CHUL JUN LEE

And

AROCET INVESTMENTS (PVT) LTD

Versus

HYO JUN LEE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 15 MAY & 20 JUNE 2019

Opposed Application

B. Masamvu for the applicants
K. Ngwenya for the respondent

MAKONESE J: The 1st applicant and 2nd respondent are Korean nationals. They are shareholders in the 2nd applicant, a company they established in Zimbabwe in September 2016 known as Arocet Investments (Pvt) Ltd. The 1st applicant alleges that there are various disputes between himself and the respondent arising from the respondent's failure to pay up for their shares, amongst other issues. First applicant has brought this court application seeking the following relief:

"1. The application be and is hereby granted.
2. The respondent is hereby requested to pay the call-in respect of unpaid registered shares in the name of the 2nd applicant.
3. The respondent is ordered to pay $53 386,16 being the actual value of 740 shares in his name with 2nd applicant within 14 days from the date of this order.
4. In default of paragraph 2 and 3 above, the 2nd applicant is authorized to forfeit the 740 shares registered in favour of the respondent without further notice.
5. Further in default of paragraph 2 and 3 above the respondent to pay interest on the amount of $53 383,16 at 5% per annum and the 2nd applicant is authorized to issue out a writ to recover the said amount together with interest..
6. The 420 shares surrendered by Manish Kantilal Ranchold on the 5th September 2018 be allocated and issued t o the 1st applicant paying the transfer charges as may be charged by the relevant authorities.
7. Respondent to pay the costs of suit on an attorney and client scale."

The respondent is opposed to the relief sought by the applicant presumably for two reasons. Firstly, the respondent contends that the 2nd applicant is not properly before the court as there is no Board Resolution attached to the application for the 2nd applicant to institute these proceedings, yet the relief being sought affects the 2nd applicant. Secondly, the respondent contends that the applicants have not placed before the court any legal and justifiable grounds and basis for the granting of the relief sought.

I propose to deal with the first issue raised by the respondents relating to the absence or lack of a Board Resolution. The 1st applicant concedes that indeed there is no Board Resolution. He avers that he approached this curt by virtue of being a director and shareholder of the 2nd applicant. Further, the 2nd applicant, a registered company is crippled and cannot make a decision on its own and that as such he is authorized to represent the 2nd applicant by virtue of a derivative action. It is trite law that there is a distinction between the company and its shareholders and directors.

A similar situation was dealt with in the case of *Kufandada* v *Dairiboard Zimbabwe (Pvt) Ltd & Anor* HH-564-15, where the learned judge, MATSHIYA J made reference to the case of *L. Piras & Son (Pvt) Ltd & Anor Intervening* vs *Pirahs* 1993 (2) ZLR 245 (SC). In that case one of the directors sued the company and obtained default judgment. A Dr Mudekunye, one of the two directors attempted in his personal capacity, to have the judgment against the company set aside. He failed because he had no *locus standi*. On appeal the decision of the lower court was confirmed by the Supreme Court. Dr Mudekunye then applied for leave to intervene on behalf of the company. The application was granted. On that basis, he was allowed to proceed with the application for rescission of judgment.

The then learned Chief Justice GUBBAY (CJ) (*supra*) spoke of the need to have a derivative action where a shareholder or director, such as the applicant, would intervene to save the interests of a company such as the 2nd applicant. He states thus:

"Taking account of the law as I perceive it to be, it is clear to my mind that Dr Mudekunye was not empowered to resolve that the appellant institute the application for rescission. In my view, the learned judge was correct in concluding that it was not the appellant that was litigating but the unauthorized Dr Mudekunye on its behalf.

It remains to consider whether the appeal should be allowed on the ground that Dr Mudekunye, as an intervening party, is entitled to pursue the derivative action as a shareholder in his own name on behalf of the appellant in order to protect the interests of the latter …"

The learned Chief Justice went on to say:-

"The derivative is an exception to the rule in *Foss* v *Herbottle* 1843 67 ER 189 and was expanded thus by LORD DENNING MR in *Wallerstener* v *Moi*r (No 2) [1975] 1 ALL ER 849 CA at 875d – f:

It is a fundamental principle of our law that a company is a legal person with its own corporate entity separate and distinct from its directors and shareholders, and with its own corporate identity, separate and distinct from the directors and shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for damage. Such is the rule in *Foss* v *Herbottle.* The rule is easy enough to apply when the company is defrauded by an outsider. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who hold the majority of the shares – who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorize the proceedings to be taken by the company against themselves. If a general meeting is called they will vote down any suggestion that the company should sue themselves yet the company is the one person who is damnified. It is the one who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.

The nature, then of a derivative action is that it is device designed to ensure the court to do justice to a company controlled by the wrongdoers and prevents a serious wrong from going unresolved. A shareholder is allowed to appear as the plaintiff. He acts, not as a representative the other shareholders, but as a representative of the company to enforce the rights derived from the company. The action is brought by him in his own capacity to vindicate the company's rights.

> I see no reason to deny Dr Mudekunye the right to pursue a derivative action in his name, and in his capacity as the remaining shareholder, on behalf of the appellant. A wrong of a fraudulent nature was done to the appellant, the details of which I have already outlined. By virtue of the lack of the quorum, for which the respondent was responsible, the appellant has been unable to bring proceedings itself to redress that wrong."

On the facts of this matter, the respondent admits that e is a director of the 2nd applicant. He concedes that he did not pay for the shares. His contention is that he never intended to pay for the shares neither was he expected to do so. He argues that his contribution in the company was in the form of technical and administrative exercise. In particular respondent avers that he is the one who established and set up the company. Respondent further contends that for all is effort he was to be allocated equal shares with the 1st applicant. A careful reading of the papers reveals that respondent's assertions are contributory. On the one hand the respondent argues that 1st applicant did inject some financial capital into the company and brought some equipment from Korea. He suggests that the equipment brought into the country was over-valued in order to comply with the investment laws of this country. On the other hand, however, the respondent creates the impression that the monies injected into the company were not paid-up share capital but a loan that was to be repaid by the company. 1st applicant challenged the respondent to prove that he did not invest an amount of US$218 717,00 into the company.

What is clearly established and is beyond dispute is the fact that respondent has failed to pay the shares as required by the articles and memorandum of association of the company. In fact, respondent has attempted to cripple the activities of the company by making reports t the police of financial irregularity against 1st applicant. This has led to the company accounts being frozen, thereby paralyzing the company. It is clear that such a wrong s being committed by an insider, who is a director of the company. The 1st applicant must be allowed to rely on the derivative action to bring this action in his capacity on behalf of the company. The application is therefore properly before the court.

In my view, the opposition by the respondent does not withstand activity. The respondent cannot have his cake and eat it. He has chosen not to pay the shares as required. H e has sought to cripple the company. His conduct is detrimental to the interests of the applicants.

In the result, on the basis of the aforegoing, the applicants are entitled to the relief sought in the draft order.

Accordingly, the following order is made:

1. The application is hereby granted.
2. The respondent is ordered t pay the call-in respect of unpaid registered shares in his name with the 2nd applicant within 14 days of this order.
3. The respondent is ordered to pay the sum of US$53 386,16 being the actual value of 740 shares in his name with 2nd applicant within 14 days of the date of this order.
4. In the event of non-compliance with paragraphs 2 and 3 of this order, the 2nd applicant is authorized to forfeit the 740 shares registered in favour of the respondent.
5. Further, in the event of non-compliance with paragraphs 2 and 3 of this order, the respondent is ordered to pay interest on the amount of US$53 386,16 at 5% per annum.
6. 2nd applicant is authorized to issue out a writ of execution to recover the said amount against respondent.
7. The 420 shares surrendered by Manish Kantilal Ranchold on 5th September 2018 shall be allocated and issued to 1st applicant with applicant paying he transfer charges.
8. Respondent ordered to pay the costs of suit.

Dube-Tachiona & Tsvangirai, applicants' legal practitioners
T. J. Mabhikwa & Partners, respondent's legal practitioners