Judgment No. 8/07
Case No. HC 1422/06
X-Ref HC 677/06 & HC 588/06

EDWARD G. KHUZWAYO

Versus

ASSISTANT MASTER OF THE HIGH COURT

And

BONGANI NDLOVU N.O. (cited herein in his official capacity
As the liquidator of Langa (Private) limited (in liquidation))

And

ZODWA DABENGWA

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 18 JANUARY 2007

Advocate E Matinenga, for applicant
M Nyathi, for third respondent
No appearance for first and second respondents

Urgent Chamber Application

BERE J:

The background:

The third respondent one Zodwa Dabengwa made an urgent chamber application in this court as applicant in case number HC 588/06 seeking an order liquidating a company called Langa (Private) Limited. The application was duly served on the now applicant and no opposition was filed leading to the inevitable granting of the final order on 27 April 2006.

When the liquidation proceedings were in progress applicant in the instant case filed an urgent chamber application in this same court seeking an order to suspend or stay the liquidation process. In doing so applicant invoked the provisions of section 227 of the Companies Act [Chapter 24:03] (the Act).

After hearing detailed arguments from both counsel I granted the relief sought and couched my order in the following:

"Final Order

Pending the institution of action by applicant to rectify the register of Langa (Private) Limited (in liquidation) and its determination thereof, it is hereby ordered as follows:

1. The final order liquidating Langa (Private) Limited issued on the 27th day of April 2006 be and is hereby stayed.
2. All process consequent upon the issuance of the order of liquidation referred to in paragraph 1 above be and are hereby suspended or stayed.
3. Applicant is to file an action for the rectification of the membership of Langa (Private) Limited within 10 working days from the date the reasons for this order are given failing which the granted order aforementioned falls away.
4. The current status of Langa (Private) Limited be and is hereby maintained until altered by an order of the court.
5. Applicant and respondents are deemed to have received this order five days after the reasons for judgment are handed down.
6. The costs of this application including the costs of liquidation proceedings to date be and are hereby to be borne by applicant on the ordinary scale."

I indicated then that my reasons would follow. Here are my reasons.

In his founding affidavit applicant conceded that he had not timeously sought to oppose the order which he now seeks to have stayed or suspended. He said he did not oppose third respondent's application in case number HC 588/06 because he genuinely believed the matter would be resolved amicably and without the hustles of court action. He says he was so advised by his counsel.

Applicant was cautious to maintain that in making this application he was not making an application for rescission but was merely making it in terms of section 227 of the Companies Act [Chapter 24:03].

Applicant highlighted in his founding affidavit that his borne of contention with third respondent was on the shareholding structure of Langa (Private) Limited. He contended that third respondent

and the other shareholders had fraudulently allocated to themselves shares in the above referred company and that because of this he wanted this issue resolved first before the company could be liquidated. Applicant appreciated that there was likely to be a dispute of facts hence his desire to proceed in terms of section 118 of the Companies Act.

The matter was brought on urgent basis because the first meeting of creditors towards liquidation was supposed to be held barely a week or so before this application was filed.

It is noted that none of the respondents filed any notice of opposition. What in fact happened was that the third respondent's legal practitioner one *M Nyathi* filed a notice of opposition purportedly on her behalf. I will come back later in my judgment to deal specifically with the propriety or otherwise of the action taken by counsel.

What clearly runs in counsel's opposing affidavit alluded to is that applicant by filing the instant urgent application was merely trying to bring an application for rescission through unorthodox procedure. Counsel opined that the confirmed order could only be reversed by way of filing a proper application for rescission of the final order granted.

It was also respondent's counsel's contention that the application by applicant was not merited as what he thought to achieve could have been done without necessarily interfering with the liquidation process. Counsel's view was that the shareholding structure which applicant sought to have corrected was merely an ancillary matter to the dispute faced by the parties.

I will deal with the points in contention in the order counsel raised them.

Was it competent for counsel for respondent to file a notice of opposition in this particular matter?

Advocate Matinenga who appeared for applicant took issue with the approach taken by respondent's counsel of filing his notice of opposition instead of merely seeking the court's indulgence to be granted more time in order for him to take proper instructions from his client, the

third respondent. Applicant's counsel argued that respondent's counsel does not stay in the shoes of third respondent and more specifically that he could not be in a position to deal specifically with the issues at stake, that is the shareholding structure of Langa (Private) Limited.

Respondent's counsel sought to counter the attack in his notice of opposition by arguing that there was no reason for him to wait to seek proper instructions from client, third respondent because the matter was extremely urgent. To quote from respondent's counsel he stated in his submissions in court as follows:-

"For the record the application was meant to forestall the creditors meeting that was supposed to be held on the 12th of July. There was accordingly extreme urgency and the issues contained were within the personal knowledge of counsel. If I had to sit and wait for third respondent I would have put her in jeopardy because no papers were going to be filed in time."

In my view there must be something wrong with a legal practitioner who desires to take a client's case as his. Legal practitioners are conduits through which litigants' cases are properly put before the courts for determination. They are the professional servants of their clients and can only act on specific instructions from such clients. They are the agents through which litigants' cases are dealt with because of their assumed expertise in the field of law. A legal practitioner cannot, in the

absence of specific instructions from his client speculate on the possible line of defence or position of his client. Doing so would be tantamount to abusing his role to his client and also a stout effort to mislead the court which looks up to him for proper and professional guidance as an officer of the court.

In the instant case, the issues at stake centred on the shareholding structure of a company called Langa (Private) Limited. Only third respondent and applicant could have sworn positively to the shareholding structure of that company. Both counsel could not under normal circumstances purport to have independent or personal knowledge of the shareholding structure of

that company.

It appears to me that faced with the instant application, counsel for respondent was naturally obliged to seek instructions from his client, third respondent instead of groping in darkness as he did. I am far from being persuaded by the argument hat he acted in the manner he did because of the urgency of the matter. Our rules of practice and procedure have in them built in mechanisms to deal with the situation counsel found himself in. Counsel could have easily sought the indulgence of the court to enable him to take proper instructions from his client. Third respondent's counsel was certainly not in such a desperate situation which compelled him to violate basic court procedure.

The difficult respondent's counsel finds himself in does not end here. His speculative approach is further highlighted by his own submissions in court when he states:

"I would like to point out that my affidavit was deposed to without me having cite of the draft provisional order sought. See paragraph 8 of my affidavit. I did not know then the exact nature of the order that was being sought. I could only divine the order from the reading of applicant's founding affidavit and I would like to refer you to paragraph 33 of applicant's founding affidavit."

I find it to be significant that respondent's counsel again did not seek the court's indulgence or at least make an effort to have these dark areas clarified by applicant's counsel before he offered any response. He appeared to have been in a hurry to indulge in conjectural litigation.

On these two highlighted technicalities, in particular respondent's deliberate failure to take specific instructions from his client, third respondent before acting in the manner he did, I would be persuaded to conclude that strictly speaking there was no opposition to the urgent application made by applicant and would safely grant the relief sought without further ado.

However, I wish to develop the argument further and proceed to consider whether or not there was need for applicant to formally apply for rescission of the confirmed order.

Implications of section 227 of the Companies Act [Chapter 24:03]

As already stated applicant brought the instant urgent application in terms of the above-cited section of the Companies Act.

The section is couched in the following:

"227 Court may stay or set aside winding up

The court may at any time after the making of an order for winding up, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings on such terms and conditions as the court deem fit."

In my view this special provision in the Act is quite explicit and requires no interpretation. It would seem to me that this section does provide an alternative

remedy to an application for rescission of judgment as provided for in the High Court rules.

What this implies is that in a proper case where the winding up of a company is involved and where the need to stay those proceedings arise a litigant has this option at his/her disposal. If one decides to opt for this course of action, that litigant cannot be condemned for doing so because such litigant is at liberty to exercise this option.

Applicant has been criticised for failing to timeously oppose the confirmation of the liquidation of Langa (Private) Limited. This may be so but one should not lose sight of the fact that up until the provisional order was confirmed, there was a genuine attempt to resolve this matter by both parties. In fact in his letter of 25 April 2006 (Annexure 'A4') applicant through his counsel clearly highlighted his reservations about the proposed liquidation of the company. In the same correspondence applicant proposed that the matter be postponed. Even third respondent through its letter of 26 April 2006 (Annexure A5) which was a response to Annexure A4 appreciated the need to resolve the shareholding structure of Langa (Private) Limited.

Applicant has made serious allegations against the other shareholders. He alleged that they fraudulently or improperly transferred shares to themselves. Applicant went on to say that:

"Mrs Dabengwa had no *locus standi* to institute the winding up. Mr Dabengwa did not have any shares in the company. Consequently, his proxy could not exercise powers which he did not have."

In my view, these allegations make it necessary to have the shareholding structure of the company clarified or ascertained before the winding up of the company.

In this regard I am satisfied that applicant has made a case warranting the relief sought.

The question of costs

It has not escaped my attention that despite making a finding in favour of applicant, both applicant and his counsel adopted a dilatory approach in the handling of this matter.

Applicant knew that a provisional order had been obtained and did nothing to prevent the confirmation of that order by way of filing opposing papers. But for applicant's casual approach, the provisional order would not have been confirmed hence the instant application would not have arisen.

For this reason, I am satisfied that an appropriate order for costs against him must be made.

It was for these reasons that I granted the final order earlier on referred to in this judgment.

Mashayamombe & Company, applicant's legal practitioners
Mabhikwa, Hikwa & Nyathi, third respondent's legal practitioners