DHARMESH BHIKA

Versus

PHILIP NDLOVU (N.O)

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 22 APRIL & 9 SEPTEMBER 2021

Urgent Chamber Application

N. Sibanda with M. Mahaso for the applicant
G. Nyoni for the respondent

MABHIKWA J: The applicant filed this application which was served on the respondent on the date of hearing. He opposed the application. It was proposed and agreed that the parties file heads of argument and the matter be determined on the papers. This court then gave directions as to the filing of the notice of opposition, answering affidavit if any, and the heads of argument.

Applicant in short averred that he is a shareholder and creditor in the company known as H. Bhika Enterprises (Pvt) ltd and as such has vested interests and *locus standi in judicio* although he was suspended from supervising the day to day activities of the said company through a process of judicial management.

The applicant further alleges that the judicial manager, in the process of managing the affairs of H. Bhika Enterprises, has disposed various properties without the consultation or consent of the company's creditors and shareholders. The various assets listed, include industrial shares, till points, a bread rack, a fridge, a fruit and vegetable stand, 3 crystal country sweets stand, bred binds, a cake box, a rolling pin, muffin tins, a cake knife and various other items. The applicant avers that the alleged disposal of the said property is unlawful hence this application.

In the final order, the applicant seeks that the respondent be permanently barred from disposing any property belonging to H. Bhika Enterprises (Pvt) Ltd without the consent of creditors and shareholders. In the interim, he seeks that the respondent be ordered to return the allegedly disposed property within 24 hours of the granting of this order.

I must say from the onset that in his application and in his answering affidavit, the applicant claims that the matter is "extremely urgent" and that he only learnt of the looting of properties on the 8th of April 2021 and that he moved in swiftly to court to file this application. This claim is clearly untrue and misleading. He mentions the 8th of April in his paragraph 6 Ad paragraph 8 of his answering affidavit. In his application, he simply alleges urgency without showing when the need to act arose.

Further, annexure "OA" to the notice of opposition is a letter written by the applicant himself (Dharmesh Humutal Bhika) to the master of the High Court on 28th December 2020. The gist of the letter appears to have been a complaint that there were irregularities and fraudulent activities that would cost the company or even sink it to oblivion if judicial management was allowed to continue. He claimed that going back at least 270 days before the writing of that letter on 28th December 2020, analysis would show that there were no creditors and that the company had been making profit. He claimed it was only 3 months before the writing of the letter that certain prices including judicial manager's fees and consignors' prices, were raised inordinately, and ostensibly "to sink the company into unprofitability so that the consignor can wrest control of the company when its value had been withheld down to junk. He claimed in the last two paragraphs of the letter that he and other shareholders wished to see the return of control of "the rehabilitated company" to them plus a reversal of all the decisions made by the judicial manager that would have been made and recorded.

In paragraphs 7 of the 28th December letter, he wrote;

> "There is a sore point for the shareholders to do with some assets stripping in the company under management which though it was brought to the attention of both the consignor and the judicial manager, the stripping seemed to continue …"

Paragraph 5 also talks of shareholders properties having been wrongfully proffered to the consignor. He then asked the Master to investigate those issues.

It appears that having received no joy from the Master of the High Court, the applicant then filed an urgent chamber application with the High Court on 27 January 2021. KABASA J dealt with that application and held that it was not urgent in a judgment of 31 January 2021 in annexure OB to the notice of opposition.

In any event, having complained of asset looting in a letter to the Master on 28 December 2020, it would have been very strange and completely improper for the applicant not to complain of the same and the now alleged commercial urgency in January 2021, only to claim "extreme urgency" in April 2021. I therefore agree with respondent's submissions that the alleged looting of assets was raised in the January 2021 urgent application which KABASA J held was not urgent.

Thereafter, applicant filed a fresh application on the same facts, slightly and cleverly twisted in the hope that a different judge may grant him in effect the same relief that he had sought in January 2021. That cannot be accepted.

The matter cannot turn out to be urgent now. Having said that, I do not need to go into the details of the merits save to say that I am inclined to agree with respondent that applicant has simply made a speculative and in my view ordinary claim for the return of property. Even then, the property stripping, which is denied by respondent, has been speculatively made with no account or inventory at all to show the allegedly stripped property. Even from the tone of the answering affidavit, the court is left to guess or infer that the property must have been taken from the company and should be returned to the company. The court cannot be left to make such inferences. I have said that this is an ordinary claim of return of property because barring the lack of urgency in bringing the matter to court, there is no other urgency shown. The mere

mention of the phrase "commercial urgency" because monetary value is involved does not necessary translate to urgency.

I will not be persuaded as it were, to circumvent or even, review my sister judge's judgment. The same cases referred to by KABASA J on urgency, that is to say; *Kuvarega* vs *The Registrar-General & Anor* 1998 (1) ZLR 188; *Documents Support Centre (Pvt) Ltd* vs *Mapuvire* 2006 (2) ZLR 240 @ p 244 and *Gwaranda* vs *Johnson* 2009 (2) ZLR 159 remain pertinent.

The applicant still has not shown exactly why the matter should jump the queue of other matters. I must say that at least the respondent has filed annexure "OE", being a lease agreement and then a list of property leased following the agreement.

The respondent raised somewhat preliminary points in the matter which applicant has dismissed in his answering affidavit as non-issues. He argues that;

> "a point *in limine* which a respondent must raise must be one that is capable of disposing of the matter and I submit that an argument about the forms does not dispose of the matter."

He continues thereafter to state that he says so, "based on the jurisprudence in our jurisdiction."

The above statement in my view says nothing. He is in fact guilty himself of the very same conduct that he complains of in the 2nd sub-paragraph of paragraph 6 AD para 4-5. That paragraph is ironically couched as follows;

> "Nonetheless I submit that in this instance I have filed an application which complies with the mandatory requirements of an urgent chamber application. The respondent even fails to point out the rule I have not complied with."

I say ironically because he too simply says his submission about the argument on the terms is "based on the jurisprudence in our jurisdiction" without stating exactly what jurisprudence he is talking about, neither has he outlined what mandatory requirements of an urgent chamber application has he met.

Firstly, I agree that the applicant's application and the answering affidavit are not properly numbered and in order. This is a growing concern in this court. Whilst the court would hesitate to decide or quickly dismiss matters on such technicalities as failure to number one's papers, legal practitioners should be reminded that the court is in fact perfectly entitled to do so. Thick applications have been filed in this court completely unnumbered or at times so confusingly numbered. This cannot simply be dismissed as a non-issue. Order 32 rule 227 (1) (c) clearly states as follows;

"(1) Every written application, notice of opposition and supporting and answering affidavit shall;

(a) …
(b) …

(c) Have each page, including every annexure and affidavit, numbered consecutively, the page number, in the case of documents filed after the first set, following consecutively from the last page number of the previous set, allowance being made for the page numbers of the proof of service filed for the previous set."

Rule 227 (1) (d) then refers to the indexing and clear description of each document filed in the case of an application comprising more than five (5) pages. I must say however that whilst the applicant does not deny that the application is not numbered or indexed, the copy in the record is in fact numbered and indexed. It is in fact the answering affidavit that is not paginated and made part of the index. Similarly, the applicant points out in his answering affidavit that in terms of form 29B of the rules of court, there is no notice of opposition because the opposing affidavit has not been signed and commissioned. However, the copy of the opposing affidavit on record is properly signed and commissioned.

As clearly shown, the applicant has replied that "it is clear" from his application that he means that the property was looted from the company and should be returned where it was taken from. This cannot be by way of conclusion or surmise by the court from the facts. It must be alleged and shown to be so.

Further, inspite of rule 87 of the High Court Rules, 1971, I agree that the mis-joinder *in casu* was fatal. Having clarified that the application means that the property was looted from the company H. Bhika Enterprised (Pvt) Ltd, the applicant has not cited the company as an applicant and shown his legal authority to represent it. He also has not cited the company as a respondent either. He is therefore making an application and seeking relief on behalf of a party that has not complained and is not before the court. Consequently, the relief that he seeks is incompetent. In fact as stated by the respondent, the draft order does not state at all from whom or where the property was taken and therefore to whom it should be returned. The court cannot grant a vague and unenforceable order. In any event, to grant the order sought by the applicant would in effect amount to granting him and, or his core directors the power to run the company, which is currently under judicial management. This would clearly be wrong as it would not only render the judicial management order useless but also contravene the law regulating judicial management of companies. This was in fact the *ratio decidendi* in the case of Sibanda & Anor vs Odieng & Ors – 2012 (2) ZLR 254 (H) at p 270 to p 274 H wherein three (3) inexperienced legal practitioners sought an order that would allow them to get instructions from clients and practice on their own in circumstances that would contravene the legal practitioners (General Regulations 1999 (S.I. 137 of 1999). The court refused as it were, to sanction an illegality.

I am therefore inclined to agree that *in casu*, the mis-joinder was fatal. The points on the mis-joinder and the relief sought were the only two worth noting. The rest are either dismissed or condoned in terms of rule 4C. I have also already stated that the matter is not urgent.

Accordingly, I order as follows;

1. The matter is not urgent and is accordingly removed from the roll of urgent matters.

2. The applicant is to pay the costs of suit at an attorney and client scale.

Tanaka Law Chambers, applicant's legal practitioners
Moyo & Nyoni, respondent's legal practitioners