PHIBION GWATIDZO
versus
FIRST TRANSFER SECRETARIES (PRIVATE) LIMITED
and
MAST STOCKBROKERS
and
SECURITIES COMMISSION OF ZIMBABWE
and
THE MASTER OF THE HIGH COURT NO

IN THE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 14 August 2013

L.Madhuku, for the applicant
D. Ochieng & Ms *Madenga*, for the 3rd respondent

URGENT CHAMBER APPLICATION

MAKONI J: The applicant approached this court, on a certificate of urgency seeking an order in the following terms.

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the Third respondent's directive to first and second respondents barring them from selling and or registering the shares of Renaissance Securities (pvt) Limited (in liquidation) be and is hereby declared unlawful, void and of no force.
2. That the third respondent shall pay the costs of this application on the case of legal practitioner and own client.

SERVICE OF THE PROVISIONAL ORDER.

This provisional order shall be served on the respondents or their legal practitioners by applicant's legal practitioners.

The brief background is that the applicant is a liquidator of Renaissance Securities (pvt) limited (in liquidation), (the company). In the process of executing his duties as such, he instructed the second respondent to sell various parcels of shares in the company's name.

Between 27 June 2013 and 9 July 2013 the second respondent proceeded to sale shares valued at $ 308 683 .57. This amount was deposited into a trust account established for that purpose. During the period between 28 June 2013 to 22 July 2013 the second respondent also to sell shares to value of $434 167.14. 2nd respondent is yet to tender the purchase price of the shares. Persuant to the sales, the second respondent instructed first respondent to register those shares in the name of the buyers in accordance with their registration instructions.

On 25 July 2013 the second respondent advised the applicant that the third respondent had issued a directive to the effect that the second respondent stop selling any or all of the company shares, and if it had already sold or transferred any such shares as to reverse the sale and cancel the registrations. Persuant to the directive, the second respondent has since stopped dealing with the shares and demanded the reimbursement of the sum of $308 687.57.

Applicant then approached this court seeking a declaration that the third respondent has no powers to interfere with a liquidation process in the manner it has done.

The basis for seeking the declaration is that the third respondent's directive is unlawful. Once a company is under liquidation, only two authorities can make decisions relating to the process that is, the liquidator and the High Court. Any third party should seek leave of the court.

It has further averred that the third respondent has no power to give directives relating to registration of a specified set of shares. Even if it had, it had exercised the powers arbitrarily. The thirds respondent's directive has caused serious irreparable harm to the interests of the creditors and to the liquidator. He runs the risk of being sued by third parties with whom he concluded binding contracts. Further the liquidation process has to be completed within a tight time frame. There is no alternative remedy available to no the applicant. The application is opposed by the third respondent and at the hearing it raised two points *in limine* viz competency of the order sought and lack of urgency. I will deal with these points first and in *seriutum* .

RELIEF SOUGHT.

Mr *Ochieng* submitted that in terms of para 1 of the Interim Relief sought and para 2 of the applicant's answering affidavit, the applicant seeks a final order. It is not competent to seek a final relief in an urgent chamber application. The application cannot therefore succeed,

Mr *Madhuku* in response argued that the issue of a final or interim relief should not arise in this matter. The applicant is *sui generis* is as it is seeking directions from the court by a liquidator.

My view is that the submission by Mr *Madhuku* amounts to a concession that the applicant is seeking a final order. He then goes on to distinguish the present application from others by submitting that it is *sui generis*. The question then is whether this court can grant a final order in an application sought on a certificate of urgency.

The position is now settled in our law that it is not competent to seek an order with the effect of a final nature on an urgent basis. The reason is quite simple. A party approaching the court on a certificate of urgency is seeking interim protection from the court pending the determination of the main dispute between the parties. The standard of proof at this stage is on prima facie basis unlike on the return date stage where it will be on a balance of probabilities.

The above view was well formulated by Chatikobo J in the case of *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 H at 198 A-B where he stated:

> "the practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a prima facie case. This to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day."

See also *Documeni Support Center (pvt) Limited* v *Mapuure* 2006 (2) ZLR 240 H at 245 C.

No special circumstances have been advanced by the applicant that would warrant this court to depart from the general principles which apply in urgent application brought in terms of the rules. The applicant, in my view, is not seeking directives, as suggested, but is seeking relief which is such that if granted the applicant will not have an interest in the outcome on the return date. I will therefore uphold the *point limine*.

URGENCY

Mr *Ochieng* submitted that the applicant had not demonstrated urgency in its papers. The certificate of urgency in para 6 is at variance with the founding affidavit. It states that third

parties have cancelled agreements and demanded their money back. The affidavit states the applicant is at risk of being sued by third parties without stating that they have demanded their money from him. The certificate states that harm has been suffered by the creditors of the company and the liquidator but does not specify the harm. It also refers to doubt about the ownership of the shares. The applicant should then not seek to dispose them.

The applicant avers that there are time constraints but these are not disclosed. The applicant's case inherently speculative that is that he might be sued. Applicant as liquidator cannot be sued without leave of the court. The third respondent is not interfering but regulating the sell of shares to protect investors.

Mr *Madhuku* submitted that the liquidation process is subject to the supervision of the court. Where a liquidator seeks protection of the court against unlawful interference that in itself creates urgency for access to the court. An application brought by a liquidator is inherently urgent as a matter of law. The applicant in its heads of argument poses a question "why should a request for the direction of the court be determined by an ordinary application"

It was further submitted that the demand for buyers of the cancellation of the agreements of sale and return of the purchase price will cause irreversible prejudice to the liquidation process. There was therefore a clear case of urgency in determining the lawfulness of the intervention.

I want to agree with the submissions made by the Mr *Ochieng.* The applicant has not established a basis, on its own papers for the matter to be heard on an urgent basis. I was not furnished with authority which supports the proposition that an application brought by a liquidator is inherently urgent. Nothing was advanced to distinguish it from any other application. I am not sure whether the fact that the liquidation process is supervised by this court makes every application brought by a liquidator urgent.

The certificate of urgency filed by the certifying practitioner does not assist much. It does not explain what harm has already been suffered. The founding affidavit does not expand on the issue.It also makes reference to demands for cancellation of the sell of shares having been made. This is not supported by the founding affidavit. In any event the company cannot be sued without leave of the court. It also talks about the need for the liquidation process to be completed within "short time limits set by the law". It does not state what these time limits are and how the actions of the third respondent have had an effect of

these time limits. The founding affidavit did not assist in this regard. In also talks about 'tight' time limits which are not specified.

I will again uphold the point *in limine* and make a finding that the matter is not urgent.

In view of the above it is my view that it will not be necessary to deal with the matter on the merits.

I will make the following order.

1) The application is dismissed.
2) The applicant to pay the respondent's costs.

Mundia & Mudhara- applicant's legal practitioners

Coglan Welsh & Guest- respondent's legal practitioner