TAMIRA OVERSEAS SA
versus
OLIVER MASOMERA
and
AQUARIUM TRADING (PVT) LTD
and
MASTER OF THE HIGH COURT
and
TALEB MAHOMED
and
SANDRA VAN ROOYEN

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 2 May 2018 & 30 June 2021

Urgent Chamber Application

C Damiso, for applicant
S Makonyere, for 2nd & 3rd respondent
A Muchadehama, for 4th & 5th respondent

HUNGWE J: On 2 May 2018 I granted a provisional order in favour of the applicant couched in the following terms:

> "That pending the confirmation or discharge of the provisional order, the applicant is granted the following relief: -
> 1. The 1st respondent be and is hereby interdicted from conducting the affairs of the second respondent in any way that increases second respondent's financial obligations pending the finalization of both matters under case numbers HC 595/17 and HC 1868/17."

The background to this matter is as follows. On 24 April 2018 this matter was placed before me under a certificate of urgency. I gave directions relating to the hearing of the matter. Before the date of hearing counsel for 4th and 5th respondents indicated in writing that they will apply for a joinder. At the hearing Mr *Muchadehama* made a formal application as promised. The application was granted principally for the reason that the parties are involved in ongoing litigation in the two reference files cases both brought by the applicant. In HC 595/17 the applicant sought an order for the cancellation of the Final Judicial Management Order. Applicant also sought a provisional order for the liquidation of Aquarium (Pvt), the 2nd

respondent in the present matter as well as the appointment of one Knowledge Hofisi as the Provisional Liquidator.

In HC 1868/17 the applicant sought the removal of Oliver Masomere, 1st respondent herein, as the Judicial Manager of 2nd respondent, Aquarium (Pvt) Ltd (under judicial management) and the appointment of one Reggie Saruchera, in his stead. In the present matter applicant seeks a provisional order interdicting the Judicial Manager, 1st respondent from conducting the affairs of the 2nd respondent in any manner that increases second respondent's financial obligations pending the finalization of both matters under case numbers HC 595/17 and HC 1868/17. Applicant seeks an interim interdict based on the averments made in its founding affidavit. In it the following appears:

> "17. On the 13th April, 2018 applicant received a meeting request from Inonge Management Consultancy who purport to have been appointed as Forensic Auditors of second respondent.
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> 18. This request was alarming firstly because a costly Forensic Audit had already been conducted on Second Respondent's affairs. Secondly, it is alarming because First respondent is incurring further expenses on behalf of second respondent. But most alarming is the fact that this decision was made without consulting with the applicant, who happens to be Second Respondent's largest creditor.
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> 19. First respondent's decision to order an audit and incur expenses without consent from creditors or following the proper processes renders such an action unlawful….."

The respondents opposed the application. They took the following points *in limine* viz;

i. That applicant being a foreign registered company, had not provided security for costs prior to launching the application;

ii. That applicant is not locally registered in this jurisdiction and therefore in the event that the respondents obtained a writ of execution, they would not be able to execute against applicant;

iii. That applicant did not seek leave of court to proceed against 2nd respondent in spite of the clear terms of an order of court to that effect;

iv. That the matter is *lis pendens* before this court;

v. That the matter is not urgent in spite of the certificate to that effect.

These points *in limine* were dealt with and dismissed in an interlocutory ruling for the reasons given off the cuff. However, if authority for those reasons is required, I proceed to discuss these hereunder.

Requirement to provide security for costs by a p*eregrinus*

In dismissing this point on 2 May 2018, I pointed out that nowhere in their opposing papers do the respondents indicate that they made an application for security of costs against the applicant in respect of this matter. The discretion lay with the court whether to no-suit the *peregrinus* applicant based on failure to provide security for costs. This court has on numerous occasions pointed out that there are no rules governing the grant for an order for security for costs which arise out of judicial practice. As such the court has exclusive jurisdiction to make such an order or not to: *Bowes and Ors* v *Manolakakis* 2011 (2) ZLR 59 (H) 63 D*; Wong and Ors* v *Lin and Anor* HH 380/13.

The rationale of the rule relating to security for costs is to ensure that an *incola* will not suffer loss if he was awarded costs of the proceedings. See: Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa***,** 3 ed at p 251. *Zendera* v *McDade & Anor* 1985 (2) ZLR 18 (H) 20 A-D. Applicant is owed substantial amounts of money by 2nd respondent. Therefore, respondents will suffer no prejudice from the absence of security for costs. Closely linked to this point i*n limine* was the submission by Mr *Makonyere* that this court ought to deny audience to the applicant because it has no local registration. No authority was referred to for this submission. There is no substance in this submission as there is no requirement for foreign companies to register before they can approach our courts.

Failing to seek leave of court before approaching the court

Respondents submitted that applicant was obliged to seek leave of this court before suing the respondents in compliance with the order of this court in case number HC 2020/14. This submission was premised on the wording of the order obtained by consent of the parties in HC 2020/14. This same point arose in *ZFC Limited* v *KM Financial Services (Pvt) Ltd & Another* HH-75-15. In that case an order in terms of section 301 (1) of the Companies Act [*Chapter 24:03*] was worded exactly as that in HC 2020/14. ZHOU J held that the words "be stayed" mean that the section applies to actions, proceedings writs, summonses and other processes already in existence at the time the provisional order is granted. It does not, however, exclude the institution of proceedings against the company. It occurs to me that the

protectionist provisions against the company placed under provisional judicial management were not intended to be futuristic in their effect but to arrest existing situations which situations would otherwise worsen the viability of the company if the ongoing legal suits were not arrested. This point, therefore, in my view, stands to be dismissed.

Whether matter is *lis alibi pendens*

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. In order for a matter to qualify as *lis pendens* it is trite that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. In the present case, although the applications are between substantially the same parties and the subject matter appears to be substantially the same, quite clearly the cause of complaint is entirely different. Applicant seeks to interdict specific conduct of the 1st respondent. Neither of the reference cases deal with the cause of complaint raised in the present matter. Even if I were wrong in holding that the plea *lis alibi pendens* cannot be successfully be raised in the present matter, it is within the court's discretion to allow or stay proceedings where this plea is successfully raised. Herbstein and van Winsen (*supra*) state:

> "If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendants to take the objection of *lis pendens* that is another action respecting the identical matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action." (at pp 269-270).
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> The present matter seeks a specific remedy based on an entirely different set of facts.

Therefore, in my view, this point ought to be dismissed.

Whether the matter is urgent

In matters of this nature the first issue for the court to decide when an urgent application is placed before it in terms of r 244 is whether or not the matter is urgent. The test for urgency is well settled in the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H). The principles set out in that case have consistently been followed by our courts.

In South Africa, the approach is not dissimilar. The applicant in an urgent application is required to set out the factors and circumstances which, in the belief of the applicant, renders the matter urgent. In addition, the applicant should give reasons for believing that he or she

cannot obtain substantial redress at a hearing in due course. See *Salt* & *Another* v *Smith* 1991 (2) SA 186.

Urgency itself cannot be defined with scientific precision. The question that ought to guide a court in the determination of urgency was the test set out in *Kuvarega* (supra) which is whether, to avoid the harm apprehended the matter cannot wait. The other considerations that come into play are whether there is available another satisfactory remedy besides approaching the court for an interim interdict on an urgent basis. If the matter is indeed urgent, be it on commercial or other basis, the next question becomes whether the applicant has made a *prima facie* case entitling it to the order sought.

What constitutes a *prima facie* case has been described in case law as a threshold upon which, if accepted, would entitle the applicant to succeed on the papers. See *Hualong Construction (Pvt) Ltd* v *MC Plumbing (Private) Limited* HH 88/15; *Mafusire* v *Greyling & Anor* 2010 ZWHHC 173; *Madombwe* v *Rimbi & Anor* 2015 ZWHCC 354; *Osupale* v *Bank of Botswana* 1997 BLR 1356; *Barend van Wyk* v *Tarcon (Private) Limited* SC 49/14. In order to succeed, the applicant must allege facts, which if proved at trial would entitle him or her to succeed. Put differently, what is required in order for an applicant to secure success in an application for a provisional order are facts or circumstances from which a court will be satisfied that a *prima facie* case exists for the grant of a provisional order. In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach should be to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or might find for the applicant. The standard of proof required to establish a *prima facie* case is much lower than proof on a balance of probabilities.

In the present case the respondents strenuously argued that there was no evidence of the cost of the forensic audit or by how much it would deplete the resources of the 2nd respondent. In my view, there is an implied acceptance of the fact that 1st respondent took this extraordinary step of engaging auditors without consultation with the 2nd respondent's creditors. It was his duty and obligation to do so. Clearly, in light of the fact that there existed another forensic audit the need for the second one was not justified in the eyes of the applicant. It reasonably feared the ability for the 2nd respondent to meet its financial obligations were

unnecessarily being compromised by an officer whose duty was to resuscitate the company and ensure that the creditors' interests were protected. In my view, the applicant had no other satisfactory remedy to arrest the situation besides launching this application on an urgent basis.

Upon a full appreciation of the facts placed before me, I was satisfied that the applicant had made a case for the grant of the provisional order. Consequently, and for these reasons, I granted the provisional order as prayed.

G Mlotshwa & Co, applicant's legal practitioners
S Makonyere legal practitioners, 2nd, & 3rd respondents' legal practitioners
Mbidzo, Muchadehama & Makoni, 4th & 5th respondents' legal practitioners