RENAISSANCE SECURITIES (PVT) LTD
(in liquidation)
versus
STEPHEN MASHOZHERA

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 27 January 2014 and 20 August 2014

Civil Trial

B.M.Bhala, for the plaintiff
G. Mugabe, for the defendant

MATANDA-MOYO J: At the onset of the trial the defendant raised a point *in limine* that plaintiff be ordered to pay the defendant's security for costs in terms of s 350 of the Companies Act [*Cap 24:03*]. It provides;

> "350 security for costs
> Where a company or --- is plaintiff or applicant in any legal proceedings, the court may at any stage, on sufficient proof that there is reason to believe that the company--- or the liquidator ---- thereof will be unable to pay costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given."

The defendant implored the court to take judicial notice that plaintiff was placed under liquidation and on that basis alone it may fail to pay costs of suit. The defendant submitted that as at 11 September 2013 the plaintiff was owing close to $1 583 000-00. The plaintiff's assets amounted to at least ± $927 000-00. Counsel for the defendant submitted that such information was available at the Master's office. However no financials were placed before me to prove that fact. It meant the defendant's expected the court to adjourn and call for the records before the Master to establish the correctness of the facts. It was the plaintiff's case that its assets stood at $2 million against liabilities of less than $1million. Once the issue of incapacity to pay had been challenged and there were no facts placed before me, that indeed there was a real possibility that the plaintiff would fail to pay costs should it lose the case, I could not grant the application.

There was no proof before me that the liquidator would fail to pay such costs. Counsel for the plaintiff referred me to s 52 (1) of the High Court Act [*Cap 7:06*] which gives this court authority. On application, to give an order that a party who has brought the proceeding pay security costs, if such party has no means of paying the costs of the other party, should such cost be awarded against it. As I said above no proof was put before me that plaintiff lacked the means to pay such costs. The only fact which is common cause is that the plaintiff is under liquidation. Being under liquidation does not automatically entitle an opposite party to security costs. The other party must still prove that the liquidator would be unable to pay. The defendant failed to discharge that onus on him.

The defendant also submitted that the plaintiff's claim was not fit for the High Court. The plaintiff's claim could very well have been dealt with by the Magistrate's Court. He urged this court to exercise its powers in terms of s 52(1) (b) of the High Court Act. In terms of that section this court can order a plaintiff "to satisfy it that plaintiff has a cause of action fit to be produced in the High Court." I do not find merit in this application. This court is a court of unlimited jurisdiction and the plaintiff had a right to institute proceedings before this court. The defendant's fears could be wound by an order of costs at the Magistrate Court.

In *Manes & Ors* v *Monolakakis* 2011 (2) ZR 59 (H) the court held that the court has a discretion to make an order for payment of costs or not to. The court in so doing should be guided by a person's right to protection of the law and a person's right to a fair hearing within a reasonable time.

I cannot close the court's doors to the plaintiff at this moment as the defendant has failed to prove that the plaintiff would be unable to pay costs. Accordingly the point *in limine* fails. The plaintiff issued summons against the defendant for;

> "(a) the delivery to plaintiff of all share certificates for 100,00 ordinary shared in Alco Africa Limited which were mistakenly transferred to defendant.
> (b) an order directing the defendant to sign all such document and dos as maybe necessary to effect transfer of the 100,00 shares in Alco Africa Limited to plaintiff or its nominee within 7 days of judgment failing which the Deputy Sheriff be directed and authorized to do so on the defendant's behalf alternative by the value of shares as at 13 August 2010.
> (c) payment of all costs directly and incidentally relating to the said transfer of shares to the plaintiff including but not limited to any stamp duty and brokerage fees;
> (d) costs of suit on the higher scale of attorney and client."

It is the plaintiff's story that on 14 November 2008 the defendant instructed the plaintiff to purchase on his behalf 100,000 Alco shares. The plaintiff did so. The purchase price was to be paid on or before 17 November 2008. Transfer of shares was done to defendant but the defendant has to date not paid for the 100 000 Alco shares. The defendant seeks the return of the 100 000 shares on the principle of unjust enrichment or alternatively the value of shares as at 13 August 2010.

The defendant conceded that indeed shares were purchased on his behalf on 14 November 2008. The defendant however pleaded that such shares were paid for on 21 November 2008. The shares were only transferred in February 2009 after payment was done. The defendant denied being unjustly enriched at plaintiff's expense. The defendant pleaded that he has already disposed of such shares to a third party. The claim by plaintiff to surrender back the shares is no longer available to it as such shares are no longer being held by the defendant. Title of such shares is no longer vested in the defendant and the defendant cannot transfer that which he doesn't hold.

It is imperative for me to determine whether the order sought by the plaintiff is competent at this stage. The plaintiff sought the transfer of the shares back to itself or alternatively the value of the shares as at 13 August 2010.

The main relief sought can only be granted once there is proof the defendant is still holding on to the shares. The plaintiff led evidence from a Mswaka, the former Managing Director (MD) of the plaintiff. This witness failed to produce proof that the defendant is holding the shares. This witness conceded that he did not have the knowledge of who held the shares at the date of trial. The plaintiff closed its case after calling only this witness.

The defendant applied for absolution from the instance. The defendant argued that the plaintiff has failed to discharge the onus on him of proving that the defendant was still holding onto the shares. The defendant's defence was that he had already transferred the shares to a third party. The defendant also insisted the shares were paid for.

An application for absolution form the instance is akin or similar in nature to a criminal application for discharged at the close of the state case. The test is enunciated by BEADLE CJ in the case of *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at p 5 where the learned Chief Justice said;

> "The test, therefore, boils down to this is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not all."

GUBBAY CJ in *United Air Charters (Pvt) Ltd* v *Jaman* 1994 (2) ZLR 341 (S) at 343 said;

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of this case, there is evidence upon which a court directing its mind reasonably to such evidence, could or might (not should or ought to) find for him…"

It is trite that in making such consideration the court should lean towards dismissing such application. The courts should not be quick to dismiss matters without hearing both sides. See *Theron* v *Behr* 1918 CPD443 and Supreme Service Station case (*supra*).

The plaintiff led evidence from one Barthlomew Mswaka. The defendant took issue with the admissibility of that witness' evidence. The defendant submitted that such witness did not have the requisite legal authority from any of the persons lawfully capable of giving him such authority to represent the insolvent plaintiff.

Mswaka conceded that he was only called by the plaintiff's legal practitioner "at short notice" to appear before the court. This witness was not in court at the instance of the liquidator nor the creditors of the company. The witness did not even produce proof of authority.

It is common cause that the summons were instituted before the plaintiff was placed under liquidation and Barthlomew Mswaka as the plaintiff's MD then was lawfully representing the plaintiff. The plaintiff was placed under liquidation. Once the plaintiff was placed under liquidation, the liquidator became the authorized person to deal with the matter. In terms of s 221 (4) (a) the liquidator becomes the authorized person to bring any action to recover debts owed to the company in liquidation. The liquidator can only do so either with the authority of a resolution of creditors and contributions. The *proviso* to the above section empowers the Master to authorize a liquidator to institute legal proceedings for the recovery of any outstanding accounts, the collection of which appears to be urgent to the Master.

On 1 July 2013 when the plaintiff was already under liquidation papers were filed without reflecting the position that the plaintiff was under liquidation. This was obviously unprocedural as the former directors were no longer responsible for the running of the plaintiff.

It was the liquidator, with the authority of creditors or with leave of court. The liquidator was supposed to represent the plaintiff in the proceedings. To date the papers before me do not reflect that it is the liquidator persuing the claim on behalf of the plaintiff. The liquidator was neither in court nor was any paper filed before court proving that the liquidator was the one persuing the matter. The former Managing Director could not possess the *locus standi* to do so. Consequently anything said by the witness is of no consequence. The plaintiff was therefore not represented before me during trial.

It is my considered view that there was no plaintiff before me.

Accordingly plaintiff's claim is dismissed with costs.

Mundia & Mudhara, plaintiff's legal practitioners
Nyakutombwa Mugabe Legal Counsel, respondents' legal practitioners