ZAMEER GAFFER
and
ZEENAT ZAMEER GAFFER

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 November 2016 and 13 January 2017

Opposed Matter

R Zimudzi, for the applicant
M Nzarayapenga, for the respondent

MANGOTA J: Tavengwa Madangure ["Madangure"] and Emmanuel Enock Masuku ["Musuku"] floated and formed Procadale Investments (Pvt) Ltd ["the company"]. It was incorporated on 7 April, 2004. It was a legacy for Madangure's two minor children and Masuku's two minor children. Madangure and Masuku were the directors of the company. The minor children of each director held 50% of the company's shareholding. Its principal place of business is 32 Lanark Road, Avondale, Harare.

The company's only asset is a certain piece of land which is situated in the district of Salisbury. It is stand number 41 Borrowdale Township of Lot 9 of Borrowdale Estate also known as 41 Piers Road, Borrowdale. It is held under Deed of Transfer 1886/2005. It is 8094 square metres in extent.

In about February, 2014 Masuku sold 50% of his children's shares in the company to the applicants. This was after he had successfully sought the court's permission to dispose of the children's 50% shareholding in the company.

The applicants did not state the circumstances under which they came to purchase the shares of Masuku's minor children. All they did was to apply and move the court to place the

company under provisional liquidation. Their reasons for the application were three fold. These were that the company:

(a) was in default of lodging statutory reports;

(b) was in default of holding statutory meetings – and

(c) failed to commence operations within one year of its registration.

They submitted that it was just and equitable that the company be wound up. They stated that, from the time of its registration, the company did not conduct any business due to failure by its directors to agree on business projects or to fund the same. They averred that it was in the interest of justice that it be wound up and its asset be shared equally to enable the shareholders to deal with their proportions in the asset as they deemed fit and, in the process, realise some profit. They contended that, because of disagreements, the asset remained underdeveloped and, as such, it constituted a threat to members of the public. They attached to the application a letter which they said they received from the Director of Urban Planning Services. They called it Annexure F. The annexure, they said, highlighted complains which members of the public raised relating to the condition of the asset and the inherent dangers which it allegedly posed to the public. The annexure read, in part, as follows;

> "……
>
> A site visit conducted by my officers on 17th March, 2014 confirmed that the property is overgrown with grass and bushes. Complaints from the neighbourhood indicate that muggers have taken advantage of this neglected state of the property to waylay pedestrians using Piers Road at night and rob them of their valuables….."

The Director of Urban Planning Services wrote the letter on 20 March, 2014. He addressed it to the company's director. He addressed it to number 38 G.T. Bain Centre, Avondale Shopping Centre and not 32 Lanark Road, Avondale, Harare which the applicants gave us the company's principal place of business.

The applicants recommended that a Mr Modern Mutumwa of the Saint Consultancy (Private) Limited be appointed the company's provisional liquidator. They attached to the application Annexure G. The annexure constituted Mr Mutumwa's willingness to accept the appointment. They also attached to the same the Master's Report which they called annexure H. The contents of the annexure supported the application and the appointment of Mr Mutumwa as the company's provisional liquidator.

Madangure opposed the application. He did so on behalf of his two minor children and the company. He raised four technical issues after which he addressed the court on the merits. He stated, *in limine*, that:

(i) the applicants approached the court with dirty hands and, as such, they should not be heard;

(ii) they had no *locus standi* to approach the court as, according to him, they were not members of the company

(iii) the manner in which they purchased the shares and acquired transfer of the same and altered the company's CR 14 without his knowledge and consent was *ultra vires* the Articles of Association of the company.

(iv) they did not furnish the court with proof that they paid for the shares.

He submitted, on the merits, that the applicants were not members of the company. He stated that they were not known to him. He said he had never ever met with them to discuss the affairs of the company. He said their intention was to partake in the asset of the company as evidenced by their assertion which was to the effect that they wanted *the company to be wound up and the company assets be shared equally.* He averred that he was more than willing to consider any proposed developments of the company as long as the same would be of benefit to the company. He challenged the contents of annexure F and the circumstances under which the same came to be authored. He said it was not in the best interest of the company that it be placed under provisional liquidation. He submitted that the company's asset was a piece of land which was in a low density suburb. The asset, according to him, appreciated substantial value over the years. It has, he said, increased the share value of the business. He insisted that placing the company under liquidation did not benefit the company or its shareholders as that came with substantial liquidation costs. He moved the court to exercise its discretion in terms of s 208 of the Companies Act and order the director(s) of the company to comply with the requirements of the office of the registrar of companies.

The applicants, it is evident, filed the present application in terms of s 206 (b) (c) and (g) of the Companies Act [*Chapter 24: 03*] ["the Act]. The section makes reference to circumstances in which the court may wind up a company. It reads, in part, as follows:

"206. Circumstances in which company may be wound up by court.

A company may be wound up by the court –

(a) …….
(b) if default is made in lodging the statutory report or in holding the statutory meeting;
(c) if the company does not commence its business within a year from its incorporation or suspends its business for the whole year;
(d) ……
(e) ……
(f) ……
(g) if the court is of the opinion that the company be wound up"

The applicants' assertion was that the company defaulted in lodging statutory reports and/or in holding statutory meetings. Their statement which was to the effect that the company suffered the stated mishap from the time of its incorporation to the date of the application appeared to have been more far-fetched than otherwise. That was so as they came into the company in February, 2014 and not before that date. They could not, therefore, authoritatively state what the company did, or did not do, in the ten – year period which preceded their membership, if any, into the company. Whatever they stated on that aspect of the matter and for the mentioned period of time was, therefore, either inadmissible hearsay and/or opinion evidence. What they could, and can, state with certainty was/is what occurred in the company after they joined it. They could not rely on what Masuku told them and swear to that as having been the true state of affairs of the company prior to February, 2014.

The respondents, it was observed, did not deny that the company defaulted in lodging statutory reports and/or in holding statutory meetings. Their silence in the mentioned regard tended to confirm the applicants' allegations. The simple rule of law is that what is not denied in affidavits must be taken to be admitted. [See *Fawcet Security Operating* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC) and also *DD Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92].

It is on the basis of the foregoing matters, therefore, that the court remains of the view that, whilst the applicants' statement appeared to have been a far-fetched one resting as it did on inadmissible evidence, the assertion seemed to have contained some grain of truth. If it did not, the respondents would have stopped at nothing to rebut it in its entirety.

The applicants' next ground for the application was that the company did not commence its business within one year of its formation or that it suspended its business for one whole year. There was no doubt that the assertion was yet again another assumption which they made

without any substantiation. The respondents stated that the company's only asset was/is the property which, in a large measure, was the *sine qua non* reason for the present application. They did not state the date when the company acquired the property.

The company's Memorandum of Association does, however, assert as one of its objects, the acquisition of properties or assets for the company. Reference is made in this regard to clause 2 as read with sub clauses (d) and (i) of the Memorandum of Association of the company. The clause reads;

> "2. The objects for which the company is established are:-
> (a) - (c) ……
> (d) To purchase or take in exchange or on lease, or to rent, occupy or otherwise acquire any lands or buildings in Zimbabwe or elsewhere,……..
> (e) (e) – (i) ……
> (j) To purchase, take or otherwise acquire, adopt or undertake any part of the business, goodwill, property, assets, liabilities and transactions of any persons or company carrying on any business which this company is authorised to carry on, or possessed of property suitable for the purpose of the company" [emphasis added].

There is no doubt that the company did not remain lying idle from the date of its incorporation to the date of this application. It acquired the property and, in the words of the respondents, it allowed the asset to appreciate in value over the years. The asset which it acquired lies in an upmarket area of Harare. Its appreciation in value, therefore, remains of substantial interest to the company and its shareholders.

The company, it has already been shown, was incorporated in February, 2004. The property was transferred to the company in or about February, 2005. The Deed of Transfer, Annexure D, which the applicants attached to the application constituted clear evidence of the observed matter.

The applicants' statement which was to the effect that the company did not carry out any business activities since its formation was, no doubt, misplaced. It purchased the piece of land and it allowed it to remain in an undeveloped state with a view to having the value of the same appreciate. The value of the land as at the time of acquisition would unnaturally be markedly different from its current value. It increased tenfold or twenty-fold. The aspect of allowing the value of the land to appreciate, as it did over the years, did not fall outside the business activities of the company.

Persons the world over do, more often than not, acquire real rights in land for speculative purposes. They acquire or purchase those rights in the hope of dealing with their acquired asset(s) after it has or they have appreciated in value. That is part of a businessman or businesswoman's activities including legal entities such as the present company.

The just and equitable principle which the applicants employed to move the court to wind up the company depended on their status in the company. They insisted that they were shareholders in the company. They, to the stated extent, attached to the application their share certificates and share transfer documents.

The share certificate and the share transfer document of the first applicant were respectively marked Annexures C1 and D1. Those of the second applicant were marked Annexures C2 and D2 respectively.

An examination of the share transfer documents revealed some startling result. Annexure D1 showed that Masuku's daughter one Nokutendaishe Ellyn Masuku did, on 6 February 2014, transfer her one (1) ordinary share in the company to the first applicant who accepted the transfer on 25 February, 2014. She signed the document as the transferor and he signed the same as the transferee. The name which was printed under her signature was not Nokutendaishe but Nokutenda.

Annexure D2 showed that Masuku's son one Tadiwanashe Lynn Masuku did, on 6 February 2014, transfer his one (1) ordinary share in the company to the second applicant who accepted the transfer on 25 February, 2014. He signed in his capacity as the transferor. The second applicant, curiously, did not sign the same. The first the applicant signed as the transferee.

One was, in the premises, left to wonder if the first and the second applicants were the transferees or only the first applicant was the transferee of both shares. Further, whilst the court may not have the expertise in handwriting, a mere glance of the signature of Nokutenda Ellyn Musuka showed that the signature in question was, in no way, different from that of Tadiwanashe Lynn Masuku. One person appeared to have signed both transfer share documents as the transferor of the shares. He or she signed for, and on behalf of, Emmanuel Enock Masuku.

The court order, Annexure A, which authorised Masuku to dispose of his children's shares in the company stated that:

(i) Nokutendaishe Ellyn Masuku was born on 3 January, 2005 – and

(ii) Tadiwanashe Lynn Musuka was born on 9 January, 2000.

Nokutendaishe and Tadiwanashe were approximately 9 and 14 years of age respectively as at the date of the transfer of the shares. They were minors. They could not, therefore, lawfully transfer their shares to the applicants.

In the ordinary scheme of things, Masuku should have sold his children's shares and transferred the same to the applicants. He should have done so for, and on behalf of, his two minor children. He obtained a court order to achieve that objective. He was, therefore, authorised to sell, and transfer, the shares for and on behalf of, the two children. The children could not. It was, accordingly, extraordinary that the share transfer documents purported to suggest that the children who were, or are, minors sold and transferred the shares and that each of them did so for, and on behalf of, his or her father. Indeed, as has already been indicated, the signature which appears under the word TRANSFEROR in both Annexures D1 and D2 is, to all intents and purposes, that of one and the same person. The court's assumption was or is that it is that of Masuku and not that of any of his two minor children. The observed matter makes the transfer process invalid.

The respondents put into question the authenticity of the above mentioned annexures. They described them as something which was akin to fraudulent conduct by the applicants. They stated that the manner in which the applicants purchased the shares and acquired transfer of the same was suspect. They submitted that the applicants were not members of the company.

The applicants' assertion in rebuttal was that they lawfully purchased the shares and that they paid for the same in full. They referred to Annexures D1 and D 2 as proof of payment of the shares. They, in the mentioned regard, submitted that they paid $1-00 each for the shares. They stated, during submissions, that they made cash payments. They stated, during the mentioned stage of the proceedings, that Masuku did not issue any receipt to either of them.

When it was shown that the applicants could not have spent a total of $2-00 to purchase shares in the company which had an asset the value of which was $350 000-00, they changed and stated that they paid a total of $150 000-00 for the shares. They, on 11 November 2016, filed a notice which tended to show that they paid $100 00-00 for the shares on 3 February 2014 and $50 000-00 on 6 February, 2014. They did not come up with any explanation as to why the

figure of $150 000-00 was not mentioned in their founding, or their answering, affidavit. They did not withdraw the initial figure of $2-00 which they gave in the founding affidavit. They could not, and did not, explain the cause of the variance of the figures as the same appeared in their affidavits as read with the contents of the belated notice which they filed suggesting that they paid $150 00-00 for the shares. They took the court on an uneventful expedition, so to speak. Because they allowed their two statements to remain standing side by side in one and the same matter, they placed the court into a very invidious position. It remained unclear as to what, and what not, to accept of their evidence as contained on the papers. The evidence which they gave did, as it were, contradict itself to a point where nothing of any credence remained in support of their case. It, in the process, destroyed their credibility and, by way of logical consequence, their entire case to a point of no return.

The respondents' assertion which was to the effect that the applicants were not members of the company was, in the court's view, not without merit. The above analysed matters supported the court's conclusion.

The applicants portrayed themselves as a very big fraud. They appeared to be persons who made up their minds to prey upon the respondents' company particularly its only asset. They were, if a comparison may be ventured, like wolves in sheep's clothing. They had and have no interest of the company at heart at all. They, as the respondents stated, wanted to reap where they had not sawn any seed. The fact that they, in the past, unsuccessfully filed an application which was similar to the present one proved their clear intention not to build the company but to plunder the same. Such conduct as they exhibited under case number HC 2075/14 and the present one is reprehensible in the extreme sense of the word. It cannot be condoned let alone accepted.

Having found as the court did, that the applicants are not members of the company, their application cannot stand. They have no *locus standi* to apply to have the company to which they are not members wound up. Section 207 of the Act precludes them from applying as they did. Paragraph (ii) of subs 1 of s 207 of the Act is relevant in the mentioned regard. It reads:

> " Provided that:
>
> (i) ……
>
> (ii) A petition for winding up a company on the ground of default in lodging the statutory report or in holding the statutory meeting shall not be presented by any person except a member, ……" (emphasis added)

The proviso is not discretionary. It is mandatory. It, therefore, should be strictly complied with.

The court observed that the company flouted para (b) of s 206 of the Act. It cannot continue to remain relevant if it fails to address that stated matter. The court will, in the interests of the company and its shareholders, invoke the powers which s 208 of the Act confers upon it and direct the company to observe and comply with the stated paragraph's provisions.

The court has considered all the circumstances of this application. It is satisfied that the applicants did not prove their case on a balance of probabilities. It is, accordingly, ordered as follows:

1. That the application be and is hereby dismissed.
2. That the applicants pay the costs of this application, jointly and severally the one paying the other to be absolved, on a legal practitioner and client scale.
3. That the 1st respondent be and is hereby ordered to comply with paragraph (b) of section 206 of the Companies Act [*Chapter 24:03*] on or before 30 June, 2017.

Zimudzi and Associates, applicant's legal practitioners
Dube-Banda, Nzarayapenga and Partners, respondent's legal practitioners