AL SHAMS GLOBAL BVI
versus
DEPOSIT PROTECTION CORPORATION
and
KIITUMETSI ZAWANDA
and
EQUITY PROPERTIES PVT LTD
and
REGISTRAR OF DEEDS NO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 October & 4 November 2021

Urgent Chamber Application

T Chagundumba, for applicant
S Moyo, for 1st & 2nd respondents
T Magwaliba, for 3rd respondent

1. TSANGA J: The applicant filed an urgent chamber application for a *mandamus* in which it sought on a provisional basis, the following:

i) That the 3rd respondent is ordered forthwith to surrender to the Registrar of Deeds a replacement Deed of Transfer No. 9068/2008 *in lieu* of the original issued on 7th September 2021 referenced consent number 2310/2021.
ii) The 3rd respondent is barred from using the replacement Deed of Transfer No. 9068/2008 *in lieu* of the original issued on 7 September 2021 referenced consent number 2310/2021 for any purpose whatsoever.
iii) The 1st and 2nd respondents shall jointly and severally, the one paying the others to be absolved pay costs of suit on a legal practitioner and client scale.

2. The first respondent, the Deposit Protection Corporation, is the liquidator of *Interfin Banking Corporation*. The second respondent, Kiitumetsi Zawanda, is its company secretary. The third respondent, Equity Properties (Private) Limited, is the owner of the original deed in respect of property known as Lot 3 Bannockburn held under title deed 9068/2008. Equity Properties hypothecated the said deed and tendered the immovable property as security in respect

of a loan borrowed from *Interfin Banking Corporation* (the Bank). The Bank, in turn was said to have surrendered that title deed as security against certain amounts it borrowed from the applicant. The first to third respondents were said to be aware that applicant is in possession of this original title deed. The applicant therefore sought the *mandamus* on the basis that the replacement deed and been wrongfully obtained. Applicant also averred that there were several pending matters between it and Equity Properties concerning the said deed and that it therefore made no sense for the latter to have sought the replacement Deed. At the hearing of the matter which was set down on an urgent basis, the first to the third respondents raised a number of points *in limine*. Suffice it state at the outset that there are two common cause cases which are vital to the understanding of the preliminary points raised in this matter, and, on the other hand, the objections to them by the applicant.

3. It is common cause that in 2016, under HC 6644/15 in the matter of *Al shams Global BVI Limited* v *John Chikura NO and Deposit Protection Authority*, the applicant sued the Deposit Protection Corporation (first respondent herein) and John Chikura NO its Chief Executive, for a declaratory order seeking confirmation of the enforceability of the very same agreements cited herein concluded between it and the Interfin Bank. It is also common clause that the High Court, having the granted the *declaratur* sought on 15 June 2016 to honour the terms of the agreement, the respondents therein successfully appealed to the Supreme Court as dealt with in SC 23/2020. The Supreme Court dismissed the order of the court *a quo* granting the *declaratur*. Crucially, the decision of the court below was upturned on the critical ground of whether the proceedings were properly before the court since the application for the declaratur had been brought without seeking the leave of the court to sue a company under liquidation. The court below had held that prior leave was not necessary because the proceedings were against the liquidator as an administrative authority. The Supreme Court found that leave of the court to bring the application was indeed necessary because the proceedings that had been before the court below related to a bank in liquidation. In other words, the finding was that the cause was contractual and not administrative in nature. The Supreme Court did not, however, find it necessary to determine the issue of whether the court below was correct in holding that where a liquidator, as an administrative authority, is sued to respond to questions posed to him or her in connection with the liquidation process, leave of the court would not be required.

4. The second common cause case of significance in understanding the grounding of applicant's quest for a *mandamus* as well as applicant's objections to some the preliminary grounds raised, is that of *Equity Properties (Private) Limited* v *Al Shams Global BVI Limited and the Registrar of Deeds* under judgment SC 101/2021. Therein Equity Properties had obtained a replacement deed as a result of a default judgment which the applicant argued had been improperly granted as it stemmed from defective service. The appeal by Equity properties was against the High Court's granting of an interim order preventing the use of that title deed. The Supreme Court found the provisional order preventing the use of the replacement title deed proper and dismissed the appeal.

First and second respondent's points *in limine*

5. Representing the first and second respondents, Mr. *Moyo* raised four points *in limine* in particular. His first submission was that the first respondent cannot be sued except in its capacity as a liquidator and that as such prior leave to sue a company under liquidation was required before applicant could file this application. The second respondent too was said to have been improperly cited in her personal capacity. It was in this regard that the Supreme Court matter under SC 23/2020 involving the same applicant and the first respondent, was said to have already decided this issue that proceedings could only be brought against the first respondent in its official capacity as a liquidator of the Bank. Herein, the applicant was said to be doing the exact same thing that it was told it cannot do, save that it was now suing the Deposit Protection Corporation and its company secretary in her personal capacity. Moreover, the circumstances under which a director can be personally liable were said not to have been pleaded. To the extent that the applicant's actions were precisely the same as those prohibited under SC 23/20, Mr. *Moyo* argued that the matter should be thrown out of court with costs on higher scale.

6. The second point he raised was that there were serious dispute of facts. The validity of the cession itself was said to be hotly contested, yet the applicant had brought this matter as if he has a valid cession, when the issues on the cession being impeachable have not been addressed. In addition the applicant was said to have come to court relying on validity of cession for which he had in fact failed to get a *declaratur*.

7. Mr. *Moyo's* third point *in limine* was that the applicant was wrongfully in possession of the title deeds. This was because once the Bank was placed under liquidation, all creditors were obliged to prove their claims through the liquidator and all documents had to be surrendered to the liquidator in terms of s 49 of the Insolvency Act [*Chapter 6:07*]. Once the liquidator was satisfied that the debt had been paid, for which the title deeds had been held, the liquidator had an obligation to return the title deeds. He further submitted that if a creditor is secured, they are paid by the liquidator but what they cannot do is to hold on to the title deeds as had been done herein. The applicant was said to be not even a secured creditor and was holding on to title deeds to frustrate everyone into paying him.

8. Finally, the applicant was said to be a foreign company registered in Panama with its offices in Dubai and has no presence in Zimbabwe in the form of registered branch. Therefore to the extent that the Company has no presence in Zimbabwe, Mr. *Moyo* drew attention to s 241 of the Companies and Business Entities Act [Chapter 24:31] which prohibits establishing a place of business without registering a subsidiary or a branch in Zimbabwe. He emphasized that it is a criminal offence to do so without being registered. The act of entering into a cession was said to be an act of transacting here and an act of establishing a place of business without registration. The transacting was said to be the *actus* of the criminal offence and that it followed that any transaction which established an act of business without registration is an illegal act. He therefore argued that the applicant could not come to court seeking protection on the basis of an illegal transaction. In essence, the applicant was said to have come to possess the title deed under circumstances constituting a criminal act and as such it cannot hold on to the title deed in order to sue any party.

Third respondent's points in limine

9. Mr. *Magwaliba* also raised at least six points *in limine* on behalf of the third respondent though some overlapped with those raised on behalf of the first and second respondents. Firstly, the matter was said not to be urgent as the applicant was said to be aware at all times that it was open to the first respondent to apply for a replacement deed as far back as February 2020. In particular, there was said to be no impediment to seeking a replacement deed once the Supreme Court had dismissed the applicant's matter under SC 23/2020 for failure to seek leave of the

court in bringing an action against a company under liquidation, represented by its liquidator. The urgency was therefore said to be contrived as remedial action should have been sought in 2020.

10. Secondly, the principle being that interdicts are not remedies for past evasion of rights, the applicant was said in this instance to be seeking to interdict conduct which had already occurred. Furthermore, Mr. *Magwaliba* submitted that there is no law which requires the Registrar of Deeds to keep a deed which has already been issued. Thirdly, as with Mr. *Moyo*, he too argued that the institution of proceedings against the company in liquidation and its liquidator without leave of the court was improper. What he also highlighted was that the third respondent had not applied for the replacement of the title deed itself but that this had been done by the liquidator.

11. Fourthly, the applicant was also said to be guilty of material non-disclosure of the existence of the SC 23/2020 judgment in the founding affidavit as he knew that its effect was to reverse the judgment that the security agreements were valid. The matter was said to be *res judicata* on the security agreements against the backdrop of the dismissal of the matter in SC 23/2020. Applicant was said to have known that disclosure would negate his cause of action herein and hence sought to obtain relief on the basis of incomplete disclosure. Fifthly, the relief sought being a mandatory interdict, Mr. *Magwaliba* argued that the applicant had to establish a clear right which he had not attempted to do in his application. He was therefore said to be seeking a mandatory interdict on the basis of a *prima facie* right. Lastly, he too pointed to the misjoinder of the second respondent who he said has no personal interest in the matter. The application was thus said to be defective in this regard. He prayed that the second respondent ought to be excused. As for the rest of the application, his prayer was that it be dismissed.

The applicant's response to the *points in limine*

12. The applicant argued that the matter was urgent as it could not have been anticipated that there would be another replacement title deed following SC101/21. Moreover, as regards the replacement title deed that had been improperly obtained, the Supreme Court in SC101/ 21 was said to have dealt with the issue of urgency. He maintained that this court should rely on that judgment.

13. Drawing on SC 23/2020, Mr. *Changudumba* also submitted that leave is required if the issue has a bearing on the entity under liquidation and that this was not the case in this instance. His thrust was that in that matter, (SC 23/2020) leave was required because the issue had an import on the liquidation entity and that the court order from the court below affected the entity under liquidation. What is sought here was said to be aimed at the conduct of the first and second respondent which conduct had no bearing on the liquidation entity.

14. As regards the joinder of the second respondent, this was said to be justified in that she had been in direct communication with the applicant's legal practitioner regarding the title deed. She was said to have given her assurances that she understood the need to proceed through the courts. Moreover, she knew where the title deeds were. With respect to the relief sought by the respondents, he submitted that the issue was *res judicata* as the Supreme Court had dealt with the replacement title deed in SC 101/21. The position in that case was said to still prevail.

15. On material non-disclosure the applicant's counsel argued that the third respondent was not clear on which information had not been disclosed. The Supreme Court judgment in SC 23/2020 was said to be irrelevant for the purpose of this application to the extent that it ruled that leave to sue is required if the issue affects the entity under liquidation. Regarding applicant transacting here illegally, that too was submitted to be a non-issue as the applicant was said to have clearly submitted to this court's jurisdiction under a series of consolidated matters in an order by MUSHORE J under HC 8113/2016. Furthermore, with respect to the arguments on legality of the cession, these were said to relate to the merits whereas in this instance what is sought is a preservation order. Moreover, the argument that the applicant is not entitled to the title deed was said to be the subject of a pending matter. He thus prayed for the dismissal of all points *in limine*.

Key issues decision

16 Whilst a number of preliminary issues have been raised, the key issue for decision upon which the consideration of all other preliminary points before the court would be based is whether or not the matter is properly before the court. This is by virtue of the absence of the authority to sue the company under liquidation as represented by its liquidator. The citation of the second respondent in these proceedings also falls for determination at this point as an intertwined issue given that her actions were on behalf of the entity under liquidation. It would

not make sense to decide upon the rest of the other preliminary issues if indeed the matter is improperly before the court for lack of authority to sue. In other words, the issue is whether this matter is at all distinguishable from SC 23/2020 where leave to sue the company under liquidation by the same applicant, before approaching the court, was deemed necessary.

17. Materially, both Mr. *Moyo* and Mr. *Magwaliba* in their response to the applicant's submissions that the leave to sue decision is not relevant, stressed that this argument is misplaced. It was said to be misplaced as the liquidator had an obligation to return the title deed upon full settlement of what the Bank was owed. In other words, their core argument was that the liquidator, having been paid by the debtor was not at all acting in an administrative capacity but in his official capacity when he obtained a replacement title deed. By continuing to hold onto title deed when there was no longer any cause, the applicant was said to be in fact now acting as the liquidator. Such conduct, it was maintained, affects the patrimony of the company under liquidation.

18. Suffice it to stress that the representative of creditors in company that is being wound up is indeed the liquidator. The liquidator is appointed to represent all creditors. Section 213 (a) of the now repealed Companies Act [*Chapter 24:03*] under which the liquidation process began and the liquidator was appointed, provided that no action or proceeding against a company in liquidation shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. What is common cause is that no leave to sue was sought or has been sought in this case.

19 The rationale for such leave has always been to protect the company from unnecessary litigation. As the court explained in SC 23/2020.

> "Leave of the court is required before proceedings against a company and /or bank in liquidation. This is so because the broad purpose of the law of insolvency and the winding up of companies is to ensure due distribution of the insufficient assets of the debtor company amongst the competing creditors under the watchful eyes of the court. Thus, the position is settled at law that an order placing an estate or company in liquidation has the effect of creating a *concursus* of the creditors of the insolvent and no creditor can thereafter do anything that will alter the rights and interests of other creditors without the leave of the court. Unsupervised and unsanctioned litigation and proceedings against the insolvent will disturb the due distribution of the insufficient assets and removes the role of the court from the process.

> It may also be added that the leave of the court is necessary in such circumstances as a broader consideration of protecting the economically fragile company from unnecessary litigation quite apart from protecting the interest of the creditors. It being common cause that leave of the court was not sought and obtained prior to the instituting of the proceedings *a quo*, the appeal succeeds on this basis alone.*"*

19. Of significance indeed in this matter before me is the averment by the liquidator that the debt owed by the third respondent was in fact paid and there was no reason for the liquidator to hold on to the title deed. It cannot be argued that the liquidator's actions, in seeking a replacement deed, were just administrative. In this instance, the application and obtaining of the replacement of the deed was sought by the liquidator in the discharge of duties as a liquidator after the debt had been satisfied. The reason why the replacement deed was sought is because the applicant was holding on to the original outside the process applicable to all creditors. Applicant was doing so without the leave of the court.

20. There are set procedures that are followed by a creditor to recover a debt from a company under liquidation. Leave to sue is necessary for a party to show the court why its particular case needs a suit outside the normal procedures that are there for recovering a debt by creditors through the appointed liquidator. It is the court that is tasked with assessing the merits of any application including its prospects of success based on the sufficiency of evidence placed before it. Indeed it would have been under such an application for leave to sue that an issue such as that raised by respondents herein that the company is not registered locally would have been considered under prospects of success in determining whether or not that leave to sue should be granted.

21 Applicant ought to have paid regard to the decision in SC 23/2020 regarding the need to seek leave to sue a company under liquidation. I do not think that the Supreme Court matter in SC 101/20 is of aid to the applicant in this matter. This is because the court in that case specifically upheld the provisional order preventing the use of the replacement title deed because it had been wrongly obtained following a defective default judgment. What was of concern to the court was that the replacement deed had been obtained upon a defective default judgment. It is this that the Supreme Court frowned upon. The facts are distinguishable. Here the debt owed to

the Bank by the owner of the deed has been paid to the liquidator. If applicant challenges the propriety of the obtainment of that deed, then it should have sought leave to sue.

The respondents have been put to unnecessary expense. As for the second respondent, there is clearly no basis under the circumstances for suing the second respondent in her personal capacity.

I find that the application is improperly before the court as no leave to sue the company under liquidation was sought.

Accordingly;

The application is struck off the roll with costs on a higher scale.

Atherstone & Cook, Applicant's Legal Practitioner
Scanlen & Holderness, 1st Respondent's legal Practitioners
Chambati Mataka & Makonese, 4th Respondent's Legal Practitioners