IN RE: GRAPHIC AGE ADVERTISING
(For an order of Provisional Management)

HIGH COURT OF ZIMBABWE
BERE J
HARARE: 23 October 2008

L. Mazonde, for the applicant
N. Madya, for the respondent

Opposed Matter

BERE J: After hearing argument in this matter I dismissed the applicant's application with costs pegged on attorney – client scale. I indicated my elaborate reasons would follow. Here they are:-

BACKGROUND

The applicant and the respondent were both co-shareholders and co-directors in a company called GRAPHIC AGE (PRIVATE) LIMITED, a company duly registered in accordance with the laws of this country.

In December 2006 the applicant resigned as Director of the company and the respondent, in accordance with the parties' shareholders' agreement swiftly moved to exercise his pre-emptive rights to acquire the entire shareholding in the company. This, he did after the company valuation had been done in accordance with the shareholders agreement. After the valuation of the company had been concluded, there was some delay in the payment of applicant by the respondent prompting the former to call for revaluation of the company assets in an effort to cushion himself against hyper inflation. The respondent was not amenable to the suggestion and instead offered to pay him in accordance with the already concluded valuation. Aggrieved by the attitude of the respondent, the applicant lodged the instant application seeking to place the company under provisional judicial management.

The basis of the applicant's application are clearly laid down in paragraph 4 of his founding affidavit where the applicant states:-

> "4. I have a substantial interest in the company as a 50% shareholder. It is in the best interest of the company that an order of judicial management be made on the following basis:-
>
> (a) I resigned from the company as an Executive Director of this company sometime in December 2006. This company had two Directors, myself and Isaac Chidavaenzi.

(b) Since my resignation the remaining director is unable to form a quorum and the company cannot therefore function or operate in terms of the Company's Act.

(c) I have offered my Co-Director pre-emptive rights to purchase my entire shareholding in the company in terms of our shareholding's agreement, a copy of which I attach hereto".

The respondent has vehemently opposed the application basically on three grounds. Firstly, the respondent's position is that the applicant, having resigned from the company had no *locus standi* to bring this action on behalf of the company. It was also contended on behalf of the respondent that in bringing this application, the applicant had not exhausted the domestic remedy provided for in the shareholders' agreement, i.e. invoking the arbitration clause therein.

Finally and on merits the respondent sought to disable the applicant's case by arguing that the application did not satisfy the requirements for a provisional judicial management order as envisaged by s 300 of the Companies Act [*Cap 24:03*].

I will now deal with the points raised in seriatim.

1. Does the applicant have *locus standi* to bring this action

Under normal circumstances, anyone desiring to bring action on behalf of a company (which enjoys a separate legal existence from its members or shareholders) must be armed with a proper resolution authorising him to so act. See *Tapson Madzivire and Three Others v Misheck Brian Zvariwadzwa and Two Ors*[1].

But in this case, these very basic principles of company law do not even apply because it is accepted by both the applicant and the respondent that at the time this action was initiated, the applicant had long resigned from the company. The applicant had relinquished his shareholding in the company to the respondent in accordance with the parties' shareholders' agreement.

It is abundantly clear that the applicant could not under those circumstances purport to want to protect a company whose shareholding he had lost to his erstwhile co-shareholder.

It would also appear to me that the applicant's remedy was not to try and plunge the company under provisional judicial management but merely to enforce his rights against the remaining shareholder, the respondent since the dispute is between the two.

[1] HH 74-2005

It is a dispute which has nothing to do with the company whose operations has now been normalised by the appointment of other directors (an averment which has not been disputed by the applicant).

2. The need to exhaust available domestic remedy

It will be noted that the shareholders' agreement signed by the two erstwhile shareholders on 12th of September 2000 envisaged the possibility of a dispute between the parties. Paragraph 7 of that agreement provided as follows:-

ARBITRATION

"Any dispute or question in the issue whatsoever which may arise either during the association of the parties in the company or afterwards and touching upon the Deed or the construction application thereof or any clause or matter contained therein or any account, valuation or division of assets, debts or liabilities or dividends to be made hereunder or as to any act, deed of omission or commission to any party or as or as to any other matter in any way related to the party's interest in the company or its affairs or the rights, duties or liabilities of any party under this Deed shall be referred to and decided by the Board of Directors in the first instance who shall resolve the matter within 60 days failing which the matter shall be referred by the board to independent arbitration ……" (my emphasis).

Clearly, arbitration was provided for by both parties as the first and immediate remedy in the event of any dispute like the one the parties find themselves in. The applicant was supposed to invoke this clause and he has not proffered any explanation as to why this was not done.

Generally, courts are not keen to come to the rescue of a litigant who ignores exploiting a readily available remedy like arbitration. SMITH J (as he then was) aptly summed it up when he stated:-

> "A clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke this clause at anytime if he wishes to do so[2]. See also the case of *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd*"[3].

There was a deliberate and determined attempt by the applicant to circumvent referral of this matter to arbitration. This was contrary to the express views of the parties at the stage they signed the shareholders' agreement. This does not strengthen the applicant's case.

3. The Requirements for provisional judicial management

[2] Zimbabwe Broadcasting Co-operation v Flame Lilly Broadcasting (Pvt) Ltd 1999 (2) ZLR 448
[3] 1991 (1) ZLR 268 at 272

The requirements for the granting of a provisional judicial management order are clearly spelt out in s 300(a) of the Companies Act[4].

Basically the court is enjoined to grant such an order if it appears to the court –

"(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so.

Assuming the applicant had properly brought the instant application, his position would have been further compounded by his failure to satisfy the above-referred criteria which are critical and decisive in bringing a company under provisional judicial management.

These must be properly articulated in the founding affidavit and it is clear that the applicant made no attempt to do so. See the position adopted by EBRAHIM JA (as he then was) in *Mannatt v MM DEKock and Sons Ltd*[5].

4. Costs

The applicant was forewarned of the impropriety and futility of pursuing with his threatened legal action. The shortcomings of such a legal action were highlighted to him by the legal practitioners representing the respondent. The applicant stubbornly persisted with the legal suit. In such circumstances a litigant must be prepared to pay costs on a high scale. It was for these reasons that I made the order against the applicant.

P. Chiutsi, applicant's legal practitioner
Wintertons, respondent's legal practitioners

[4] Chapter 24:03
[5] 2000 (1) ZLR 543 (S)