(1) JAMES MAKAMBA **HC734/19**

versus

KESTREL CORPORATION (PVT) LTD

And

GEORGE MANYERE

And

ECSPONENT ZIMBABWE (PVT) LTD

(2) GEORGE MANYERE **HC 1671/19**

And

ECSOPNENT ZIMBABWE (PVT) LTD

Versus

KETREL CORPORATION (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 26 APRIL 2019 & 28 MAY 2020

Urgent Chamber Application

J. Tshuma for the applicant
Advocate K. I. Phulu for the 2nd and 3rd respondents

TAKUVA J: Applicant has approached this court on a certificate of urgency seeking the following relief:

"Interim relief sought

That pending confirmation of this order on the return day, the following relief is granted:

1. The provisional order granted in case number HC 167/19 on 19 March 2019 is hereby discharged.

2. Alternatively, the return day in case number HC 167/19 for confirmation or discharge of the provisional order shall be on 17 April 2019 and pending the return day, the provisional judicial manager shall not encumber, transfer or alienate in any way whatsoever any assets of the 1st respondent.
3. The second and third respondents shall pay any costs and fees due to the provisional judicial manager, Winsley Militala jointly and severally the one paying the other to be absolved.
4. The second and third respondents shall pay costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved."

Terms of final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:-

1. The provisional order granted in case number HC 167/19 on 19 March 2019 is hereby discharged.
2. The second and third respondents shall pay any costs and fees due to the provisional judicial manager, Winsley Militala, jointly and severally the one paying the other to be absolved.
3. The second and third respondents shall pay costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved.
4. The 1st respondent shall pay the costs of this application on a legal practitioner and client scale."

I heard the application on 26 April 2019 and delivered judgment on 16 May 2019. In that judgment I granted the following order:

"1. The return day in case number HC 167/19 for confirmation or discharge of the provisional order shall be on 23 May 2019.
2. Pending the return day, the provisional judicial manager shall not encumber, transfer or alienate in any way whatsoever any assets of the 1st respondent.
3. Costs shall be costs in the cause."

Prior to the hearing on 21 May 2019, the legal practitioner for the applicant in case number 1 requested the Registrar to have the two matters HC 724/19 and HC 167/19 heard on the same time before the same judge since they are related and involve the same parties. It was also pointed out that this would be necessary in order to avoid potentially having inconsistent judgments being issued by the court on the same dispute. I granted the order by consent and both parties filed their heads of argument.

Background

On 31 January 2019 under cover of case number HC 167/19 the second and third respondents made an *ex parte* application for placement of the 1st respondent under judicial management. The provisional order was granted on 19 March 2019 and it fixed 23 May 2019 as the return day for confirmation or discharge of the provisional order. Upon becoming aware of the order the applicant herein filed an urgent chamber application for the discharge of the provisional order on 3 April 2019. Alternatively, the applicant sought to anticipate the return day. It simultaneously filed its notice of opposition in case number HC 167/19. I heard the urgent chamber application and subsequently granted the alternative relief sought on 16 May 2019. I then set the 23 May 2019 as the date for hearing the matter.

Under cover of case number HC 167/19 the 1st applicant George Manyere (Manyere) in this case sought an *ex parte* order of provisional judicial management of the respondent Kestrel Corporation (Pvt) Ltd. Manyere, on the face of the application alleged the grounds to be;

> (1) By reason of mismanagement, reckless and fraud the respondent is unable to pay its debts or is and has not become or is prevented from becoming a successful concern."

In his founding affidavit Manyere claimed that the application is made in terms of section 291 and 300 of the Companies Act in that Kestrel is indebted to the applicants and is unable to fulfill its obligations owing to its "gross mismanagement bordering on fraudulent conduct." Manyere further claimed that the placement of Kestrel under the control of a 3rd party will allow for the "expeditions resolution of issues affecting it and its creditors."

Further, in paragraph 8 of his founding affidavit Manyere stated the basis of the application to be the following;

1. Respondent (Kestrel) was paid the sum of US$2 750 000,00 (two million seven hundred and fifty thousand United States dollars) as a deposit for the purchase of 690 000 ordinary shares in Empowerment Corporation (Pvt) Ltd.
2. The background leading to Kestrel's indebtedness is set out on the Extraordinary General Minutes of E C dated 9th of February 2017 held in South Africa.

3. Consequent to the acceptance of the deposit, the parties signed two agreements of sale for the purchase of 69% of Kestrel's shaes in E.C. The conditions precedent in both agreements have been fulfilled.
4. Makamba has caused Kestrel to illegally sell a house in a transaction that has caused prejudice to Manyere. He has also externalized through violation of the country's exchange control regulations, hundreds of thousands of United States dollars.
5. There are numerous violations of the Income tax Act and related legislation by Kestrel. These transactions relate to Kestrel's dealings with E.C. and Telecel Zimbabwe (Pvt) Ltd.
6. Makamba through Kestrel has failed to honour certain debts in South Africa leading to public auctioning of Makamba's assets in that country.
7. Kestrel must be placed under provisional judicial management so that its assets particularly the shares in Empowerment Corporation are protected from other illegal actions occasioned by Makamba's mismanagement of Kestrel to the prejudice of Manyere.

James Makamba filed a notice of opposition under case number HC 167/19 in his capacity as the Managing Director and Chairman of Kestrel. He raised two points *in limine* which are interwoven or enmeshed with the merits. To demonstrate this point I will summarise them hereunder. The 1st point *in limine* is that the applicants have no *locus standi* to institute this application in that they are not the creditors of the respondent. The second point *in limine* is that the application does not satisfy the legal requirements for the respondent to be placed under judicial management in that it is not alleged by the applicants that Kestrel owes applicants a certain sum of money. Finally, it was contented that Kestrel is not a trading company. Therefore, there is nothing that the judicial manager will do or has to do which will benefit the company. The broad issue for consideration is whether or not placing the respondent (Kestrel) under judicial management is in the interests of all members and creditors. As regards *locus standi* the starting point is section 299 of the Companies Act (Chapter 24:03) (the Act). It provides;

"299 Circumstances in which provisional judicial management order maybe obtained

1. Subject to section three hundred, the court may –
   (a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order; or
2. Before an application referred to in paragraph (a) of subsection (1) is filed with the court, a copy of the application including supporting affidavits and other documents, shall be lodged with the Master who may report to the court on any circumstances which appear to him to justify the court in postponing or dismissing the application and in such event the Master shall transmit a copy of this report to the applicant."

Those who may apply for an order are mentioned in section 207 which states;

"An application to the court for the winding up of a company shall be by petition presented, subject to this section by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties together or separately or in case falling within subsection (2) of section one hundred and sixty-two, by the Minister accompanied, save in the case of a petition by the Minister by a certificate of the Master, Assistant Master or a Magistrate that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator …"

The clear meaning of the above provision is that for one to have *locus standi* to apply for judicial management, he or she must have been the company itself, a creditor, prospective creditor or contributory. Manyere and the 3rd respondent (his company) allege that they are creditors of Kestrel (1st respondent) and are accordingly entitled to bring these proceedings. The basis of this status is a loan advanced to Kestrel by a company called Brainworks Capital Management (Pvt) Ltd (Brainworks). That the original sum advanced to Kestrel was paid by Brainworks is common cause. Manyere alleges that the benefit of this loan was assigned to him by Brainworks and the sum was for shares. However, clause 8.2 of the loan agreement between Kestrel and Brainworks provides that, "no party may assign, hold in trust or otherwise transfer any rights or benefits under this agreement or any document entered into pursuant to this agreement without the prior written consent of the other party."

While both applicants concede that the origin of their indebtedness is the 'assignment', they have not said anything about Kestrel's consent to the assignment. They have not produced any proof of the existence of Kestrel's prior written consent.

The other ground upon which Manyere claims to be a creditor is that he is owed delivery of shares in terms of a share purchase agreement. See paragraph 8.4 and 9.1 of his founding affidavit. However, the agreement lapsed by virtue of non-fulfillment of the conditions precedent as outlined in paragraph 10 of Makamba's opposing affidavit in HC 167/19. Manyere and his company have not provided proof of payment of the sum of US4 500 000,00 owed to ABSA Bank (Pvt) Ltd by Makamba. This was a condition precedent as shown in clause 2.1.2 of the agreement on page 50 of HC 167/19. In any event if their agreement are still valid and subsisting as alleged, the applicants should have simply approached the courts to enforce them instead of applying *ex parte* for judicial management. It appears to me that the assertion that the share purchase agreement lapsed for want of fulfillment of conditions precedent has not been rebutted by Manyere and the 3rd respondent.

Manyere's reliance on Annexure "D" to his *ex parte* application as evidence that he is a creditor is in my view unhelpful as it is irrelevant in this regard. His further reliance on Annexure 'E' to the urgent chamber application (the share purchase agreement) does not take his case any further because that agreement lapsed on account of conditions precedent not having been fulfilled. In any event, annexure "E" does not have the prior written consent contemplated in the agreement between Kestrel and Brainworks. What should be noted is that it is the validity of a cession agreement between 2nd and 3rd respondents that is in dispute. That there are share purchase agreements between the parties does not prove anything material to the issue before me.

Accordingly, I find that it has not been established that 2nd and 3rd respondents are creditors, prospective creditors or contributors as required by the Companies Act. In the circumstances they are not Kestrel's creditors. For this reason, they have no *locus standi in judicio* to mount this application.

Assuming I am wrong, I proceed to examine the nature and purpose of judicial management with a view to ascertain whether or not the requirements of the Companies Act have been met *in casu*.

Section 300 thereof provides that:

> "300. The court may grant a provisional judicial management order in respect of a company –
> (a) on an application referred to in paragraph (a) of subsection (1) of section two hundred and ninety-nine, if it appears to the court -
>
> (i) that by reason of mismanagement or for any other reason the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and
>
> (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
>
> (iii) that it would be just and equitable to do so."

> "Tett & Chadwick Rhodesian Company Law p172 states that, "The power to grant judicial management is a creature of statute and is limited to the circumstances laid down in the relevant provisions. As might be expected, it is confined to situations where a company is unable to pay its debts or that by reason of its mismanagement or of its probable inability to meet its obligations or become a successful concern…"

A analysis of what an applicant must show in order to meet the requirements of the Act was set out in *International Capital Corporation (Pvt) Ltd* v *Clairson (Pt) Ltd* 2002 (1) ZLR 565 (H). The court said, "The company must be unable in fact to pay its debts or it must be likely that it will be unable in fact to pay them. Thirdly, there must be a reasonable probability that the company will become a successful concern".

In casu, Manyere's allegations that the *ex parte* application has been precipitated by Kestrel being "unable to fulfill its obligations owing to gross mismanagement and theft", and

that there are valid share purchase agreements, have not been substantiated in that the claim for shares is disputed on the basis that the sale agreement lapsed. Under HC 3342/18, Kestrel specifically denies that it owes Manyere the sum of US$2 750 000,00. This is the amount that forms the dispute in this application. If Manyere insists that he is lawfully entitled to the shares, then his relief lies in a claim for specific performance against Kestrel. On the basis of the above, I find that there is no debt that Kestrel failed to pay.

I find also that applying for judicial management *in casu* is incompetent and improper in that the alleged debt is disputed by the target company under HC 3342/18, a matter that is pending. In my view, Manyere and the 2nd respondent want to use judicial management as a mechanism to compel specific performance by Kestrel. On the authorities in our jurisdiction, judicial management is available for debts which are admitted and which the company is demonstrably unable to pay.

The court in *Tobacco Auctions Ltd* v *A W Hamilton (Pvt) Ltd* 1966 RLR, 190 at p 193 stated some of the considerations taken into account including whether a company should be placed under judicial management as follows;

> "In my respectful view, the fact that a company is a private company with no more than two or three members or even with few issued issues is not in itself sufficient reason for holding that section 265 does not apply to it or is not an appropriate form of relief. The extent and scope of the business activities of a company, its assets and liability and the nature of its difficulties are all relevant factors in deciding whether s265 is applicable. The fact that a company only has a few members is only a factor to be taken into account together with all other relevant facts in deciding whether it should be pertinent under judicial management."

In the present matter, Kestrel has no liabilities save for the disputed claims of Manyere which are the subject of litigation in the Harare High Court. It is as also trite that the judicial manager's aim is to restore the company to being a successful concern. *In casu*, this is unnecessary in that Kestrel is a successful concern as it has not been shown that it is a company in distress.

Further, the requirements in s300 of the Act, which are cumulative, must all be satisfied for an application like the one *in casu* to be successful – see *International Capital Corp (Pvt) Ltd (supra)* where it was held that, section 300 (a) of the Companies Act sets out criteria, all of which must be satisfied before a court may make an order of judicial management – see *Manata* v *M M De Kock & Sons Ltd* 2000 (1) ZLR 543 (S) at 544A".

In casu, the 1st requirement in s300 has not been met in that it has not been shown that Kestrel is unable to pay its debts which debts are due and owing. Can it be said that Kestrel is "deemed unable to pay its debts?" The answer is to be found in s205 of the Act which provides;

> "A company shall be deemed to be unable to pay its debts –
> (a) if a creditor, by cession or otherwise to which the company is indebted in a sum exceeding one hundred dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
> (b) if the execution or other process issued on a judgment, decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or messenger or with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so or
> (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The *ex parte* application does not even attempt to satisfy the second requirement set out in s300 in that it does not show that a judicial manager will enable the company to pay its debts. The requirement presupposes that there is a debt which his due and owing. *In casu* the claim for shares is disputed. As regards the 3rd requirement, the application does not in my view allege, let alone show that it would be just and equitable to place Kestrel under judicial management. The intention is that the justice and equity is to be determined with reference to the right and interests of the members and creditors in all the circumstances of the case. The overriding consideration is that judicial management should be instituted where it is shown that it is in the interests of all members and creditors – *Tobacco Auction Ltd* v *A. W. Hamilton (Pvt) Ltd* 1966 RLR 170 (G).

It has not been shown how the placement of Kestrel under judicial management would be in the interests of creditors and members. This requirement has also not been met. In all the

circumstances, I am satisfied that the provisional order for judicial management should be dismissed.

As regards costs it is trite that depending on the circumstances of the case. The court may make adverse or punitive orders as a seal of its disapproval of *mala fides* or dishonesty on the part of litigants. In *Ellingbarn Trading (Pvt) ltd* v *Assistant Master* 2013 (1) ZLR 332 the court stated the duty of the parties that;

> "Utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court so much so that if an order has been made upon an *ex parte* application and it appears that the material facts have been kept back, whether willfully and *mala fide* or negligently which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set this order aside with costs on the ground of non – disclosure …"

Ndou J in *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) 555D stated that;

> "An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all material facts known to him or her … This court has a discretion even if the non-disclosure is material to grant or dismiss the application; see *Venter* v *van Graan* 1929 TPD ;
> "The courts should in my view, discharge urgent applications, whether *ex parte* or not which are characterised by material non-disclosures, *mala fides* or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case, the applicants attempted to mislead the court by not only withholding information but by also making untruthful statements in the founding affidavit. The applicant's nondisclosure relates to the question of urgency."

In casu, Manyere did not disclose certain material facts which were within his knowledge at the time that the *ex parte* application was filed. Had the court been aware of these facts, it might not have granted the *ex parte* application. The undisclosed facts are as follows;

1. the pending and contested litigation between the parties in HC 3342/18 pertaining to the sum of $2 750 000,00 which forms the basis of this application,
2. the negotiation between the parties pertaining to the settlement of that claim, which negotiations involve "a sale of shares" transaction.

In my view it is pretty obvious that Manyere was aware of these material facts at the time he filed the *ex parte* application under HC 167/19. Quite clearly, the intention was to hoodwink the court into granting the order as prayed. The court was in fact hoodwinked in granting the order forcing the applicant not only to oppose the confirmation of the order but also to file an urgent chamber application for stay of execution of the order granted *ex parte* pending its confirmation or discharge. The applicant was in the process put out of pocket unnecessarily.

In the circumstances, it is ordered that;

1. The provisional order granted in case number HC 167/19 on 19 March 2019 is hereby discharged.
2. The 2nd and 3rd respondents shall pay any costs and fees due to the provisional judicial manager, Winsley Militala, jointly and severally the one paying the other to be absolved.
3. The second and third respondents shall pay costs of suit on a legal practitioner and client scale jointly and severally the one paying the other to be absolved.

Messrs Webb, Low & Barry incorporating Ben Baron & Partners, applicant's legal practitioners
Mutamangira & Associates, 2nd and 3rd respondents' legal practitioners