

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

2014/HPC/0422

BETWEEN:



MUKWA INVESTMENTS LIMITED

PLAINTIFF

AND

PAN AFRICAN BUILDING SOCIETY

1st DEFENDANT

BANK OF ZAMBIA

2nd DEFENDANT

**Before Mr. Justice Bonaventure C. Mbewe in Chambers on the
31st day of January, 2020**

For the Plaintiff : *Mr. J. Madaika from Messrs.
J & M Advocates*

For the 1st & 2nd Defendants : *Mr. C. Sikazwe, Senior Legal
Counsel with Ms. G.
Mukulwamutiyo, Legal Counsel
Bank of Zambia*

RULING EX - TEMPORE

Cases referred to:

- Southern Cross Motors Ltd. v. Monc Systems Technology Ltd.
(2011/HK/223) [2011] ZMHC 98 (20th October 2011)*

Other Authorities Referred to:

1. *High Court Rules, Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England of England (White Book) 1999 Edition, Vol. 1*
3. *The Banking and Financial Services Act, Act No. 7 of 2017*

I must apologize to the parties at the outset that the Court appears to have been running 2 files concurrently (the main file and a temporary jacket) in this matter which may have caused some problems with the filing and searching of documents in the cause. This has since been rectified with the Temporary Jacket closed and the documents therein merged *ad sequentium* in the main file.

This is an application by the Plaintiff for an order for the preservation of shares which are the subject of the cause of action in this matter. The Application was made pursuant to **Order 27, Rule 3** of the **High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia** as read together with **Order 29, Rule 2 of the Rules of the Supreme Court of England, 1999 Edition, White Book.**

The application is supported by an affidavit sworn by one **Hilary Duckworth** who is the Chief Executive Officer of the Plaintiff Company. The affidavit discloses, that after the commencement of this suit and during its pendency fresh facts came to light that

necessitated the Plaintiff's application for a preservation order of its shares which are the main subject of the matter in this cause.

These fresh facts being: that on the 17th day of October, 2019 it was announced by the 2nd Defendant through a press statement that the 1st Defendant had been placed under liquidation which liquidation signifies that the company's assets will be sold and disposed of and the proceeds utilized to pay debts owed by it. The deponent further asserts, in his affidavit, that in the absence of a preservation order of its shares previously transferred to the 1st Defendant in a transaction it later came to find out was not supported by law; the liquidator cannot be precluded from disposing of the said shares as a means of raising funds toward the settlement of the 1st Defendants debts. The deponent further states that such order is necessary to preserve the sanctity of proceedings in this matter and that damages would not be sufficient to atone for the shares if they were to be sold or disposed of as the action for return of the shares is not for a monetary claim as they are property with value being beyond monetary. In the Plaintiff's skeleton arguments in support of the application, the Plaintiff re-emphasizes its argument and cites the case of **Southern Cross Motors Limited v. NONC Systems Technology Limited (1)** praying that the court grants an order for the for the preservation of the shares subject of this action.

The Defendant opposed this application and filed an Affidavit in opposition dated 26th November, 2019 together with skeleton arguments and a list of authorities of even date. In the affidavit deposed to by **Mbinga Kafunya** the Assistant Director-Regulatory Policy, Licensing and Liquidations in the 2nd Defendant, he discloses that the 1st Defendant has been operating under a license from the 2nd Defendant since 2005 and has its majority shareholding held by the Plaintiff. He further deposes that as a result of this, the Plaintiff as majority shareholder was responsible for the Board of Directors as well as the management team that ran the 1st Defendant for the benefit of its shareholders. The deponent states that between August, 2016 and September, 2016 numerous irregularities began to be unveiled which prompted an inspection and further a decision to appoint a new board of directors for the 1st Defendant which board was appointed by the Plaintiff and operating on its behalf. Further the deponent states that an examination report produced by the 2nd Defendant highlighted financial weaknesses of the 1st Defendant, and the 2nd Defendant then directed the 1st Defendants board of directors to remedy these weaknesses by recapitalizing the 1st Defendant Company. The deponent states that the 1st Defendant through its board of directors failed to appropriately recapitalize itself which led to its inevitable collapse.

It is the deponent's submission that the 2nd Defendant did engage the Plaintiff to assist in recapitalizing the 1st Defendant following which the Plaintiff transferred 50% of his shares in Leopards Hill Memorial Park to the 1st Defendant in breach of the law and directives of the

2nd Defendant which transfer was done without the knowledge and consent of the 2nd Defendant. The deponent does confirm through his affidavit that the 2nd Defendant did indeed place the 1st Defendant under compulsory liquidation after establishing that the 1st Defendant was insolvent in accordance with provisions of the law and the deponent contends that all interested parties; the Plaintiff included, had until the 17th of November, 2019 to object to the liquidation of the 1st Defendant.

In his affidavit, the deponent contends that ever since the liquidation of the 1st Defendant, the rights of the Plaintiff were relegated to the end of the queue in liquidation and that the effect of granting an order of preservation of shares in this matter would be to circumvent and prejudice the interest of all other creditors, depositors and stakeholders in the 1st Defendant and breach the priority of payment established by the law. The deponent further states within his affidavit that the Plaintiff did not sufficiently demonstrate that damages will not be an adequate remedy as the Plaintiff would be adequately be compensated by an award of damages in the event he succeeds in his claim. The deponent submits that the Plaintiff's interests in the 1st Defendant are limited to any surplus after the liquidation process is over.

In their skeleton arguments, the Defendants state in opposition, that the order sought by the Plaintiff is discretionary and not granted as

a matter of right. The Defendants submit that the Court take into consideration the general conduct of the Plaintiff before exercising its discretion on whether or not to grant their application and cite some cases in which applications for injunctive remedies were considered by the courts.

The application was heard on the 31st of January 2020. At the hearing of the matter, learned Counsel for the Plaintiff in augmentation of his application before Court, submitted that the action that is present before the Court is not by a creditor but by a shareholder who in his claim alleges that he was misled into transferring his 50% shareholding in Leopards Hill Memorial Park as a means of improving the capital requirements for the 1st Defendant. The Plaintiff contends that if the preservation order is not granted, the 1st Defendant who is under liquidation will go ahead and sell his shares as part of the liquidation order causing the Plaintiff's claim in the main matter to become an academic exercise at the time the matter is determined.

In response, learned Counsel on behalf on the Defendants, maintaining their opposition to the application submitted that the 1st Defendant, who did not oppose to the liquidation of the 1st Defendant, is making an attempt at stopping the liquidation through the back door, which is against the provisions of the **Banking and Financial Services Act, Act No. 7 of 2017**. The Defendants contend that liquidation relegates the rights and privileges of the shareholders and

the Plaintiff through his application intends to jump the queue. He further contended that the relief the Plaintiff seeks, which is injunctive in nature, can be easily atoned for in damages and therefore should not be granted. The Plaintiff also interrogated the legality of the transaction and whether it is proper for the Court to intervene in favour of a party, on an illegality created by the party itself.

RULING

I have read and considered all the pleadings and documents filed before Court by the Plaintiff and the Defendants and have also read and considered the verbal submissions made on behalf of all the parties to this matter in respect of the application before me.

In the first instance, I find it necessary to note that there is on record before me an Ex-parte Order granting the Plaintiff leave to proceed with the action against the 1st Defendant herein being in liquidation therefore it is within the Court's jurisdiction to proceed to hear and decide the current application within the cause.

The application made before me by the Plaintiff in this cause, is one for an order for the preservation of the shares which are subject of the cause of action in this matter. It is made pursuant to **Order 27**,

Rule 3 of the **High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia** as read together with **Order 29, Rule 2 of the Rules of the Supreme Court of England, 1999 Edition White Book** which orders provide:

Order 27, Rule 3:

“It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject of such suit, and, for all or any of the purposes aforesaid, to authorize any person or persons to enter upon or into any land or building in the possession of any party to such suit; and, for all or any of the purposes aforesaid, to authorize any samples to be taken, or any observations to be made or experiments to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

Order 29, Rule 2 (1):

“2. - Detention, preservation, etc., of subject-matter of cause or matter

(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter,

or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.”

The rules or statute relied on by the Plaintiff express clearly that, any party to a suit may apply on any terms for an order for preservation of any property which is the subject matter of a cause or indeed any property as to which any question may arise within the cause and the order may or may not be granted in accordance with the judge's discretion. The enforcement by the Plaintiff of these provisions within statute signify the enforcement of the party's rights in the cause or litigation and not the enforcement of the Plaintiff's rights as a shareholder. The assertion made by the Defendants that the application before me is flawed by among other reasons the fact that compulsory liquidation relegates the rights of a shareholder to the end of the list is unfounded because by this application the Plaintiff who happens to be a shareholder in the 1st Defendant does not seek from the Court enforcement of any of his rights as a shareholder of the company but seeks through his application the preservation of specific assets by enforcement of a certain provision of the law: which is his right as a litigant in the cause.

Further, the law does not penalize or indeed preclude a party who previously did not raise questions or objections as to the liquidation of a company from raising questions concerning the said liquidation

in litigation. Indeed it is trite and well known law that any person that has sufficient legal capacity subject to certain pre-conditions may sue or be sued and that the High Court has unlimited and original jurisdiction in civil and criminal matters – which allows for parties to bring any matter in the High Court they wish to litigate and does not preclude parties from pursuing causes save for exceptional circumstances.

Concerning the Defendants further contention, that the application cannot be granted to the Plaintiff due to the fact that the nature of its claim is one that can be easily compensated by damages, I find that the rules/law afore cited on which the Plaintiff relies contain no specific requirement that the Plaintiff must demonstrate that its claim is one that can easily be atoned for in damages. The provisions themselves are unambiguous and allow for a Judge to make an order for preservation of property *upon such terms as may seem just* to him. The terms on which the Judge will make this order are not premeditated or suggested by statute but are as a matter of fact entirely discretionary and will vary on a case to case basis as the law is progressive and foretelling seeking to safeguard rights of parties in as many ways as possible without hurdle-like restrictions which may impede the dispensation of justice. In fact, the manner in which this rule operates under **The Rules of The Supreme Court of England** is provided for under **Order 29/8A/9** which provides:

"Detention, custody or preservation"

~ R10 ~

Under rule 2 (1) the Court may order the "detention, custody or preservation" of property. The rule extends to every case where the Court sees that as between Plaintiff and Defendant there is something which ought to be done for the security of the property. An order may be made on such terms as the Court thinks just. The Court will not be deterred from making an order for preservation of property because a party against whom the order is sought has a proprietary interest in it. An order should not be refused merely because the Defendant claims that he has a discretionary power to determine whether or not the property should be preserved and how it should be preserved, when one of the issues in the case is whether or not the power is untrammelled by a duty to the Plaintiff to preserve the property..."

Further, Honourable Mr. Justice ICT Chali in the persuasive case of **Southern Cross Motors Limited v. NONC Systems Technology Limited (1)** in application of **Order 29, Rule 2 of the Rules of the Supreme Court of England, 1999 Edition, White Book** found that:

"In my view, the intention in the above cited legal provisions is to preserve the subject matter of the cause or matter, or property in dispute in the suit so that the applicant, if successful at the trial, is not deprived of the true or full value thereof. From the pleadings and affidavit evidence on the record there is no doubt, that the "subject matter" or "property which is in dispute" in this case is motor vehicle Mitsubishi Sportero 200 Registration Number ALB 2631..."

As I have already indicated, the motor vehicle on which the application has been made is at the very Centre of the suit. The reliefs the Plaintiff seeks relate directly to that subject matter. It is clearly the “property which is in dispute in the suit” (Order 27 Rule 1 of the High Court Rules) or “the property which is the subject matter of the cause or matter or as to which any question may arise therein”. (Order 29 White Book).”

In light of the above, I find that the shares in this instance are subject of this suit (**Order 27 Rule 1 of the High Court Rules, Order 29, Rule 2 of the White Book**) and are *“the property which is the subject matter of the cause or matter or as to which any question may arise therein” (Order 29 RSC White Book)*. I also find that the Defendants submissions do not effectively address or respond to the application herein and issues raised by the Plaintiff in relation to preservation of the said shares and their submissions in response are either immaterial or matters to be determined at trial of the cause.

In consideration of the Plaintiff having sufficiently demonstrated that the shares through liquidation run the risk of being dissipated through the process of liquidation, I find that this is a proper case in which to exercise the judicial discretion vested in the Courts by statute and grant the preservation order to maintain the status quo between the parties until determination of the matter on its merits.

I hereby order and direct that the shares subject of these proceedings, particularly the 50% shares in Leopards Hill Memorial Park be preserved during the pendency of this matter or until further order of this Court. In the event that the Court shall hereafter be of the opinion that that the Defendant shall have sustained any damage by reason of this Order which the Plaintiff ought to pay – the Court shall make such necessary order.

Costs in the cause.

Delivered at Lusaka this 24th day of February 2020

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a dotted line.

**Bonaventure C. Mbewe
HIGH COURT JUDGE**