

MWAMI M. SIAMSIPA N.O.
(Representing Estate Late Francis Siamsipa)
versus
TUDOR HOUSE CONSULTANTS (PRIVATE) LIMITED
and
CECIL MADONDO
and
THE MASTER OF THE HIGH COURT
and
OWEN MASWELA
and
SALOME MUTSINZE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 March and 13 September 2017

Opposed application

P. Kawonde, for the applicants
S. M. Hashiti with him *L Kafesi*, for the 1st & 2nd respondents
K.T. Madetse, for the 4th respondent

ZHOU J: The applicant instituted the instant application seeking an order in the following terms:

“IT IS ORDERED THAT:

1. The appointment of the first respondent as liquidator of Kunganda Farm be declared a nullity.
2. That all liquidation proceedings by the first respondent be and are hereby set aside.
3. That the sale of the remainder of Goodwill Estates in the district of Hartley measuring 4219487 hectares be and is hereby set aside. In the event that the said piece of land has been transferred to the fifth respondent or any other party, such deed of transfer be and is hereby cancelled and the sixth respondent is directed to restore in its registry the property to the ownership of Kunganda Farm (Private) Limited.
4. That the first respondent be and is hereby removed from the position of liquidator of Kunganda Farm (Pvt) Ltd.
5. That the costs of the abortive liquidation including the costs of subdivision of the two pieces of land estates in the district of Hartley called Godwill Extension of Woodlands of Railway Farm 20 Chegutu, shall be borne by the first and second respondents.”

The application is opposed by the first, second, fourth and fifth respondents.

At the hearing of the matter Mr *Kawonde* for the applicant abandoned the relief stated in paragraphs 1, 2 and 4 of the draft order. He advised that the applicant persists with seeking the relief stated in paragraphs 3 and 5 of the same draft order.

The facts upon which the application is predicated are as follows. The deceased, Francis Siamsipa, whose Estate is now represented by the applicant, was a shareholder in a company known as Kunganda Farm (Private) Limited. The other shareholder was Owen Maswela who is cited as the fourth respondent. That company was placed under liquidation by an order of this court which was granted in case No. HC 6470/2000 on 22 October 2003. An appeal against that order was struck off the roll by the Supreme Court on 26 March 2012. Pursuant to the order placing the company under liquidation the second respondent was appointed as the liquidator. The first respondent is a company in which the second respondent is a director.

It is common cause that Kunganda Farm (Private) Limited has only one asset, a farm comprising two pieces of land called Goodwill Extension of Woodlands of Railway Farm 20 and the Remainder of Goodwill of Railway Farm measuring 323, 7427 and 533, 4286 hectares respectively. The applicant's complaint is that the second respondent has imposed liabilities upon the company in liquidation and has sold a portion of the only property of the company, the farm, without the leave of the court. The applicant complains about the manner in which the subdivision of the farm was done by the second respondent as well as the motivation for such subdivision.

In addition to opposing the application on the merits, the respondents' raised points *in limine*. The objections *in limine* pertain to the following (a) the non-joinder of the company in liquidation, (b) the citation of the first and second respondents in their individual capacities, (c) that no leave was sought to institute the proceedings which in substance are against the company in liquidation; and (d) that there is no fourth defendant as the fourth defendant cited died before the application was instituted.

The first ground of objection can be easily disposed of. Order 13 r 87 (1) of the High Court Rules, 1971, provides as follows:

"No cause or matter shall be defeated by reason of the of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The same rule also empowers the court to order the joinder or cessation of a party in respect of any proceedings which are pending before it.

In any event, the citation of the liquidator who represents the company would sufficiently take care of the interests of the company. After all, what is being sought is the setting aside of decisions made by the liquidator. There is therefore no invalidity in the proceedings which results from the failure to join the company in liquidation as a respondent.

As for the manner in which the first and second respondents were cited, that too does not invalidate the proceedings. The first respondent should not even have been cited in the first place as it is not the liquidator appointed pursuant to the order of this court. But that is not the respondents' ground of objection. Their objection is that it should not have been cited in its personal capacity. That argument is self-defeating as the first respondent has no "official" capacity in relation to the liquidation of Kunganda Farm (Pvt) Ltd. Its only association with the case is that its director is the one who was appointed to be the liquidator of the company. Nothing therefore turns on the manner in which it is cited.

The citation of the second respondent should, correctly, have reflected that he is being sued in his capacity as liquidator of Kunganda Farm (Private) Limited. But the manner in which he is cited equally does not invalidate the proceedings. That is a matter that can be attended to by granting the applicant leave to properly cite the second respondent.

The question of leave to institute the proceedings does not arise for the simple reason that the company under liquidation is not a party to these proceedings. That objection is therefore misconceived as it is not founded upon the factual issues disclosed by the papers.

The objection regarding the citation of the fourth respondent is valid. But the invalidity only affects the fourth respondent, and does not affect the application as a whole. The Executrix Dative in the Estate of Owen Maswela has deposed to an affidavit in opposition to the application. That affidavit shows that the fourth respondent died on 8 November 2010. The present application was filed about five years later on 1 October 2015. As at that date no proceedings could be instituted against the fourth respondent as he was not in existence. In the interests of finality, the court will uphold the point *in limine* but direct that the applicant cite the executor in the Estate of the Late Owen Maswela as the fourth respondent in this matter.

In the result, it is ordered that:

1. The point *in limine* relating to the manner in which the first respondent is cited is dismissed.
2. The objection *in limine* relating to the manner in which the second respondent is cited is upheld. The applicant is granted leave to apply to this court for the citation of the second respondent to be corrected.
3. The objection *in limine* that the applicant ought to have sought leave to institute the instant application is dismissed.
4. The objection *in limine* relating to the citation of the fourth respondent is upheld. The applicant is hereby granted leave to apply for the joinder of the Executor in the Estate of the Late Owen Mawela.
5. The applications referred to in paragraphs 2 and 4 of this order shall be instituted within 10 days from the date of this order failing which the application shall be deemed to be dismissed and the Registrar shall notify the parties accordingly.
6. The applicants shall pay the respondents costs of attending to argue the points *in limine*.
7. In the meantime the matter is removed from the roll and the record is to be returned to the Registrar

Kawonde Legal Services, applicant's legal practitioners
Henning Lock, 1st and 2nd respondents' legal practitioners
Mawere Sibanda Commercial Lawyers, 4th respondent's legal practitioners