as directors of the company they have a responsibility to its creditors, employees and a responsibility to ensure that the company funds are properly handled. It would be remiss of me to authorise, in the absence of the disclosure of all material facts, one of the directors to have unfettered access to the company funds and unfettered discretion to use those funds in the absence of the other director particularly in view of the apparent lack of cooperation between them. At the very least I would have expected the applicant to indicate the amount which she requires for the purposes she mentioned. I am therefore not satisfied that the applicant has placed before me all the material facts necessary for me to grant the relief she seeks. (See *Kuvarega v Registrar General* 1998 (1)

ZLR 188 (H) and *The Trustees of Roper Trust v District Administrator, Hurugwe & 7 Ors* HH 92-2002 where the requirement to establish a *prima facie* case is stated.)

He second issue was the propriety of the applicant instituting the proceedings in her personal capacity and not in the name of the company. It was quite clear to me, in the absence of other information, that the company and not the applicant is facing the problems raised by the applicant. It is true that an artificial person, such as the company, operates through its agency - (*Mall (Cape) (Pty) Ltd v Merino-ko-operasie Bpk* 1957 (2) SA 347 (C) - but there must be a basis for an application such as the present to be instituted in the name of a director or shareholder and not in the name of the company or at its instance. I raised this matter with the applicant's legal practitioner. She filed written submissions to satisfy me that the applicant was the correct person to make this application and not the company. She submitted that the applicant did not know the whereabouts of the second respondent until the morning of the hearing. She said that it was not possible for her to obtain a resolution of the company authorising her to institute the proceedings in the absence of the second respondent. She said that the only course of action open to her was to bring the action in her own name in order to protect the company's interests. In support of this course of action the legal practitioner cited the case of *L. Piras & Son (Pvt) Ltd & Anor v Piras* 1993 (2) ZLR 245 (S). In this case GUBBAY CJ discussed the nature of a derivative action which he said is an exception to the rule in *Foss v Harbottle* (1843) 67 ER 189. At 251F he said –

> "The nature, then, of the derivative action is that it is a device designed to enable the court to do justice to a company controlled by its wrongdoers and prevents a serious wrong from going unremedied. A shareholder is allowed to appear as plaintiff. He acts, not as representative of the other shareholders, but as a representative of the company to enforce rights derived from the company. The action is brought by him in his own capacity to vindicate the company's rights."

The learned CHIEF JUSTICE referred with approval to the decision of LORD DENNING MR in *Wallersteiner v Moir (No. 2)* [1975] 1 All ER 849 (CA) at 857d-f where he said:

> "It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which it alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for damages. Such is the rule in *Foss v Harbottle.* The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs – by directors who hold a majority of

> the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is indemnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law will fail in its purpose. Injustice would be done without redress."

This therefore is the reasoning that underlies the right to pursue a derivative action by a shareholder in his personal capacity where such shareholder has been left without an option if he has to protect the interests of the company against detrimental conduct by the other directors or shareholders whose authority would otherwise be required to enable the company, *qua* company, to institute legal proceedings, to protect its interests. The same principle can be applied to this case but only if the applicant had placed all the facts before me. In *Piras supra,* the respondent had precluded himself by his conduct from voting in favour of the company taking the necessary legal action. In this case it was not made clear whether the second respondent had precluded himself from voting in favour of a resolution dispensing of his signature on the company cheques. The difficulty which arose was simply that the applicant did not know, until the morning of the application, the whereabouts of the second respondent. Approaches had been made to the legal practitioners acting for him in another matter but the second respondent could not be located. I would have been quite willing to come to the assistance of the applicant if only she had satisfied me with regard to the material facts which are necessary for me to make a determination in her favour. The applicant having failed on that first hurdle I cannot issue the provisional order sought.

Finally I would like to mention that I had asked the applicant's legal practitioner to supplement her affidavit by providing the material facts which I had found to be lacking. I had sympathy for the company and the employee who was not receiving his salary. She had more than a day within which she should have done so. Up to the time of writing this judgment that had not been done.

In the result I dismiss the application.

Coghlan Welsh & Guest, legal practitioners for the applicant.