

STEPHEN HOVE
versus
TRUST BANKING CORPORATION LIMITED
IN LIQUIDATION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 6 March, 2018 and 8 May, 2018

Opposed application

P Kawande, for the applicant
Ms M Mafo, for the respondent

MANGOTA J: The respondent is a financial institution. It is under liquidation. Prior to its liquidation, it advanced loans to two companies. These comprised Matfield Operations (Pvt) Ltd and Shareview Enterprises (Pvt) Ltd.

The applicant is a businessman. He secured the two companies' loans. He, in the mentioned regard, registered a mortgage bond over his property which is known as the remainder of Lot 3 of subdivision 6 of Quinington, Borrowdale Estate, Harare ("the property").

The companies failed to pay off their respective debts. The respondent successfully sued the applicant and others under HC 3254/12. Judgment was entered in its favour in the sum of \$21 336.01 together with interest thereon at the rate of 10% above the bank overdraft rate with effect from 17 February, 2012 to the date of full payment. It also successfully sued the applicant and others under HC 8650/12 wherein judgment was entered in its favour in the sum of \$206 253.93 together with interest at 45% per annum with effect from 10 April, 2013 to the date of full payment.

The applicant's allegations are that he made every effort to satisfy the judgment debts which had been entered against him and others. He states that his aim and objective were to achieve his intended goal so that he would have the title deed which relates to his property released to him. He alleges that, whilst he was engaged in the mentioned process, the respondent was placed under liquidation. He accuses the respondent of having acted

negligently to his prejudice. He makes a narration of the steps which he says he took to encourage the respondent to furnish him with its requirements for the cancellation of the mortgage bond which was registered over his property. He avers that, because of the respondent's negligent breach of duty as well as its breach of the compromise agreement which he and it concluded, he sustained damages and pure economic loss in the sum of \$569 881.61. He insists that he wants to sue, and recover the same from, the respondent. He, therefore, filed this application for leave to sue the respondent.

The respondent opposed the application. It raised the defence of *res judicata* as its first preliminary matter. Its second *in limine* issue centres on the draft summons which the applicant intends to issue out of this court if leave to sue the respondent is granted to him. It states that the citation of the deponent to its opposing affidavit in his personal name renders the draft summons fatally defective. It insists that the deponent should have been cited, in the draft summons, in his capacity as the liquidator of the respondent. It states, on the merits, that it furnished the applicant with the bond cancellation requirements. It submits that the damages which he seeks to claim from it are both speculative and baseless. It, therefore, moved the court to dismiss the application with costs.

The respondent abandoned its first preliminary matter during submissions. Its argument on the second *in limine* issue was without merit. It related to a draft summons which the applicant had not yet issued. The applicant was not and is not tied to the draft summons. The fact that it is in a draft form means that he can, if leave to sue is granted, alter it to avoid anything which would render his intended suit stillborn on technical grounds. It was, indeed, an exercise in futility for the respondent to have argued on a matter which was not before the court. The draft summons is simply what its name suggests. It is just a draft and no more than that. It was, and still is, out of court. It, therefore, remains within the domain of the applicant to issue it as it appears or in any way which he deems fit. He is not held to the contents of the draft summons which he attached to this application. It was for the mentioned reason, if for no other, that I refused to entertain the respondent's second preliminary matter. It dealt with an issue which was not before me. It invited me to speculate on how the draft summons should have appeared which is not my business. The matter of the applicant's intended suit is for another day and before another court. The *in limine* issue was, therefore, dismissed on the basis of the above-stated grounds.

The disposal of the respondent's two *in limine* issues led the court to consider the merits of the application. The applicant states, and correctly so, that his application is in terms of r

226 (1) (a) of the High Court Rules, 1971. He also states, correctly so as well, that the application falls under s 213 (a) of the Companies Act, [*Chapter 24:03*].

Rule 226 (1) (a) refers to all applications which the applicant makes for whatever purpose in terms of the rules of court or any other law. Such applications are, as *in casu*, made in writing to the court and on notice to all interested parties. The applicant complied with the rule to the letter and spirit. He applied in writing. He notified the respondent, which is an interested party, of the application.

Section 213 (a) of the Companies Act [*Chapter 24:03*] [“the Act”] under which the application was filed is relevant. It prohibits persons from suing a company which the court is winding up. It directs a person who wants to sue such a company to seek and obtain leave of the court to do so. It reads:

“In a winding up by the court-

- (a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court”[emphasis added].

It follows, from the foregoing, that a company which is under liquidation shall not, as a general rule, be sued. The reasons for the stated principle are obvious. Chief amongst them is that a creditor is prohibited from taking an unfair advantage of having his claim satisfied to the exclusion of other creditors of the company. The principle is fair, simple and straightforward. Its aim and object are to benefit all creditors of the company which the court is winding up.

A person who seeks leave to sue falls into the exception of the principle. He must persuade the court to exercise the discretion which is stated in the section in his favour. He should advance clear and cogent reasons which justify the granting of the application for leave to sue. He must show a clearly defined cause of action upon which he bases his intention to sue. He should, in other words, satisfy the court that a refusal of the application would visit him with serious injustice.

The converse of the above stated matter holds true. An application which is frivolous and vexatious will not see the light of day. Equally, an application which does not have a clearly defined cause of action cannot succeed. The court will not, in other words, regard a matter which is vague and embarrassing to enjoy the privilege of the exception which is stated in s 213 (a) of the Act. It will not do so because litigation is serious business. It is not anchored upon chance. It rests upon firm principles which define an applicant’s or a plaintiff’s

unquestionable right to sue. Where such is non-existent, the contemplated suit is as good as no suit at all.

The applicant cited a number of case authorities which, in his view, support his application. These comprised *Swaby v Lift Capital Partners Pty Ltd* [2009] FCA 749; *Cassegrain v Gerard Cassegrain & Co Pty Ltd [in liquidation]* (2012) NSWCA 435 and *Ridgeal Artist Management Pty Ltd [in liquidation]* (2015) NSWCA 936.

Whilst the cited cases remained of persuasive value on account of the fact that they do not originate from this jurisdiction, a common thread which runs through them is discernable. The thread offers a very good guide to the determination of this application. Two of the three cited cases stressed, among other matters, the following as issues which the court dealing with an application of the present nature should pay due regard to:

- (i) the amount and seriousness of the claim;
- (ii) whether the claim has arguable merit- and
- (iii) whether the proceedings will result in prejudice to the creditors.

The applicant intends to sue and claim from the respondent damages in the sum of \$569 881.61. That, on the face of it, appears to be a fairly huge claim which justifies the suit. His computation of the alleged damages, however, remains unclear. The figure appears to have been plucked from thin air, as it were. It is mentioned nowhere else except in para 18 of the founding affidavit.

I am not an ardent student of mathematics. However, even with my rudimentary understanding of the subject, I failed to see how the stated sum which he wants to claim was arrived at. He should have added more flesh to the bones which he placed before me to enable me to have an idea of where he was coming from as well as where he was leading to.

The applicant made a number of statements which he hoped would convince me of the effort he made to either pay off the debts he owed to the respondent or to have the latter release the title deed of his house to him. Unfortunately for him, however, those statements remained in the realms of allegations which he did not substantiate. He, for the avoidance of doubt, stated as follows:

- “(i) the respondent advised me that the amount payable to it in satisfaction of the judgments awarded in its favour was \$270,000 together with interest thereon at the rate of 38.6% per annum if the said amount was not paid by 30 November, 2013 (para 7 p 5 of the founding affidavit).

- (ii) I secured a mortgage loan from CBZ as a way of meeting my guarantee commitment (para 8 p 5).
- (iii) on 3 December 2015 I accepted the respondent's cancellation conditions and tendered payment of the sum of \$270 000 together with interest thereon at the rate of 38.6% per annum (para 9 p 5).
- (iv) I secured a written offer from a purchaser who wanted to purchase his property at \$1100 000 (para 14 p 6).”

The applicant produced no evidence which showed that he entered into a compromise agreement with the respondent. Issue (i) *supra* is, therefore, without any substantiation. It is, if a comparison may be favoured, left to conjecture. He did not, as well, show if he secured a mortgage loan from CBZ to meet his guarantee commitment to the respondent as he alleged. His averments which were to the effect that he accepted the respondent's cancellation conditions and tendered to pay to it \$270 000 is just but a statement. There is no evidence that he acted as he alleges. He claims to have secured a written offer from a person who wanted to purchase his property for \$1100 000. He did not attach the alleged written offer. Nor did he explain why such was not made part of his application.

It is pertinent for the applicant to realise that the attachment of documentary evidence to each of the abovementioned matters would have rendered his statements more credible than they currently appear. The court would have observed that the respondent and him entered into a compromise agreement from which the former could not depart; that he secured a mortgage bond from CBZ as a way of meeting his guarantee commitment to the respondent; that he accepted the respondent's cancellation conditions and tendered payment of \$270 000 to the respondent and his efforts to sell his property for \$1100 000 did not materialise out of no fault of his own. He would, in other words, have portrayed the respondent as a party which frustrated all his effort to secure the return of his title deed to him. He made very important allegations which he did not substantiate. He, in the process, did more harm to his application than good.

Paragraph 17 of the applicant's founding affidavit contains falsehoods more than it reflects the correct position of the matter. He alleges that the respondent did not furnish him with the bond cancellation requirements in respect of the property from 14 January 2014 to October, 2015.

Annexures A and B which the respondent attached to its opposing affidavit show respectively that the applicant was provided with the bond cancellation requirements on 17 February 2015 and also on 27 March, 2015. His averments which are to the effect that the

respondent could not cancel the bond without the consent of the cessionary (i.e Stroll Investments (Pvt) Ltd) is completely devoid of merit. It was not for him to have entertained that view. That was not his business. He was not privy to the agreement of cession which the respondent and Stroll Investment (Pvt) Ltd had concluded between them. He should simply have paid what the respondent demanded of him after which he would have insisted on the cancellation of the mortgage bond. The respondent, in fact, stated in para 4 of Annexure B that the issue of the cession was not the applicant's business. It said it would settle that matter with the cessionary and secured the cancellation of the ceded mortgage bond.

The applicant told a lie when he stated that the respondent did not furnish him with the bond cancellation requirements from January 2014 to October, 2015. He was furnished with such. Reference is made in this regard to Annexures A and B (*supra*). He, for reasons known to himself, did not take advantage of the same.

It is trite that if a litigant gives false evidence, his story will be discarded and adverse inference may be drawn as if he has not given evidence at all. (See *Leather Trade Zimbabwe (Pvt) Ltd v Smith*, HH 131/03). People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court (See *Deputy Sheriff, Harare v Mahleza & Anor*, 1997 (2) ZLR 425). It is fundamental to court procedures in this country and in all civilised countries that standards of faithfulness and honesty should be observed by parties who seek relief. If the court were not to enforce that standard, it would be washing its hands of its responsibility. (See *Underhay v Underhay*, 1977 (4) SA 23 (W) 24 E-F).

The above cited case authorities stress the need with which parties who file suits with the court are enjoined to conduct themselves. They are, at all material times, urged to tell the truth and nothing but the whole truth. Where they choose to lie, as the applicant *in casu* did, the court will find it difficult, if not impossible, to believe them.

The compromise agreement which the applicant says he concluded with the respondent is more of a conjecture than it is a reality. If such was reached and if it stated, as the applicant said it did, that his indebtedness to the respondent was \$270 000 together with interest thereon at 38.6% per annum, the respondent would not have requested him to pay \$310 000 and the Sheriff's fees of \$10 324 as the condition for the cancellation of the mortgage bond. It would not have been allowed to go outside the compromise agreement. It would have been perpetually tied to the same.

It is common cause that the provisional order of liquidation was set aside during the period which stretches from 28 March to October, 2017. The applicant did not ever make mention of this matter in his founding affidavit. He, however and to his credit, admitted the same when it was raised. That he did not mention it is not the issue. The issue is that he did not take advantage of the window period which had been opened to him. He should have sued the respondent during the eight months that the provisional order was not in force.

I remain satisfied that, if the applicant's claim was as valid as he would have the court believe, he would have sued the respondent then. Nothing prohibited him from doing so. The fact that he did not shows nothing other than the suggestion that he was trying his luck when he applied as he did.

The respondent missed the point when it sought to advance the argument that the applicant was its creditor. Case authorities which it cited in its Heads are relevant to the observed matter. These comprise *Zimbabwe Allied Bank Ltd v Dengu C & Nyabanda* HH 583/15; *Walker v Sylret* N O, 1911 AD 141 and *International Shipping Co (Pty) v Affinity (Pty) Ltd and Anor*, 1983 (1) SA 79.

The applicant was, and is, the respondent's debtor. He is not its creditor as the respondent suggested.

The respondent's argument was, no doubt misplaced. However, that notwithstanding, it is not for the respondent to disprove the averments of the applicant. The applicant must prove his case on a balance of probabilities. The mis-statements of the respondent would only hold water where the applicant's case remains an unassailable one.

The applicant failed to establish a cause of action against the respondent. He made important averments which he did not substantiate. He told a lie in some portion of his papers. He, in short, did not prove his case on a balance of probabilities. His application cannot stand. It is, accordingly, dismissed with costs.

Kawonde Legal Services, applicant's legal practitioners
Scalen & Holderness legal practitioners, respondent's legal practitioners