HB 276/18
HC 2724/18

MERSPIN LTD

Versus

CECIL MADONDO N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 6 & 8 NOVEMBER 2018

Urgent Chamber Application

G. Nyoni for the applicant
D. Sanhanga for the respondent

MAKONESE J: The applicant seeks the following relief against the respondent:

"Interim relief granted

Pending the finalisation of case number HC 7810/18 filed in the Harare High Court, the applicant is granted the following relief:-

1. The respondent be and is hereby interdicted and restrained from holding himself out as the judicial manager of Merspin Ltd.
2. The respondent be and is hereby restrained and interdicted from hiring out, leasing, mortgaging, pledging as security or in any other way disposing of any of the plant, machinery and equipment of Merspin Ltd situate at stand 13722 and stand 3618 Bulawayo Township of Bulawayo.
3. The respondent be and is hereby interdicted and restrained from entering into any contracts or arrangements affecting or involving Merspin Ltd, its business assets and property.
4. The respondent be and is hereby interdicted and restrained from using and affecting any notifications, alterations and reports to any of the machinery, plant and equipment belonging to Merspin Ltd situate at stand 13772 and stand 3618, Bulawayo Township, Bulawayo.

Final order sought

1. It is hereby declared that the judgment of the court in case number HC 2353/11 placing Merlin (Pvt) Ltd under judicial management does not in any way affect the status of Merspin Ltd.
2. The respondent be and is hereby ordered to pay costs of suit on an attorney and client scale."

The application is strongly contested by the respondent. The bulk of the opposition to the interim relief sought is premised on points *in limine*. It is understandable that the respondent adopted this stance because on the merits there is no substantive argument in opposition to the order sought.

Background

On the 8th of December 2011 by order of this court in case number HC 2353/15 a company known as Merlin (Pvt) Ltd was placed under provisional judicial management. The respondent was appointed provisional judicial manager of Merlin (Pvt) Ltd. On the 5th October 2016 Merlin (Pvt) Ltd was placed under final judicial management. The respondent has been conducting business for and on behalf of Merlin (Pvt) Ltd. Meetings of creditors were held, arrangements were made for re-scheduling of debts by the respondent as judicial manager. It has recently come to the attention of the applicant and the respondent that there is no registered company in this jurisdiction or elsewhere by the name Merlin (Pvt) Ltd. The company in actual existence is Merlin Ltd. Merspin and Merlin are companies with a shared history and common directors. These companies, however, are both distinct and separate legal personalities with the separate boards of directors and shareholders. The respondent has since being appointed judicial manager of the "non-existent" Merlin (Pvt) Ltd held himself out to be the judicial manager of Merspin Ltd. To that extent, and on the strength of the order for judicial management, the respondent has convened creditors' meetings with individuals and companies, owed money by Merspin Ltd. The respondent does not dispute that there is no company known as Merlin (Pvt) Ltd. The respondent has since filed an application with the Harare High Court under case number 7816/18 and sought to have the order in case number HC 2353/11 amended to place both Merlin Ltd and Merspin Ltd under judicial management. The matter is still pending. Further relief is sought for the appointment of the respondent as final judicial manager for both entities. The application is being opposed and although the papers relating to that case have been filed in this application, I shall not venture to comment on these proceedings. They are not before me. I shall restrict myself to the matter before me.

The applicant contends that this application is urgent and that there is genuine apprehension that respondent has unlawfully leased property belonging to Merspin Ltd. The respondent does not deny that assets belonging to Merspin Ltd have been leased or mortgaged to third parties. He argues that this is done for the best interests of the applicant, creditors and the shareholders. The court has to decide whether the application has merit and if so whether the relief sought is justifiable on the papers filed. Before dealing with the merits I ought to consider the various points *in limine* that have been raised by the respondent in seeking to defeat the applicant.

Urgency

In terms of Rule 244 of the High Court Rules, 1971, an urgent application must be certified as urgent by a registered legal practitioner. The legal practitioner certifying the matter as urgent must have a genuine belief that it is urgent. The legal practitioner must apply his or her mind to the facts of the matter before him. It is argued by the respondent that the matter is not urgent and further, that the founding affidavit does not disclose any information as to why the matter ought to be heard before all other matters pending in this court. Applicant avers that the matter is urgent and cannot wait. Applicant indicated to this court that on 8th October 2018 it was advised that certain assets of Merspin Ltd where being disposed of or leased to a third party. The applicant avers that binding the applicant's property belonging to a contract with third parties is highly prejudicial to the applicants. In matters involving commercial urgency, the court ought, in my view to assess the potential prejudice to an affected party. In this matter, the respondent has not denied that assets of Merspin Ltd or Merlin Ltd are being leased to potential joint venture partners. The effects of these contracts regarding applicant's assets are undoubtedly urgent. This first preliminary point on urgency is accordingly dismissed.

Authority of the deponent to represent applicant

It was argued on behalf of the respondent that the deponent to the founding affidavit had no authority to act. The applicant has filed a replying affidavit confirming that the resolution of the board has been regularized. I do not consider it necessary to dwell on this aspect in great

detail. I am satisfied that the authority of the deponent to act has been established. The preliminary issue on this aspect must therefore fail.

Non-joinder

Rule 81 (1) of the High Court Rules provides as follows:

> "*No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights of persons who are parties to the cause or matter*."

This application is premised on a need to stop the respondent from holding himself out and acting as the judicial manager of Merspin Ltd. There is no need to cite all the parties related to the litigation in this matter. The issue involves the interests of the applicant and the status of the respondent. The respondent has conceded that there is need to correct the order for judicial management as it relates to a non-existent entity. I am satisfied that the issue of non-joinder is a non-issue and has been used to deflect the court's attention from the real issue before the court.

Material non-disclosure

The respondent alleges that the applicant has attempted to mislead the court. The founding affidavit, however, refers to the other applications before this court and the one pending at the High Court at Harare. It must be realised that the court has easy access to any matter referred in current litigation and before this court. This court cannot be hoodwinked into making adverse orders because the cases related to this application all trace back to the order for judicial management, granted by this court. The process relating to the judicial management is referred to specifically by the deponent. I do not agree that there is an attempt to mislead the court. If anything it is in the interests of justice, for the court to decide whether the respondent is lawfully acting as judicial manager when there is a clear and undeniable issue of a mis-citation of the company under judicial management. In my view, the issue of material non-disclosure does not arise. The point has been raised simply to avoid dealing with the merits. Having disposed of the points *in limine*, I now proceed to determine the merits.

On the merits

The respondent was by the order of this court appointed a judicial manager of Merlin (Pvt) Ltd. That company is not registered with the Registrar of Companies. It does not exist. In some instances the company has been described as Merlin (Pvt) Ltd trading as Merspin Ltd. When the respondent was alerted of the wrong citation of Merlin (Pvt) Ltd, and thus challenging the legality of his appointment as judicial manager, the respondent sought to seek an order amending the order by replacing Merlin (Pvt) Ltd with Merlin Ltd. In his view the judicial manager has the lawful right to continue acting as judicial manager and engage both Merlin Ltd and Merspin Ltd as if there were one entity. At the hearing of this application it became clear that Merspin Ltd is a company with separate legal identity. The respondent's view on the matter is that pending the finalisation of the case seeking an amendment of the company under liquidation he should continue exercising his power as judicial manager. The question that begs an answer is, that if the court allows the respondent to continue holding himself out as the judicial manager of both Merlin Ltd and Merspin Ltd on what legal authority would he be operating? The respondent does not seem to realise that the contracts with potential investors he seeks to conclude can simply be challenged on the basis of lack of authority by the judicial manager to act as such. Such a situation would expose the applicant, creditors, the shareholders and the investors. Put differently, the respondent is asking the court to turn a blind to the illegality. The respondent is asking the court "to massage" the illegality and allow it to continue. As I understood the applicants they seek an order restraining the activities of the respondent pending the resolution of case number HC 7816/18. The order being sought is an interdict. The applicant has clearly established a *prima facie* right though open to some doubt. The plant and machinery and other equipment belonging to Merspin Ltd is located on premises leased by Merlin Ltd. There is a reasonable apprehension of irreparable harm or injury. The fact that assets belonging to the applicant are being tied up in a contract of lease to third parties is not denied. The relief being sought is of the nature of an interdict *pendete lite*. It appears just and equitable that interim relief be granted. The balance of convenience favours the granting of an interdict. The requirements for an interdict are now settled in our jurisdiction. See; *ZESA Staff*

Pension Fund v *Mushambadzi* SC 57-02 and *Sanchem (Pty) Ltd v Farmers Agricare (Pty) Ltd* 1995 (2) SA 781.

The Supreme Court has had the occasion to deal with the fate of an application where a wrong party is cited. In *Marange Resources (Pvt) Ltd* v *Core Minerals & Ors* SC-37-16, the Supreme Court held as follows at page 9 of the cyclostyled judgment:

> *"Thus the fate of an application where a wrong party is cited is clear. The proceedings cannot be sustained. In casu, the wrong citation was computed by the appellant's stubborn refusal to rectify the error even when assured by the other side that such an application would not be opposed. This application should therefore suffer not only the general fate consequent upon such errors, but an exemplary order of costs wrought by the appellant's unhelpful attitude."*

See also *Gweru Water Workers Committee* v *City of Gweru* SC-25-15 and *C T Bolts (Pvt) Ltd* v *Workers Committee* SC-16-12.

In conclusion, I am satisfied that the respondent cannot dispute that he and others have proceeded on lack of proper information concerning the company that was meant to be targeted for judicial management. It is clear that no one bothered to demand the production of the certificate of incorporation of the company that was being placed under judicial management. The manner in which it is sought to change the names for judicial management in the application filed by the respondent is littered with challenges and obstacles. As things stand, in this present application, the applicant is not under judicial management. The respondent should not purport to engage in any conduct to the detriment of the applicant. The respondent has not lawful authority over the applicant. He is not the judicial manager of Merspin Ltd. He is not even the judicial manager of Merlin Ltd which was being targeted for judicial manager. In any event, he respondent cannot act lawfully as judicial manager for Merspin Ltd until such time as an order is sought properly naming an existing company to be placed under judicial management. This court may not sanction an illegality for the sake of expediency. In the case of *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157 B-C; KORSAH JA made the following remarks;

"*If the order was void ab initio it was void at all times and for all purposes. It does not matter when and by whom the issue of validity is raised; nothing can depend on it. As Lord DENNING MR so exquisitely put it in Mc Foy v United Africa Co Ltd [1961] 3 All ER 1169 at 11721;*

If an act is void, then it is a nullity. It is not only bad but incurably bad…And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

These remarks apply with equal force in this matter. The appointment of the respondent is afflicted with illegality. A non- existent legal entity was placed under judicial management. The relief sought by the applicant is to interdict him to purport to act as if he was its judicial manager. The respondent argues that he has filed an application to correct the mistake. That is a matter for another day. The applicant has made a good case for the granting of the order.

For the aforegoing reasons the following order is made:

1. The application be and is hereby granted as amended.
2. The respondent is ordered to pay the costs of suit."

Mashayamombe & Company Attorneys, applicant's legal practitioners
Mabuye Zvarevashe-Evans Legal Practitioners, respondent's legal practitioners