WIPHAND INVESTMENTS (PVT) LTD
and
NATSAYI GERALDINE MUJURU
and
TICHAFA ENIAS MUJURU
and
TRIUMHANT ENTERPRISES (PVT) LTD
and
CLEVER T. GOMERA
and
NATIONAL BLANKETS LTD (In Judicial Management)
versus
INFRASTRUCTURE DEVELOPMENT BANK ZIMBABWE LTD

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 7 OCTOBER 2016 AND 24 NOVEMBER 2016

Opposed Application

V Majoko for the applicants
O Mtero for the respondent

MOYO J: This is an application seeking an order declaring that the sixth applicant's obligation to the respondent was discharged by the scheme of arrangement and by consequence thereof, that the sureties be released.

The background of the matter is that in about November 2009, respondent extended to sixth applicant a facility in terms of which respondent would advance a sum of $500000 to the sixth applicant.

In or about April 2010 respondent had disbursed a sum of $300000 to sixth applicant.

In terms of the agreement between 6th applicant and respondent the amount owing to respondent would be secured by guarantees being, first to fifth applicants. As security for the amount 6th applicant owed respondent, first applicant passed a first surety mortgage bond in the sum of $140 000-00 over Lot 1 Hillside South 2 of subdivision A of farm 3A Matsheumhlophe, measuring 4047 square metres, held under deed of transfer No 2410/08. Another first surety

bond was passed by second applicant in the sum of $160000-00 over stand number 2156 Bulawayo Township measuring 695 square metres held under deed of transfer No. 1829/07.

Sixth applicant was unable to meet its obligations to the respondent and in consequence of that default, respondent commenced litigation under HC 402/11 issued in Harare wherein the sureties were sued for $394 300-18.

Case number 402/11 was not pursued to finality because a settlement was arrived at with the respondent resulting in the matter being withdrawn.

Following the settlement, a sum of $109 130-00 was paid by the sureties to the respondent in the period between March 2012 and November 2012 before a scheme of arrangement was sanctioned by the court.

In 2010 sixth applicant was placed under judicial management and in June 2013 in HC 1424/13 the High Court approved the scheme of arrangement between sixth applicant and its creditors. The respondent was one of the creditors of National Blankets in the scheme of arrangement and it actively participated in all the processes leading to the approval of the scheme. Respondent allegedly filed its claim with the judicial manager which was accepted in the sum of $362 387-95. First applicant then sought the release of its property held by respondent by virtue of a mortgage bond. The respondent declined to release the sureties contending that at law the sureties had not been discharged.

At the hearing of this matter, the respondent raised a point *in limine* to the effect that the application was fatally defective for want of compliance with section 191 of the Companies Act [Chapter 24:03]. Applicant's counsel argued that the point *in limine* should have been raised in the opposing affidavit, as, as matters stand the point is based upon proof of facts and such facts are not before the court. Applicant's counsel contends that only a point of law can be raised at any time in the proceedings but not a point that is based on proof of facts.

Section 191 of the Companies' Act (*Supra)* provides as follows:

> "1) 191 (1) where a compromise arrangement is proposed creditors or any class of them, or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, or a meeting of the creditors or of the members of the company or class of members, as the case may be, to be summoned in such a manner as the court directs.

2) If a majority in number representing ¾ in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or duly authorized agent or proxy at the meeting, agree to any compromise arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors or on the members or class of members, as the case may be, and also on the company, or in the course of being wound up, on the liquidator and contributories of the company. (my emphasis)

3) An order made under subsection (2) shall have no effect until a copy of the order certified by the Registrar of the court, together with a copy of the deed of compromise or arrangement, as the case may be, has been delivered to the Registrar for registration and a copy of every such order shall be annexed to every copy of the memorandum of the issued after the order has been made. (my emphasis)

It is clear that section 191 (3) provides that unless a scheme of arrangement or compromise has been registered with the Registrar of Companies it is of no force or effect.

Applicant does not aver in its founding affidavit that the provisions of section 191 were religiously followed and thereby validating the scheme.

Applicant argues that respondent is raising a point *in limine* tied to the facts of the matter and therefore cannot raise such at any stage of the proceedings but should have done so in the opposing affidavit.

In the case of *Pounta's Trustee* v *Lahanas* 1924 WLD 67 on 68 KRAUSE J stated thus:

> "I think it has been laid down in this court that an applicant must stand or fall by his petition and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application, is the allegation of facts stated therein, because those are the facts which the respondent is called upon to affirm or deny."

The principle of our law of civil procedure is that all essential averments must appear in the founding affidavit. Refer to *Shepherd* v *Tuckers Land and Development Comparation Pty Ltd 1978* (SA) 173 (W) at 177G –H per NESTADT J.

I hold the view that whether or not the compromise agreement has complied with section 191 (2) and (3) are indeed essential averments which need to have been made in the founding affidavit for the applicant's case hinges on the existence of a valid compromise agreement. I hold the view that section 191 (3) renders ineffectual or of no force or effect any compromise agreement not so validated through registration with the Registrar of Companies.

If it was so registered, I still hold the view that the application would be fatally defective without such an averments for the court has to make deliberations on a legally binding compromise agreement. If there is no averment to prove that the compromise agreement is indeed valid as it was done in full compliance with the provisions of the law, then the application is limping. I say so for how can I determine the enforceability or otherwise of an agreement whose legal essentials have not been pleaded before me? Since there is no averment on the validation or otherwise of the compromise agreement this court runs the risk of making a declaratory order on that which is ineffectual. It was incumbent in my view upon the applicant to make the essential averments in terms of the law.

In the case of *Barloworld Logistics Africa Pty Ltd* v *Silervton* 2013 ZAGPPHC 198 (a South African case), it was held that:

> "The omission in the founding affidavit of essential averments that applicant relies upon to establish entitlement to the relief sought may therefore be fatal to the application and it would be considered unfair and underhanded to establish the entitlement anywhere else other than in the founding affidavit, unless if the assertions are to be legitimate responses to the respondent's allegations and not included solely to remedy an omission in the launching affidavits."

This case goes further to quote D. E Van Loggerenberg and PBJ farmland on *"Erasumus Superior Court Practice* 2009 B1 – B45 to B1- B46 which provides thus:

> "All necessary allegations upon which an applicant's case is based must appear in his or her founding affidavit,"

Applicant's counsel contends that the point *in limine* is based upon proof of facts and such facts are not before the court. I hold the view that the point *in limine* raised is a legal one in that the argument proferred by the respondent's counsel is that there is no essential averment in the applicant's founding affidavit thereby rendering the application fatally defective.

I was going to agree with applicant's counsel, if respondents' argument was to the effect that facts in the founding affidavit have not been substantiated I believe an essential averment has to be made to complete an applicant's case, and if an essential averment is not made then the application is fatally flawed.

Since applicant's counsel agrees that there are no facts before the court as to whether the compromise agreement was validated in accordance with the law, or not he in a way agrees that information surrounding that issue is not before the court at all.

Therefore if the information is not before the court as to whether or not the compromise agreement was validated in accordance with the law, how will this court make a determination as to the issue of whether its binding or not? For the court to proceed and determine the rights of obligations of the parties as regarding that agreement, the court must first of all be satisfied that the agreement is valid lawful and thus binding. If the founding affidavit does not make averments as to the satisfaction of all the legal steps leading to the validity of the agreement, how will the court get there to determine the rights and obligations of the parties in relation thereto?

For the court in my view to determine the rights and obligations of the parties with regard to that agreement, the essential averments on the legal steps taken to validate it in accordance with the law must have been properly pleaded.

More so that the Companies Act *(supra),* section 191(3) specifically provides for the ineffectiveness of an agreement not done in accordance with that section. It then becomes incumbent on the applicant to allege in the founding affidavit that indeed the provisions of section 191 were adhered to and that this agreement they want the court to make deliberations on has met the legal requirements as enunciated in the Companies Act (*supra*).

The absence of such an averment in the founding affidavit thus renders the application fatally defective in my view.

An application, as I have already stated stands and falls by the founding affidavit and any absence of essential averments therein will render the application fatally defective. Even if I were to dismiss the point *in limine*, for arguments' sake and allow argument on the merits, that piece of evidence can no longer be adduced as the matter is now at argument stage so how will the court proceed to deliberate on the rights and obligations of the parties without this essential averment that the agreement where from these rights and obligations are derived is in itself valid and was done in strict adherence to the legal steps provided in the Companies Act (*supra)?* The court would run the risk of proceeding to deliberate on rights and obligations in an agreement that may well be invalid and ineffectual. I hold the view that the averment is essential to the

progression of this matter and in its absence the court cannot properly deal with the matter on the merits.

Counsel for the applicant cites two cases where he alleges that the registration of the scheme was not referred to by the judges that dealt with those matters. However, those cases dealt with the issues that arose before them, like in this case, if validity of the compromise, agreement in line with section 191 had not been challenged, I would simply have gone to deal with the issues as tabled before me. It therefore follows that once a challenge has been made on the lack of essential averments in the founding affidavit, it would be inappropriate for me to ignore same simply because that never arose in another case as each case depends on its own facts as well as the issues to be determined.

Again, the pleadings in those cases are not available for one to discern if ever such an averment had been made or not, for if it had been made, it would now be a question of style whether the judgment mentions that or not. Counsel for the respondent requested for costs at an attorney and client scale. I will not exercise my discretion in favour of the respondent with regard to the issue of costs, for I hold the view that the omission does not carry with it conduct that warrants punitive costs.

It is for these reasons that I uphold the point *in limine* and dismiss the application with costs.

Majoko and Majoko, applicants' legal practitioners
Messrs Sawyer & Mkushi, respondent's legal practitioners