TAMIRA OVERSEAS SA
versus
OLIVER MASOMERA
and
AQUIRIUM TRADING PRIVATE LIMITED
(*under Judicial Management)*
and
TALEB MAHOMED
and
SANDRA MAGADALENE VAN ROOYEN
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 4, 7, 9, 10 March 2017, 26 April 2017

Urgent Chamber Application

T. Mpofu, Mr N. Chamisa, for the applicant
R. Makonyere, for the 1st respondent
A. Muchadehama, for 3rd and fourth respondents

CHIGUMBA J. This matter came to me via the urgent chamber book, seeking an interim order, that the first respondent be interdicted from carrying out any of the functions of a Judicial Manager as set out in s 306 of the Companies Act, and that the Master of the High Court assume custody of the assets of the second respondent. The final order sought, included, amongst other things, that the first respondent be removed as a Judicial Manager of the second respondent, that Reggie Saruchera be appointed in his place, and take over the management of the second respondent and submit reports in accordance with s303 of the Companies Act [*Chapter 23:03*] (the act), divesting the board of directors of the second respondent (the Company) of the management of its affairs, giving the new Judicial Manager power to raise money on the security

of the company's interests without the consent of the directors, and staying all legal proceedings without leave.

The circumstances giving rise to the application appear more fully in the founding affidavit which was deposed to by an authorized representative of the company, *Nikolai Varenko (Varenko)*. He stated that the Company is incorporated in accordance with the laws of Belize. The applicant is a creditor of the company in the sum of USD$2 835 000-00 excluding interest, the biggest and only approved creditor, to date. The first respondent is the current Judicial Manager of the second respondent company, which is under judicial management. The application for the removal of the first respondent as judicial manager is premised on three grounds;-

1. His appointed was not properly done in terms of the Act-it being done in terms of s 302 as opposed to s305
2. first respondent has not furnished the requisite security to the Master
3. first respondent has failed to exercise his duties as set out in s306 of the Act.

Varenko avers that, the first respondent has failed to;-

(a) Lodge a final judicial management order with the Registrar of Companies
(b) Comply with s 123 of the Act
(c) Keep such accounting records and prepare such annual financial statements as required by the directors of second respondent
(d) Call consistent meetings of the second respondent's creditors or to convene the necessary general meetings
(e) Audit assets properly and has suspended a forensic investigation into the affairs of the Company
(f) Examine the affairs and transactions of the Company

The averment that the first respondent has frustrated the completion of the forensic investigation, despite being bankrolled by the applicant, by blocking the interviewing of a certain director, namely *Taleb Mahomed,* appears at record 9, para 9.2.8. The first respondent was challenged by the investigator for his apparent protection of the third respondent, in a letter, and his alleged conduct questioned by the applicant's legal practitioners in another letter. It is

common cause that the applicant has filed a report to the police, against the third respondent, and two other officials of the second respondent for alleged fraudulent conduct in the running of the affairs of the second respondent. The applicant avers that the first respondent ought to have liquidated the second respondent after he failed to conduct a forensic investigation within the stipulated statutory period of 14 days provide for in terms of s 306m of the Act. The applicant has filed an application for the placement of the second respondent under liquidation in case number HC595-17. The first respondent is accused of exhibiting bias by completely ignoring the applicant and its concerns, leading to the conclusion that he has been compromised to exhibit unprofessional conduct. The applicant avers that the first respondent is incompetent from the manner in which he has carried out his duties as a Judicial Manager. It is common cause that in November 2016 the directors and shareholders of the second respondent demanded that the first respondent resign for reasons of incompetency. It is further common cause that he refused, instead submitting a bill for his services through the Master of the High Court.

The applicant avers that it was suspicious that, a few days after the call for the first respondent's resignation, the third respondent consented to allow him to conduct the affairs of the second respondent for the next six months, but failed to advise the applicant of this decision. Applicant avers that subsequent to this consent, around 28 November 2016, there was illegal gold trading at second respondent's premises. Anomalies appeared in the Master's file, such as the fact that *Marwan Mahomed* had already started illegally trading in gold as far back as 19 September 2016, on behalf of the second respondent, without lawful authority. All correspondence to prove this was deliberately kept from the applicant, the largest creditor of the second respondent. The applicant accuses the 1st and third respondents of entering into an 'unholy alliance', as evidence by the lending of USD$150 000-00, purportedly by both shareholders of the second respondent, to the first respondent, to the further prejudice of the applicant.

In support of its application for an interdict, the applicant avers that, as the largest creditor of the second respondent, it has a right to deal with a person who has the lawful authority to manage and deal with the affairs of the second respondent, not someone who was not lawfully appointed, who has clearly exhibited bias, and, who has abdicated his statutory

obligations in his conduct of the affairs of the second respondent. On urgency, the applicant averred that the matter is inherently urgent, because the actions of the Judicial Manager are not supported by law. It avers that the first respondent's appointment is patently flawed, and that his actions are unlawful, making this court duty bound to stop his illegal conduct, and not condone it. A notice of opposition was filed on behalf of the 1st and second respondent, on 7 March 2017. first respondent deposed to the opposing affidavit in his capacity as the second respondent's Judicial Manager. Certain points *in limine* were taken, such as the lack of authority of the deponent to the founding affidavit, the lack of provision of security for costs, the lack of urgency of the matter (the need to act arose in October 2015 when first respondent was appointed, the certificate of urgency fails to disclose urgency), the fact that the leave of the court was not sought or obtained to proceed against the second respondent, a company under judicial management, in terms of the order of judicial management, the failure to cite interested parties (the Master, shareholders of second respondent, Taleb Mahomed & Sandra van Rooyen, the fact that a similar matter is already pending before the court, and lastly, that there are numerous disputes of fact which are incapable of resolution on these papers.

With regards to the merits of the matter, it was averred on behalf of the 1st and second respondents that; applicant is a foreign company which ought to provide security for costs and which should have done so before instituting these proceedings. There is no provision in the Act for the nature of this application and the relief sought. The applicant's remedy lies in expediting the proceedings under HC565-17 which also seek the removal of the first respondent. The basis of the application is petty and frivolous, that s302 was relied upon instead of s306. Security has been provided to the Master of the High Court. The parties sued each other soon after the placement of the company under judicial management on the question of who the legitimate shareholders of the second respondent were. Up to March 2016 when an arbitral award was granted none of them provided any money for the first respondent to commence operations. A report of the 1st creditors meeting was duly filed. Operations commenced in September 2016 with the assistance of the second respondent's shareholders.

The applicant is preoccupied with fighting *Taleb Mahomed* at the expense of the second respondent. Applicant ought not to have dealt directly with the forensic auditors because that

gave the impression that it was trying to influence the outcome of the investigation. Applicant did not consult or advise the first respondent of the criminal complaints against second and third respondents, nor share the preliminary forensic report with the first respondent. The reasons why the second respondent should not be liquidated are contained in the response to case number HC595-17. *Taleb Mahomed* is assisting to run the affairs of the second respondent and had lodged a claim as a creditor. None of these actions are illegal. A second creditor's meeting will soon be called. The requirements of an interdict have not been met. Applicant has other remedies at its disposal namely the application for liquidation and for the removal of the first respondent. second respondent is capable of being revived. No prejudice will befall the applicant if the status quo prevails until the application for liquidation is determined. Applicant obtained the order for judicial management. All the other subsequent orders were obtained with the consent of the applicant.

The third and fourth respondents filed a notice of opposition on 9 March 2017 in which the opposing affidavit was deposed to by *Taleb Mohamed.* He averred on their behalf that; he is the majority shareholder of the first respondent with 60% of the shares, while fourth respondent holds 40%. Various points *in limine* were taken, such as the need to provide security for costs (the applicant has failed refused and or neglected to settle the taxed bill of costs under HC2020-14 which is attached to the papers, no security for costs has been provided under HC595-17 which is pending hearing), applicant has not sought leave despite the order in HC 2020-17, there is a matter pending before this court in which similar relief is sought, there are numerous disputes of fact, the matter is not urgent (the applicant must seek to have the judicial management order corrected or set aside if it is of the view that it was erroneously obtained or unlawfully obtained in terms of a wrong section of the Act). This application is an abuse of process because it is incorrect that the third respondent has retaken control of the company.

With regards to the merits it was averred that; the applicant is a bogus company whose directors keep changing. The third respondent is potentially the largest creditor of the second respondent and is poised to lodge his claim with the Master. The requirements of an interdict have not been met, second respondent has commenced operations, and it is producing gold and selling it to Fidelity Printers. The money from these sales will be used to pay its creditors. It is

the applicant which sought and moved for the final order for judicial management so any error in the section referred to is attributable to the applicant itself. Steps were taken to assist the first respondent to revive the second respondent after 31 May 2016 when an arbitral award confirmed the correct shareholders of the second applicant. The first respondent only accepted the proposals to revive the second respondent around September 2016. Operations commenced in December 2016 after funds had been availed. The first respondent produced a first report to creditors.

After the arbitral award applicant generally conducted itself in a malicious way as evidenced by the police report for fraud. All of first respondent's actions are lawful. The applicant is aggrieved because it does not want the second respondent to be revived. The third respondent invested USD$150 000-00 towards the revival of the second applicant. The applicant's conduct of placing the second respondent under provisional liquidation under HC2020-14 caused huge losses to the second and third respondents. The applicant was laboring under the false impression that it was the largest shareholder in the second respondent. The requirements of an interdict have not been met. The appointment of the first respondent was lawful, therefore the basis of urgency falls away. The applicant should pay costs on a higher scale for abuse of court process.

The Master of the High Court, in its capacity as the fifth respondent in this matter filed its report on 9 March 2017, pursuant to the court's instruction on 8 March 2017. In the report, the Master stipulates that the removal of a Judicial Manager is provided for in terms of s 273 (1) (b), as read with s 313 of the Act. The grounds on which such removal may be premised include; misconduct, failure to satisfy a lawful demand by the Master, failure to perform any of the duties imposed by the Act, any other good causes. In dealing with each of the grounds on which this application is premised, it was the master's considered opinion that the first respondent was lawfully appointed under case number 2020-14, and that this order being extant, remained valid. It was denied that the first respondent had failed to exercise any of his statutory duties, firstly because no such complaints have been referred to the Master, and, secondly because the requisite meetings have been convened in terms of the Act, and the requisite returns filed in terms of the Act.

A meeting of creditors and an annual general meeting are not yet due in terms of the Act, when regard is had to the first applicant's date of appointment, so it cannot be correct that the applicant has failed in this regard. It is not correct that the third respondent has taken over the control of the second respondent, because he reports to the first respondent. Finally, the Master opined that one year of judicial management is not a long enough period for the second respondent to turn its fortunes around and to pay the applicant and other creditors. The Master recommended that the status quo be maintained. At the hearing of the matter, the respondents persisted in their preliminary points, which they had raised. We will deal with the question of urgency first. It has been held that;

> "The main question faced by a Judge presented with an urgent application is to decide whether or not to give priority to the application by dealing with it on an urgent basis. In arriving at a decision on this issue he or she is called upon to exercise discretion. Such discretion must be exercised judicially taking into account the factors argued in favor of and against an urgent hearing…if on the perusal of the papers, the Judge comes to the conclusion that the matter is urgent…he or she conducts a hearing and gives such order as he thinks fit. But if the conclusion is reached that the matter is not urgent, he or she must refuse to hear the application and remove it from the roll, in which event the matter is referred for hearing on the ordinary roll of court applications".

See *Madza & Ors* v *Reformed Church in Zimbabwe*[1], *Ashanti Goldfields t/a Freda Rebecca Mine* v *Bold Pak Private Limited & Anor* HH 109-04, *General Transport $ Engineering Private Limited & Ors* v *Zimbabwe Banking Corporation Private Limited* 1998 (1) ZLR 301, *Pickering* v *Zimbabwe News* 1980 Ltd 1991 (1) ZLR71, *Econet Wireless Private Limited* v *Trustco Mobile (Proprietary) Ltd & Anor Telecel* v *Portraz & Ors* HH446-15, *National Prosecuting Authority* v *Busangabanye & Anor* HH 427-15,

It has also been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, he matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See [2] .

This court has clearly stated that:

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[1] SC71-14,

[2] Kuvarega V Registrar General and Anor 1998 (1) ZLR 189

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [3] And[4], [5]

In my view, which I have previously stated, in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy.

After carefully considering the submissions made on behalf of the applicant and the respondents, and the Master's report, the inescapable conclusion is that the need to act arose in 2015 when the final judicial management order was granted (on 22 October 2015). It is the applicant itself which moved for this order to be granted. To come before us two years later, on an urgent basis, to seek to be heard ahead of other litigants, using its own error as a cause of action, is disingenuous to say the least .If the basis of the application before us is premised on the averment that this order was issued in terms of the wrong section of the Act, making it patently unlawful or incompetent, then surely this fact has existed since October 2015. We accept the

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[3] Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002"

[4] Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H

[5] Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors V Solusi University HB 53-07

submission made on behalf of the respondents that the applicant has an alternative remedy of appealing against this order in order to have it set aside, in the normal course of things. This remedy has also been at the applicant's disposal since October 2015.

No submission or evidence of irreparable prejudice was placed before the court. There is no prima facie evidence that the applicant treated the matter as urgent, nor is there a sensible, rational explanation for the two year delay in taking action. Most damning of all, is the application for final liquidation and removal of the first respondent which is pending before this court. It constitutes a satisfactory alternative remedy which is adequate. It disqualifies the applicant from jumping the queue. It tells the court that there is no need to drop everything and hear the applicants because they have sought and will be given assistance by this same court, in different proceedings. There is nothing in the founding affidavit which gives rise to the inference that the applicant is in need of the court's immediate protection or assistance. This matter is simply not urgent. Having found that the matter is not urgent, we will not consider any of the other points raised because this would be tantamount to 'hearing' the matter.

In the result, it be and is hereby ordered that:

1. This matter is not urgent. It is removed from the urgent chamber roll. It is referred to the ordinary roll of court applications.
2. The costs of this application shall be costs in the cause.

Titan Law Chambers, applicant's legal practitioners
S. Makonyere Legal Practitioners, first respondent's legal practitioners
Mbidzo, Muchadehama & Makoni, 3rd & fourth respondent's legal practitioners