

ZIMBABWE ALLIED BANK LIMITED
versus
CALEB DENGU
and
WILSON TENDAI NYABANDA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 15 June 2015 and 1 July 2015

Civil Trial

T Mpofu, for the plaintiff
E Matinenga, for the defendants

MUREMBA J: On 18 January 2013 the plaintiff issued summons against the defendants for the payment of US\$521 686-47 being money lent and advanced to Onclass Investments (Pvt) Ltd on a credit facility. The defendants bound themselves as sureties and co-principal debtors.

The defendants entered an appearance to defend and filed a plea. In their plea the defendants raised a special plea of prescription and went on to plead over to the merits. When pleadings were closed the parties held a Pre-trial Conference on 8 October 2014 and agreed on the issues for trial. According to the joint Pre-trial Conference Minute one of the issues for trial is whether or not the plaintiff's claim is prescribed.

In raising the special plea of prescription the defendants stated that they bound themselves as sureties and co-principal debtors on 28 February 2008 yet they were served with the plaintiff's summons on 24 January 2013. They averred that the plaintiff's claim prescribed on 28 February 2011.

Before the matter was set down for trial and on 4 March 2015 the plaintiff was placed in liquidation. There is a court order to that effect. In terms of that court order, it is stated that the liquidator of the plaintiff, "shall have the powers set out in s 221 (2) (a) to (h) of the Companies Act [*Chapter 24:03*]"

With the plaintiff's change of status the plaintiff's legal practitioners filed a notice of change of status on 25 May 2015 in terms of r 85 A (1) of the rules of this court. The notice states that the plaintiff's citation shall be the ALLIED BANK LIMITED (in liquidation)

The matter was then set down for trial on 10 June 2015 and the parties were served with the notices of set down. This prompted the defendants' legal practitioners to write to the Registrar of this court on 4 June 2015 stating that since the plaintiff was now under liquidation they did not believe that the matter could proceed to trial without the liquidator having obtained leave of the court. They made reference to s 213 of the Companies Act. On the basis of that provision they wanted confirmation from the Registrar that the matter would be removed from the roll. This letter was copied to the plaintiff's legal practitioners.

In response to that letter, the plaintiff's legal practitioners also wrote to the Registrar on 8 June 2015 disputing the application of s 213 of the Companies Act to the plaintiff's situation. They argued that that section only applies to a defendant company not to a plaintiff company as is the situation in the present case. They implored the Registrar not to remove the matter from the roll. They further stated that if the defendants wanted to insist on this issue the issue could be dealt with as a preliminary point on the date of the trial. The letter was copied to the defendants' legal practitioners.

In response to the letter, the defendants' legal practitioners wrote again to the Registrar stating that in terms of s 221 of the Companies Act the liquidator needed to obtain the leave of the court before proceeding with the matter. They also stated that the plaintiff's notice of change of status which was filed in terms of r 85 A was improperly filed as that rule does not apply to companies in liquidation.

On the date of the trial, 10 June 2015, Advocate *Matinenga* for the defendants raised the preliminary point that the plaintiff had no *locus standi* to continue with the proceedings in the absence of the court's leave to that effect now that it was under liquidation. He also argued that the notice of change of status which was filed pursuant to r 85 A was improperly filed because that rule does not relate to juristic persons, but to natural persons.

Advocate *Matinenga* argued that the correct provision which requires the liquidator to obtain the court's leave before proceeding with the proceedings is s 221 (2) not s 213 of the Companies Act as was earlier on stated by the defendants' legal practitioners in their correspondence to the Registrar. Advocate *Matinenga* was in agreement with Advocate *Mpofu* for the plaintiff that s 213 is only applicable to situations where the company is supposed to be sued as a defendant. I agree with both counsel on this issue. S 213 reads,

“In a winding up by the court no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”

The import of this section is that a company which is in liquidation cannot be sued without the person seeking to sue it first obtaining the leave of the court. Even if proceedings are commenced before the defendant company is placed under liquidation, once it is placed under liquidation those proceedings cannot continue without the plaintiff first obtaining the court’s leave. I draw support from the case of *Thirdline Trading (Pvt) Ltd and Another v Boka Investments (Pvt) Ltd and Another* HH 130-11 wherein Uchena J said;

“There is no doubt in my mind that section 213 (a) of the companies Act deals with the proceeding with or commencement of actions against the company. This means actions by the company itself are not covered under s 213 (a)”

In *Langey Construction (Brixham) Ltd v Wells, Wells Estate (Dartford) Ltd v Wells* 1969 2 All ER 46 Lord Widgery stated that the purpose of seeking leave to proceed against a company in liquidation is to ensure that when a company goes into liquidation, the assets of the company are administered in a dignified and orderly fashion for the benefit of all the creditors. No creditor should be able to obtain an advantage over other creditors by bringing proceedings against the company. Lord WIDGERY was interpreting s 231 of the English Companies Act of 1948 which provision is similar to s 213 (a) of our Companies Act. This English provision requires a person intending to sue a company under liquidation to first obtain the leave of the court before suing.

Advocate *Matinenga* argued that because the plaintiff’s liquidator did not obtain the leave of the court in terms of s 221 (2), the plaintiff lacked *locus standi* to continue with the proceedings. Section 221 deals with the powers that the liquidator has. In particular s 221 (2) reads,

“The liquidator shall have the power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (a) of subsection (4) of section *two hundred and eighteen* -

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding.”

In opposing the point *in limine* Advocate *Mpofu* raised quite a number of issues. His first argument was that an objection on *locus standi* should have been raised as a special plea in the proceedings as is required in terms of r 137. He argued that because the special plea

was not raised in the pleadings the objection should be dismissed. He also argued that in terms of r 139 a party is required to state all his special pleas and exceptions and make all his applications to strike at one time. Advocate *Mpofu* argued that the failure by the defendants to comply with these two rules warrant the dismissal of their point in *limine*. He said that it did not matter that the plaintiff was placed in liquidation after the Pre-trial Conference had been held. He argued that the fact that liquidation happened after the Pre-trial Conference had been held would have been the basis for the defendants to seek condonation for non-compliance with r 137 and r 139.

I find the arguments by Advocate *Mpofu* on these two points without merit. The cause of action which gave rise to the defendants raising the point in *limine* arose after pleadings in the case had been closed. Even the Pre-trial Conference had been held. It defies all logic for anyone to argue that the defendants should have raised the issue of *locus standi* at the time they pleaded to the plaintiff's claim. This is a case where clearly rules 137 and 138 are not applicable. I do not even see why the defendants would need to seek condonation in order to raise this issue of *locus standi*. There is no basis whatsoever for the defendants to seek condonation because the plaintiff was only placed in liquidation after the Pre-trial Conference had been held but before trial had commenced. As such the date of the trial was the proper forum for the defendants to raise their objection. In any case the objection is based on a point of law and a point of law can be raised at any stage of proceedings.

Advocate *Mpofu*'s other argument was that Advocate *Matinenga* was supposed to argue the defendants' special pleas at once. He submitted that since he raised the special plea of prescription in the pleadings that special plea was supposed to be argued together with the issue of *locus standi* at once. Advocate *Matinenga* objected and I find sense in his objection. The first hurdle that has to be crossed is whether or not the plaintiff has the *locus standi* to continue with the proceedings in the first place. If the answer is in the affirmative, then it means that the trial can commence. In the trial, the parties should then deal with the issues outlined in the Pre-trial Conference Minute. If the answer is in the negative, that is the end of the matter, the trial does not commence. There will not even be any need to deal with the issue of prescription.

In dealing with the substance of the point in *limine* on *locus standi* Advocate *Mpofu* argued that the point in *limine* is misplaced because when the notice of change of status was filed in terms of r 85A it did not seek to substitute the liquidator as the plaintiff in the proceedings but to show that the bank's status has changed as it is now under liquidation. He

argued that the bank in liquidation remained the plaintiff. He said that the liquidator was not substituting the bank as the plaintiff.

It appears to me that Advocate *Mpofu* did not properly understand Advocate *Matinenga*'s argument. Advocate *Matinenga*'s argument was simply that since the liquidator did not obtain the court's leave to continue with the proceedings in terms of s 221 (2) of the Companies Act, the plaintiff which is a company under liquidation has no *locus standi* to litigate. Advocate *Matinenga*'s thrust of argument was never that the liquidator was being cited as a party to the proceedings, but Zimbabwe Allied Bank Limited. Advocate *Matinenga* remained alive to the fact that the company under liquidation remains the party to the proceedings. However, Advocate *Matinenga* was wrong in arguing that r 85A which deals with the change of a party's status relates to natural persons alone and not to juristic persons.

R 85A (1) says,

"No proceedings shall terminate solely as a result of the death, marriage, or other change of status of any person unless the cause of the proceedings is thereby extinguished." (My emphasis)

The rule goes on to say that if a party to the proceedings has a change of status, a notice of change of status may be filed with the Registrar and served on all other parties to the proceedings. Nothing in this rule says that the rule is only confined to natural persons. At law the definition of a person includes both natural and juristic persons. The plaintiff was therefore right in filing a notice of change of status when it was placed under liquidation.

Herbstein and Van Winsein *The Civil Practice of the High Courts of South Africa* 5^{ed} Volume 1 at p 143 says that the expression *locus standi in judicio* literally means 'place to stand before a court.' It states that the term is used in two senses. Firstly, it refers to the capacity of a natural person or juristic person, to institute and defend legal proceedings. Secondly, it refers to the interest which a party has in the relief claimed or the party's right to claim a relief.

In *casu* the defendants are concerned with the plaintiff's capacity to sue. They are saying that the plaintiff being a company now under liquidation it has no capacity to sue because its liquidator did not obtain the leave of the court to sue or to continue with litigation from the time it was placed under liquidation.

What is in issue is whether or not a company which is the plaintiff in proceedings which have commenced requires the leave of the court to continue with the proceedings if it is placed under liquidation before the proceedings are finalised.

Advocate *Mpofu* submitted that there is a distinction between a situation where a company wants to institute proceedings for the first time and where a company wants to continue with proceedings which have already commenced. He argued that in terms of s 221 (2) of the Companies Act the liquidator only requires the leave of the court in a situation where he intends to commence proceedings on behalf of the company. He said that in a situation where proceedings commenced before placement in liquidation like what happened in the present case the liquidator does not require the leave of the court to continue with the proceedings.

The effect of a winding up order is to freeze the company's affairs in a number of respects and this includes legal proceedings, attachments and executions (S 213 (a) and (b) of the Companies Act). Dispositions of property and share transfers of the company may only be made with the leave or permission of the court (s 213 (c)). In my view the mischief behind seeking the leave of the court is to preserve the assets of the company for the benefit of the creditors. The powers of the directors cease – s 253 of the Companies Act. A liquidator is appointed to run the affairs of the company instead. In terms of s 221 of the Companies Act which sets out the powers of the liquidator, there are powers that the liquidator exercises without further authority. There are some powers that he exercises with the authority of a joint meeting of creditors and contributories. There are some powers which require him to exercise with the leave of the court.

What is clear to me from the reading of s 221 (2) is that in every case where a liquidator intends to initiate legal proceedings which have not commenced at all on behalf of the company, be they of a civil or criminal nature, he cannot do so without seeking the leave of the court.

What is not clear on the face of the provision is whether or not the leave of the court is required in proceedings which commenced before liquidation which the liquidator now wants to proceed with after taking over the running of the company. The question is can the liquidator simply take over the proceedings and continue with them without first obtaining the leave of the court? The answer to this question lies in the interpretation of the phrase, “to bring an action”. The question is what is to bring an action? The catch here is, does the phrase “to bring an action” also include or mean ‘to continue or proceed with an action’?

The *Concise Oxford English Dictionary* 12 ed defines the word ‘bring’ as (i) cause to move or to come into existence and (ii) initiate (legal action). With these definitions in mind one has to consider that the effect of a liquidation order is to freeze the affairs of the company

with a view to preserve its assets. Any disposal of the assets of the company without the leave of the court is void (s 213 (c) of the Companies Act). When the affairs of the company have been frozen it means that they have been stopped or rendered motionless. The assets of the company are prevented from being used for that time. So when a liquidator is appointed he starts running the affairs of the company. I believe that if he wants to bring any legal proceedings to court on behalf of the company, be they fresh legal proceedings or proceedings which commenced before liquidation he has to seek the leave of the court. In my view the whole idea for seeking the court's leave even in proceedings which commenced before liquidation is to protect the company assets and prevent unnecessary expenditure of that would otherwise be available to satisfy the demands of the creditors. As correctly submitted by Advocate *Matinenga*, litigating involves costs and sometimes the costs that are involved can be disproportionate to the company's resources. Some legal proceedings may even result in prejudice to the creditors. As such I do not believe that it was the intention of the legislature to let the liquidator simply proceed with actions which commenced before liquidation without obtaining the leave of the court. Obviously when an application for leave to bring an action is made by the liquidator, the court will exercise its judicial discretion on whether or not to grant it. It will consider various factors such as the amount and seriousness of the claim; the degree and complexity of the legal and factual issues involved; the stage to which the proceedings may have progressed; whether the claim has arguable merit; and whether the proceedings will result in prejudice to the creditors among other factors.

In the Kenyan case of *Trade Bank Ltd and Anor v Elysium Ltd and 2 Ors* (2012) eKLR a case whose facts fall almost on all fours with the present case, the plaintiffs sued the 3 defendants for money advanced to the first defendant which money the first defendant failed to pay back. The second and the third defendants who were the directors of the first defendant had bound themselves as guarantors.

The two plaintiffs were companies that were under liquidation. The defendants relying on s 241 (1) of the Kenyan Companies Act submitted that the plaintiffs had no capacity to institute the proceedings without the leave of the court. Section 241(1) of the Kenyan Companies Act states:

“The liquidator in a winding up by the court shall have power with the sanction either of the court or of the committee of inspection –

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company.”

Ogola J held;

“The liquidator in this matter has not provided any evidence to this court to show or prove that he secured the leave of the court to commence or to continue with these proceedings in the name of the company. That being so, in my view, and being supported by the provisions of the law I have cited above, the plaintiff lacked the capacity to bring this suit.”

The wording of s 241(1) of the Kenyan Companies Act is no different from s 221 (2) of our companies Act. In the Kenyan case the phrase to bring an action was taken to mean to commence or to continue with the proceedings.

The foregoing makes me agree with Advocate *Matinenga* that the Plaintiff being a company now in liquidation cannot proceed with the legal proceedings without the liquidator first obtaining the leave of the court to do so.

In the result, I uphold the point in *limine*. The matter is struck off the roll and the plaintiff is ordered to pay costs.

Mawere and Sibanda, plaintiff's legal practitioners
Honey and Blackenberg, defendants' legal practitioners