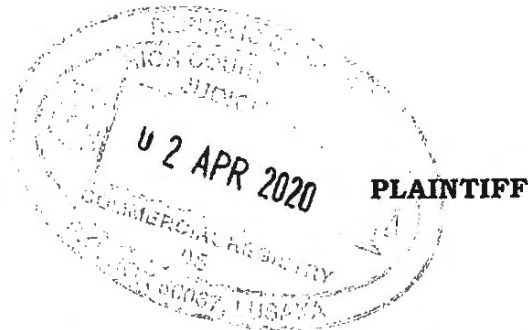


IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HPC/0470

BETWEEN:

URVESH JASVANTLAL DESAI



AND

HAWKWOOD PROPERTY INVESTMENT LIMITED	1 ST DEFENDANT
FOXDALE DEVELOPMENT LIMITED	2 ND DEFENDANT
PAN AFRICAN BUILDING SOCIETY (In Possession)	3 RD DEFENDANT

Before Lady Justice B.G. Shonga this 2nd day of April, 2020

For the 1ST and 2ND defendant, Mr. H.H. Chizu, Messrs. Chanda Chizu & Associates

For the 3RD defendant, Ms. S. Kaingu, In-house, Bank of Zambia

RULING

Cases Referred To:

- 1. Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) (Vol. 2) Z.R. 97.*
- 2. Bank of Zambia v Aaron Chungu, Access Financial Services Limited, Access Leasing Limited (2008) Z.R. 81 Vol. 1 (SC).*
- 3. Avalon Motors Limited (In Receivership) v Gadsden (1998) Z.R. 41.*
- 4. Access Financial Services Limited, Access Leasing v. Bank of Zambia, SCZ Judgment No. 7 of 2005.*

Legislation and Other Material Referred To:

1. ***Order III, rule 2 of the High Court Rules, High Court Act, Chapter 27, vol.3 of the Laws of Zambia.***
2. ***Section 10, Arbitration Act, 2000.***
3. ***Section 66 of the Corporate Insolvency Act, 2017.***
4. ***Sections 98 (2) of the Corporate Insolvency Act, 2017.***
5. ***Section 72 (7) of the Corporate Insolvency Act.***
6. ***Section 331 of the Companies Act, 2017***
7. ***Section 74 (3) (a) of the Corporate Insolvency Act, 2017***

1.0 APPLICATION

This Ruling speaks to a composite application by the defendants that the writ of summons and statement of claim be struck out as against the 3rd defendant. This limb of the application was made pursuant to ***Order III, rule 2 of the High Court Rules, High Court Act, Chapter 27, vol.3 of the Laws of Zambia.*** Alternatively, that the proceedings be stayed pursuant to ***section 10 of the Arbitration Act, 2000.***

The application is supported by an affidavit in support and skeleton arguments filed on behalf of the 3rd defendant on 28th October, 2019 and an affidavit in support and skeleton arguments filed on behalf of 1st and 2nd defendants filed on 3rd December, 2019.

The application attracted opposition from the plaintiff who, in turn, filed an affidavit in opposition and skeleton arguments in response on 10th December, 2019.

The application was heard on 28th January, 2020.

2.0 BACKGROUND

On 9th October 2019, the plaintiff took out a writ of summons against the defendants. A summary of the principal claims made by the plaintiff's claims, as endorsed on the writ are: (i) payment of the sums due pursuant to a Management Services Contract dated 1st January, 2018; (ii) determination of the interest applicable to payments under the said contract; (iii) damages for breach of contract; (iv) interest on sums found due; and (v) costs of the proceedings.

3.0 FACTS UNDERLYING THE APPLICATION

The undisputed facts, as discerned from the affidavits on record, are that the plaintiff's claims in this matter wholly arise from a Management Services Contract of 28th January, 2018 entered between the plaintiff and the 1st defendant. This is demonstrated by exhibit marked "**MM1**" to the affidavit in support filed on 28th October, 2019. Clause 4 of the Articles of Agreement reads as follows:

"Any dispute arising under this contract to be referred to Arbitration. Appointment of one Arbitrator to be mutually agreed.

Arbitration procedures will be in accordance with the Arbitration Act. 19 of 2000."

On July 19, 2019, the Bank of Zambia took possession of the 3rd defendant. On or about 17th October, 2019 the 3rd defendant was placed under compulsory liquidation by the Bank of Zambia. This is discerned from the depositions of the affiants of the affidavits in support and attendant exhibits marked "**MM2**" and "**LM2**" to the affidavits in support.

4.0 LEGAL ARGUMENTS

4.1 Arguments presented on behalf of the 3rd defendant

In its skeleton arguments, counsel for the 3rd defendant drew my attention to **section 66 of the Corporate Insolvency Act, 2017** which reads as follows:

"Where a winding-up order is made or a provisional liquidator is appointed, an action or proceeding shall not be proceeded with, or commenced against, a company except by leave of the Court and subject to such terms and conditions as the Court may impose."

Standing on the shoulders of section 66, it was submitted that this action cannot continue without leave of court and ought to be set aside for irregularity.

As regards the application to refer the matter to arbitration, reference was made to section 10 (1) of the Arbitration Act, which reads as follows:

“A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

Aside *lex scripta*, the defendant cited the case of **Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) (Vol. 2) Z.R. 97¹** where the Supreme Court held that in considering an application for stay of proceedings under Section 10 of the Arbitration Act, the learned Judge had no choice but to refer the dispute to arbitration as provided for in the agreement. Thus, it was submitted that bearing in mind the existence of the arbitration clause in the Management Services Contract, the action ought to be stayed and referred to arbitration.

4.2 *Arguments presented on behalf of the 1st and 2nd defendant*

On behalf of the of the 1st and 2nd defendant, I was invited to consider **sections 66 and 98 (2) of the Corporate Insolvency Act, 2017**. Section 66 has already been quoted above. Section 98 (2) reads as follows:

“After the commencement of a winding-up, no action or proceeding shall be proceeded with or commenced against the company, except by leave of the Court and subject to such terms and conditions as the Court directs.”

The sections cited underpin the plaintiff’s submission that this matter is improperly before Court since leave was not

obtained from the Court before the plaintiff instituted these proceedings.

In addition, reference was made to **section 72 (7) of the Corporate Insolvency Act, 2017** which permits the payment, to a person required to verify a statement of the affairs of a company, of such costs and expenses incurred in, and relating to the verification, as the liquidator considers reasonable, subject to an appeal to the Court. After referring to this section, it was submitted that the plaintiff wrongly commenced this action since a statute specifically provided for commencement.

The other argument presented on behalf of the 1st and 2nd defendants was that the requirement to obtain leave cannot be waived because it is couched in a mandatory manner. The submission was aligned to **section 331 of the Companies Act, 2017**.

4.3 Arguments presented on behalf of the plaintiff

In opposing the application, the plaintiff first took issue with the fact that the 3rd defendant's affidavit in support was deposed to by Maibiba Mulala, the possession manager. The plaintiff contended that the affiant lacked authority to depose to the affidavit because only a liquidator can depose to an affidavit made on behalf of a company in opposition. The plaintiff cited **section 74 (3) (a) of the Corporate Insolvency Act, 2017** which provides as follows:

“A liquidator may, for the purpose of a winding-up and distributing the assets of the company bring or defend an action or other legal proceeding in the name and on behalf of the company;”

The second issue that disconcerted the plaintiff was the argument that he required leave of Court before instituting these proceedings. The plaintiff observed that the 3rd defendant was in possession and not under liquidation at the time the action was commenced. The plaintiff then argued that there was no statutory requirement for a party to obtain leave before commencing an action against a company in possession.

With respect to the cases of *Bank of Zambia v Aaron Chungu, Access Financial Services Limited, Access Leasing Limited (2008) Z.R. 81 Vol. 1 (SC)*, *Avalon Motors Limited (In Receivership) v Gadsden (1998) Z.R. 41* and *Access Financial Services Limited, Access Leasing v. Bank of Zambia Supreme Court of Zambia Judgment No. 7 of 2005* cited by the defendants, the plaintiff distinguished them to this application by contending that those cases considered the *locus standii* to sue in the name of a financial institution possessed by Bank of Zambia.

As regards the application to refer the matter to arbitration, the plaintiff advocated that a prerequisite consideration to be made by the court was whether there existed a valid agreement to submit the dispute to arbitration. In this regard, it was observed that not all the parties to this action are

parties to the arbitration agreement, ergo the submission that there is no valid agreement between the parties *in casu*.

5.0 Determination

I have carefully read and scrutinized all the affidavit evidence, legal arguments and submissions of both parties.

To begin with, I considered **section 98 (2) of the Corporate Insolvency Act** cited by the 3rd defendant. My observation is that the sections falls under part VII of the Act which deals with voluntary winding-up by special resolution of the members or creditors. Since the 3rd defendant is not being would up voluntarily, I do not find the section as one which affords any support to the application.

Similarly, I do not see how the permissibility of costs and expenses incurred in proving a statement of affairs pursuant section **72 (7) of the Corporate Insolvency Act** is relevant to the viability of these proceedings.

I also considered section 331 of the Companies Act, 2017 prohibits derivative actions, save with leave of court. Section 331(1) reads as follows:

“Except as provided in this section, a director or an entitled person shall not bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.”

In my view, there is no evidence before Court that prompts me to conclude this is a derivative action. It appears to me, that the plaintiff has commenced this action in his own name.

Considering the dearth of relevance attached to sections 98 and 72 of the Corporate Insolvency Act and section 331 of the Companies Act, I am not swayed by the submissions associated to them. This is my segue into considering the next statutory provision relied on by the defendants, section 66 of the Corporate Insolvency Act, 2017.

My analysis of section 66, properly construed, is that leave of Court is required in two instances. On the one hand, leave is required to commence an action against a company where the company is under liquidation either before or at the time the proceedings are sought to be commenced.

On the other hand, where proceedings are already in progress when a winding up order is made or a provisional liquidator is appointed, leave is required for the action to be proceeded with. Thus, if a winding-up order has been made, proceedings are automatically stayed but the court may on application by a party allow them to be continued.

In casu, the affidavit evidence before me shows that on 9th October, 2019, the date on which these proceedings were commenced, the Bank of Zambia had taken possession of the


3rd defendant. Eight (days) after the action was instituted, particularly on 17th October, 2019, Bank of Zambia placed the 3rd defendant under compulsory liquidation. Since the 3rd defendant was not under liquidation at the time these proceedings were commenced, leave was not required in terms of section 66. Consequently, I cannot agree that the action was irregularly commenced.

Accepting that an order for winding-up was made during the proceedings, I acknowledge that effective 17th October, 2019 when the liquidation commenced, leave of court was necessary for the action to proceed. I have observed, however, that there is no evidence before me that reveals that after the 3rd defendant was placed under liquidation a to these proceedings obtained leave for this action to be proceeded with. In the face of section 66, I opine that it is not open to me to proceed with these proceedings in the absence of leave having been sought and obtained. That being the case, I have no jurisdiction to proceed to determine the application to refer the matter to arbitration at this stage.

Considering all the above, the application to dismiss the action for irregularity fails and is dismissed. The application to refer the matter to arbitration equally fails. The net effect of this determination is that this action automatically stands stayed by operation of the law, specifically section 66 of the Corporate Insolvency Act, 2017.

Costs are awarded to the plaintiff, to be taxed in default of agreement.

Dated this 2nd day of April, 2020


G. B. Shonga
JUDGE