

DISTRIBUTABLE (21)

Judgment No. SC 33/10
Civil Appeal No. 76/09

(1) ANTHONY ERNEST PAHWARINGIRA (2) DAVY FUKWA
MUTINGWENDE v WARREN PARK TRUST

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & CHEDA AJA
HARARE, JUNE 21, 2010 & MARCH 14, 2011

T Mpfu, for the first and second appellants

S J Chihambakwe, for the respondent

ZIYAMBI JA: The appellants together with their spouses are the directors and shareholders (referred to collectively as ('the directors')) of Saltana Enterprises (Private) Limited ("the Company"). Sometime in March 2005, the directors concluded an agreement with the respondent in terms of which the directors agreed to sell their entire shareholding in the Company to the respondent.

The following clauses of the agreement are relevant.

"2. Suspensive conditions

2.1. This agreement is subject to the fulfillment of the following suspensive conditions, namely that the Purchaser shall have, in writing, confirmed to the Sellers that it is satisfied with the results and outcome of a due diligence exercise to be carried out by the Purchaser and, or, its nominated agents. In particular, but without in any way limiting the scope of the due diligence exercise, it shall have satisfied itself of the following areas:-

2.1.4. that the financial and trading position of the Company, including, but not limited to, an examination of all bank accounts in its name or related in anyway to the Development, has been determined;

- 2.1.5. the present directors and secretaries of the Company shall have tendered their respective resignations as directors of the Company, with effect from the Effective Date after appointing, simultaneously such directors and secretaries as shall be appointed by the Purchaser;
- 2.1.6. either of the Sellers, but not more than two, shall have been appointed as consultants to the Company in terms of correspondence to that effect in writing AND paid a monthly retainer of \$10 million each from Effective Date;
- 2.1.7. the Company's rights in respect of the litigation against and related to F.M. Eiving (Private) Limited shall have been ceded to the Sellers without recourse.
- 2.4. The suspensive conditions are inserted for the benefit of the Purchaser who is entitled to waive fulfillment of any of the conditions by written notice to the Sellers.

3. Sale

- 3.1 Subject to the fulfillment or waiver of the suspensive conditions, the Sellers sell to the Purchaser which purchases the Shares with effect from the Effective Date.
- 3.2 Should the suspensive conditions be fulfilled or waived then ownership in and the risk and benefit attaching to the Shares will be deemed to have passed to the Purchaser on the Effective Date, notwithstanding the fact that this Agreement may have been signed after the Effective Date or that the suspensive conditions are fulfilled or waived.
- 3.3 Each of the Sellers hereby confirms that it has, prior to the Signature Date, waived any and all preemptive rights it may have in respect of the Shares.

4. Purchase consideration and payment

- 4.1. The consideration for the shares shall be an amount equal in the aggregate to 20% (TWENTY PER CENTUM) of the CVEM Price as at Effective Date less the development costs of the stands and the standard commission payable to any estate agent after the said date.
- 4.2. The consideration is payable within ninety days from date of receipt of the Certificate of Compliance issued by the City of Harare in terms of clause 19 of the Development Agreement.

13. Arbitration

In the event of a dispute or claim arising as a result of a breach of this agreement or other cause arising from the agreement, then the Purchaser shall be entitled, after notifying the Sellers beforehand, to have the

resolution of the dispute or claim or other cause referred to arbitration as follows.”

On 20 June 2005 the respondent, by letter from its legal practitioners, advised the directors that it had waived fulfillment of all the suspensive conditions and that it was arranging for payment of the ‘balance of the funds outstanding in terms of the said agreement’ on 10 July 2005. The directors thereupon wrote to the respondent canceling the agreement prompting the respondent to make a court application in the High Court for specific performance of the contract. After the filing of the opposing affidavit and before the filing of the respondent’s answering affidavit, an order was granted by the High Court (KARWI J) in unrelated proceedings for the placing of the Company under judicial management. That notwithstanding, the matter proceeded to be set down for hearing and the learned Judge in the court *a quo* granted the order against which the appellants now appeal. In the court *a quo*, the spouses of the appellants as well as the Company were cited as respondents. The order of the court *a quo* was against all five respondents.

A number of issues arise from the grounds of appeal the main one being whether or not the court “erred in entertaining proceedings involving a company that had been placed under judicial management and in the face of an order staying the same and so erred in granting an order against directors of a company who had been divested of the control and right to represent that company”.

I propose to deal with this issue as I am of the view that its resolution will dispose of the appeal. The order of judicial management provided as follows:

- “1. (a) the Applicant, Saltana Enterprises (Private) Limited, is placed under Judicial Management for an indefinite period.

- (b) Subject to the supervision of this Court, the Applicant's company shall be under management of a Judicial Manager appointed in terms of Section 299 of the Companies Act [*Cap 24:03*] but subject to Section 300 of that Act.
 - (c) From the date of that appointment and upon completion of a Bond of Security in accordance with Section 274 of the Companies Act [*Cap 24:03*], the Judicial Manager shall forthwith take over the management of the Applicant's company and shall prepare and submit reports in accordance with Section 303(c)(ii) of the Act.
 - (d) The Judicial Manager shall have the powers set out in paragraphs (a) to (h) of sub-section (2) of Section 306 of the Companies Act [*Cap. 23:04*] and, without the consent of creditors or the shareholders, may raise money on the security of the Applicant's company assets.
 - (e) The Directors of the Applicant's company are divested of the management of the company's management.
 - (f) All actions and applications and the executions of all writs, summons and other process against the Applicant's company shall be stayed and not proceeded with without the leave of this Court.
 - (g) The Judicial manager shall be entitled from the assets of the Applicant's company, to the payment of remuneration at a rate to be determined by the Master of the High Court and to reimbursements for all out of pocket expenses incurred by him in the course of his duties.
 - (h) The Judicial Manager shall pay the costs of these proceedings out of the assets of the company.
2. Pending the grant of an order in terms of paragraph 1 or the discharge of this order:
- (a) the Applicant company is placed under provisional Judicial Management and, subject to the supervision of this Court, shall be under the management of a provisional Judicial Manager appointed in terms of Section 299 of the Companies Act [*Cap. 24:03*] subject to Section 300 of this Act.
 - (b) The Master is hereby directed to appoint Mr Cecil Madondo of Tudor House Consultants (Private) Limited as Provisional Judicial Manager of the Applicant.

- (c) Sub-paragraph (b) to (g) of paragraph 1 of this order shall apply, *mutatis mutandis* in relation to applicant's company and the Provisional Judicial Manager as if the Applicant's company had been finally placed in Judicial Management."

It was contended by Mr *Mpofu*, for the appellants, that the judgment given by the court *a quo* was a nullity as the court had no jurisdiction to entertain the application by virtue of the order of judicial management which specifically stayed the proceedings. Mr *Chihambakwe*, on the other hand, contended that the application had 'nothing to do with the Company; that it did not matter whether the shares were disposed of because the judicial manager does not become the owner of the shares and these proceedings were not taken against the Company. In any event, it was submitted, the court *a quo* had granted leave to proceed because the court heard the matter. Leave of the Court need not always be sought on affidavit.

As Mr *Mpofu* submitted, the proceedings were brought against the Company as a respondent. Once the order of Judicial Management was made the proceedings ought to have been stayed and leave of the Court sought to continue the proceedings against the Company. The court *a quo* relied on a letter written by the judicial manager on the eve of the hearing to the respondent's legal practitioners and copied to the Registrar of the High Court to the effect that he would abide by the decision of the Court.

It seems to me that there is merit in Mr *Mpofu*'s submissions. By virtue of the provisional judicial management order all proceedings against the Company were stayed and could not be continued until leave of the Court was obtained. No application for such leave was made or granted by the Court. Accordingly any order granted against the Company was irregular.

The appellants (and their spouses) were cited in their capacities as sole shareholders and sole directors of the Company. The order sought was against them in both capacities. As shareholders, the order was that they sign all documents necessary to effect transfer of their shares to the respondent. As directors, the order sought was that they resign or failing that, be removed from the directorship of the Company by the Deputy Sheriff. They were interdicted and/or restrained from carrying on any developments in furtherance of the Company's business operations without the respondent's written approval. They were to deliver to the respondent such documents as were necessary to enable them to acquire ownership of the shares and business assets belonging to the Company.

It is observed here that the appellants in their capacities as directors of the Company would have to implement the sale and transfer of the shares by ensuring their registration in the name of the respondent.

The order granted by the court *a quo* provided as follows:

“It is accordingly ordered:

1. That upon receipt of the purchase price calculated in terms of clause 4 of the contract of sale and fulfillment of all the applicant's contractual obligations under the contract.

1.2. The 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to sign all documents necessary to transfer all their respective shares in fifth respondent to the applicant.

1.3. The 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to deliver to the applicant:

- (a) all documents and books of accounts, registers, contracts, minute books, salary records and other documents and records relating to the fifth respondent, and

- (b) such documents, powers of attorneys and authorities as may be reasonably required by the applicant to enable it to acquire ownership of 5th respondent's shares and or beneficial interest therein, the business assets or the registration in the name of any of the business assets, should the need arise.
- 1.4. The 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to sign documents resigning as directors of the 5th respondent, failing which the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to sign all necessary documents (in particular Form CR 14) removing the current directors of 5th respondent and substituting the same with applicant's appointees.
- 1.5. The 1st, 2nd, 3rd and 4th respondents and all those claiming through them, be and are hereby interdicted and or restricted from carrying on any developments and or works in furtherance of the 5th respondent's business operations without the applicant's written approval.
- 1.6. The 1st and 3rd respondents be and are hereby ordered to pay the costs of this application.
2. For the avoidance of doubt it is ordered that the applicant be and is hereby authorized to enforce it's (*sic*) contractual rights against the respondents only upon due fulfillment and discharge of all its contractual obligations under the written contract annexure "A".

The appellants were ordered to deliver to the respondent such documents as would enable the respondent to acquire ownership of, *inter alia*, the business assets of the Company. This was not a mere sale by a shareholder of shares to an outsider. It was, in effect, a takeover of the Company. The orders against the appellants in their official capacities as directors of the Company were orders against the Company represented by its directors. The application ought not, therefore, to have proceeded without the leave of the Court having first been sought and obtained. The judgment was therefore irregular and a nullity. On this ground the appeal must succeed.

I would like, however, to comment on paragraph 1 of the order of the court *a quo*. The effective date was the date of fulfillment of the suspensive conditions. On 20 June 2005, the respondent, for whose benefit the suspensive conditions were inserted, declared them waived or fulfilled. There was no evidence before the court *a quo* that the purchase price for the shares had been calculated in terms of Clause 4.1 or paid in terms of Clause 4.2. of the agreement.

In addition, there was a dispute between the parties as to whether the 200 million dollars mentioned in Clause 1.2.18 of the agreement had been paid. The Court *a quo* found that this was a dispute which could not be resolved on the papers yet the Court went on to grant an order of specific performance making the order conditional on the fulfillment of the terms set out in Clauses 1 and 2 of its order (*supra*).

Specific performance is a discretionary remedy which is granted or refused upon a proper exercise of a court's discretion. No reasons were given by the court *a quo* for this unusual order granted before the applicant (respondent) had fulfilled its part of the contract and it is difficult to ascertain whether the Court's discretion was exercised properly or at all.

The matter was not raised before us but I feel constrained to raise it as I consider that in this case in the absence of evidence of its performance of its obligations in terms of the contract, the order of specific performance was wrongly granted to the respondent.

In the light of the conclusion reached it becomes unnecessary to consider the other issues raised in the grounds of appeal.

Accordingly, the appeal succeeds and it is ordered as follows.

1. The order of the court *a quo* is set aside and substituted with the following:

“The application is dismissed with costs”.

2. The respondent shall bear the costs of the appeal.

GARWE JA: I agree

CHEDA AJA: I agree

Hungwe & Partners, first and second appellants’ legal practitioners
Chihambakwe, Mutizwa & Partners, respondent’s legal practitioner