

INRE: STAND FIVE FOUR NOUGHT (PVT) LTD  
(Under Provisional Judicial Management)  
FOR AN ORDER FOR FINAL JUDICIAL MANAGEMENT

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 23 AND 30 September 2015

### **Opposed Application**

*L Uriri*, for the applicant  
*T Mpofo*, for the respondent

MATHONSI J: This application for a judicial management order made in terms of s 299 (1) (a) as read with s 207 (1) and s 242 (b) of the Companies Act [*Chapter 24:03*] makes for very interesting reading indeed. The basis for seeking that order is contained in para 10 of the founding affidavit of Serish Pershotam Ranchod, a director of the applicant. He says:

“10. The application is made on the following basis:

- 10.1 Applicant company registered a mortgage bond over its sole immovable property as security for a loan extended to an affiliate company, Myramar Farming (Pvt) Ltd by Salzman ET CIE SA, a company registered in Panama.
- 10.2 Myramar Farming (Pvt) Ltd has since been placed under provisional judicial management under case No HC 5914/14 because it is currently unable to pay its debts although it has high prospects of discharging its debts under judicial management. (Refer to Annexure D). Consequently, Applicant’s property faces execution by Salzman ET CIE SA.
- 10.3 Execution of applicant’s sole property will result in applicant plunging into certain liquidation as it will no longer be able to conduct its main objective of holding and managing the immovable property.
- 10.4 It is therefore just and equitable that the applicant be placed under Provisional Judicial Management as the moratorium granted by judicial management will prevent execution of applicant’s property whilst Myramar Farming, the principal debtor to Salzman ET CIE SA liquidates its debt under judicial management.”

One should give credit to the applicant, at least it is brutally honest. Judicial management is not being sought for any other reason than to circumvent the consequences of

a suretyship which the applicant went into wherein it secured a huge loan taken by its sister company from a creditor who has been unable to realise any outlay from the principal debtor because it has also sought and obtained a judicial management order under case number HC 5914/14. It is therefore not paying the debt of \$750 000-00 which it owes to the creditor. Although the applicant stood as surety for the due settlement of that debt and registered a surety mortgage bond over its immovable property, being Stand 540 Salisbury Township in favour of the creditor, it has no intention whatsoever to pay the debt.

It is for that reason that it has elected to shelter under the cloak of judicial management for no other reason than to ensure that its property is safe from execution while Myramar Farming (Pvt) Ltd, the principal debtor, hopefully pays the debt owed to the creditor. It has not escaped my gaze that the deponent of the founding affidavit is the common denominator in all this in that he holds a 20 per cent shareholding in Myramar Farming (Pvt) Ltd, the principal debtor which benefited from the loan. He also has an interest in the applicant hence he has already avoided paying the debt under Myramar by obtaining a judicial management order. Using the same *modus operandi* he has moved quickly to avoid paying the same debt under the present applicant by securing a provisional order for judicial management for all the wrong reasons. That way a creditor which entrusted a large sum of money to these companies has to be left without a remedy when Ranchod and his associates have fully benefited from the loan. Is that the reason why the procedure for judicial management was invented?

In terms of s 300 of the Companies Act [*Chapter 24:03*]:

“The court may grant a provisional judicial management order in respect of a company-

- (a) on an application referred to in paragraph (a) of subsection (1) of section two hundred and ninety-nine, if it appears to the court-
  - (i) that by reason of mismanagement or for any other cause the company is unable to pay its debts and had not become or is prevented from becoming a successful concern; and
  - (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
  - (iii) that it would be just and equitable to do so;
- (b) on an application referred to in paragraph (b) of subsection (1) of section two hundred and ninety-nine, if it appears to the court that-

- (i) if the company is placed under judicial management the grounds for its winding up may be removed and that it will become successful concern; and
- (ii) that it would be just and equitable to do so.”

Section 299 (1) allows the court on an application being made by a person entitled to do so, for the winding up of a company to grant a provisional judicial management order instead. Section 242 (b) provides that a company may be voluntarily wound up if it resolves by special resolution that it be wound up voluntarily.

The circumstances giving rise to this application are accurately set out in the respondent’s heads of argument. They are that there are essentially 3 main actors involved in the matter namely Salzman ET CIE SA, the creditor, a company incorporated in Panama, Myramar Farming (Pvt) Ltd incorporated in Zimbabwe which is the principal debtor and the applicant, also incorporated in Zimbabwe and is the surety and co-principal debtor.

The principal debtor approached the creditor for a loan of \$1 245 000-00 which the creditor was only prepared to advance upon security in the form of a surety mortgage bond on immovable property being furnished. The applicant, being a sister company of the principal debtor with a common shareholder was prepared to grant that security. In 2010 the applicant executed surety mortgage bond number 2367/2010 in favour of the creditor binding itself as surety and co-principal debtor in the sum of \$750 000-00 for the due performance of the principal debtor’s obligations under the loan agreement. The applicant mortgaged its immovable property being Stand 540 Salisbury Township measuring 595 square metres. It undertook that in the event of the principal debtor’s failure to pay the debt, it would itself pay any amount due to the creditor in terms of the loan agreement.

Content with that security the creditor then advanced the sum of \$1 245 000-00 to the principal debtor. When the principal debtor defaulted, the creditor instituted proceedings in this court against the principal debtor which came to naught when the principal debtor was placed under judicial management. The creditor was forced to turn to the surety, the present applicant, for redress directing a letter of demand on 25 February 2014. When no response was forthcoming the creditor issued summons against the applicant on 8 September 2014 in HC 7916/14 seeking payment of the sum of \$750 000-00 and an order declaring the mortgaged property specially executable.

Meanwhile, the applicant moved quickly, and without notice to the creditor, to obtain a provisional judicial management order on 10 September 2014 bringing the creditor’s suit to a crashing halt. It is the confirmation of that provisional order which is strenuously

opposed by the creditor on the grounds that while the basis for seeking to place the applicant under judicial management is that the mortgaged property is the applicant's sole property, such cannot found a basis for that order because the applicant knew, when it mortgaged the property that it was its sole asset but proceeded all the same. To grant such relief would therefore be contrary to all notions of security for a debt and the principles of freedom and sanctity of contract. In addition, the application constitutes an abuse of court process in order to frustrate and/or delay a just claim while not laying out a proper case for the grant of a judicial management order.

Before I determine the merits of the application I have to deal with the preliminary points taken by Mr *Uriri* for the applicant. He has taken 2 points *in limine* namely that the deponent of the opposing affidavit does not have valid authority to oppose the application on behalf of the creditor because the power of attorney and company resolution relied upon are defective and secondly that the notice of opposition filed on behalf of the creditor was filed after the creditor was barred. It has not escaped my attention that counsel for the applicant has assigned 16 pages of his heads of argument to the 2 points *in limine* that have been taken while reserving only 3 ½ pages for the merits of the application. It is not without reason that this is so. In all fairness to Mr *Uriri* I take judicial notice that the applicant's heads of argument were not prepared by him but his instructing attorney probably before he was briefed.

On the first point it has been submitted that the deponent of the opposing affidavit of Melina Mathsiya, who is the legal practitioner, representing the creditor, cannot validly do so because the power of attorney and board resolution are defective. Those instruments of authority were signed by the creditor's representatives on 24 June 2014 when the Notary Public who authenticated the signatures did so on 26 June 2014. For that reason, the signatories did not appear before the Notary Public on 24 June 2014.

I do not intend to be detained by an argument which appears to have been conjured by a desperate litigant clutching at straws. Even the untrained eye can see that the special power of attorney was typed and printed with a date of 24 June 2014 for the signature of the creditor. The Notary Public who authenticated the signatures appended his own date stamp with 26 June 2014 and signed. There is therefore no basis for suggesting that the document was signed on different days. I am prepared to surmise that the correct date of signing by all the parties was 26 June 2014 and reject the suggesting that the document was signed on different dates. Errors of that nature do occur in the heat of the moment and are so

insignificant that they should not be allowed, on their own, to decide the outcome of important litigation.

Regarding the resolution of the board, it records at the top that it is an extract of the minutes of a meeting which was held on 24 June 2014. At the bottom it is signed by a representative of the company whose signature was authenticated by a Notary on 26 June 2014. So what? Again there is nothing to suggest that it was not signed in the presence of the Notary who authenticated the signature. Accordingly I dismiss that objection.

Mr *Uriri* was not done yet. He submitted that those documents are still invalid and of no use for purposes of this matter because the board resolution appointed: “Mtetwa and Nyambirai Incorporating Wilmot and Bennett as its attorney and agent for purposes of recovering the monies due and owing to it by Myramar Farming (Pvt) Ltd”.

As Mtetwa and Nyambirai renounced agency on 21 May 2015 (significantly long after the notice of opposition was filed on 20 November 2014) and Wilmot and Bennett are no longer part of the former law firm, Ms *Matshaya*, is therefore not authorised to represent the creditor. Surely that cannot possibly be a serious argument. What is apparent is that when the notice of opposition was filed the 2 law firms were operating as one. They must have broken up somewhere along the way to practise as distinct entities and Wilmot and Bennett continued to represent the creditor and filed a notice of assumption of agency separately. In my view that did not invalidate the appointment because they were also appointed albeit as incorporated by Mtetwa and Nyambirai.

The second leg of that argument is equally not sustainable. It is that the law firm was appointed to recover money owed by Myramar Farming (Pvt) Ltd and not to defend the applicant’s application. The process of recovering money owed by the principal debtor has taken the creditor’s agent to the opposition of an application clearly designed to avoid paying. That money is also owed by the applicant as co-principal debtor, a co-principal debtor that has renounced the benefit of excursion. It would be naive to invalidate the document on the basis that it makes reference to the principal debtor and not the surety.

In any event the purpose of attaching a company resolution or even a power of attorney is to demonstrate that it is the company which is litigating and not an unauthorised person. The court will not disbelieve a deponent of an affidavit who says or he or she has authority of the company to represent it unless it is shown evidence to the contrary. It is not enough for the applicant to just complain about such authority without placing anything before the court to suggest that it is not the company that is before the court: *African Banking*

*Corporation of Zimbabwe Limited t/a Banc Abc v DWC Motors (Pvt) Ltd and Others* HH 123/13.

Mr *Mpofu* relied on the authority of *Mudzengi & Ors v Hungwe & Anor* 2001 (2) ZLR 179 (H) 182 D – F in making the useful point that it is rather startling and unusual for an applicant to object to the *locus standi* of a respondent that it has cited. While this is an *ex parte* application, there is no doubt that it is anchored on the fact that a debt is owed to the creditor, which the applicant does not wish to pay at the moment. That authority therefore applies to this matter. The applicant cannot question the creditor's *locus standi* when it is the sole creditor owed money and judicial management has arisen precisely because of that debt.

It is important that the applicant is in fact not only a surety but also a co-principal debtor who has renounced the benefits of excursion and division. In that regard it matters not that the documents giving authority refer to Myramar Farming (Pvt) Ltd and not the applicant itself. The line between them has become blurred because of that, apart from the fact that both the power of attorney and resolution are couched in such wide and sweeping terms that they allow the agent to do virtually anything on behalf of the creditor.

Even if I were wrong in making the foregoing conclusions, I would still dismiss the objection to the instruments of authority on the basis that the rules of court no longer require a legal practitioner to produce a power of attorney to represent a litigant. It is trite that a legal practitioner is an agent of his or her client and that he or she has authority to depose to an affidavit on behalf of the client with a rider that the legal practitioner can only depose to those facts to which he or she has personal knowledge.

In *Zimbank Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H) 407G; 408A Mavangira J stated:

“I agree with the applicant's counsel's submission that it is trite that a legal practitioner is his client's agent. See para 4 of his heads of argument. I do not, consider the omission in the founding affidavit of the allegation that the deponent was 'authorised', to be fatal, particularly also, in view of the history or background of the application. This same legal practitioner acted for the applicant in the proceedings which subsequently led to the taxation now sought to be reviewed and in which the issue of his authority was not an issue. I am satisfied that the deponent's averment in the founding affidavit is sufficient in the circumstances of this matter, to show his authority to depose thereto and therefore find that the deponent was duly authorised by the applicant as he states.”

I associate myself fully with that pronouncement which equally applies to the present matter and accordingly uphold the opposing papers and the representation of the creditor.

The applicant also objected to the opposing papers on the basis that they were filed out of time. This is because the provisional order for judicial management was published in

the Government Gazette and the Herald on 16 October 2014 and when the notice of opposition was filed on 20 November 2014 it was out of time. Counsel for the applicant also submitted, without evidence to support that submission and virtually leading evidence from the bar, that the provisional order was also attached to a letter dated 16 September 2014 addressed to Mtetwa and Nyambirai, then representing the creditor. He said that correspondence can be produced at the hearing should the need arise. For that reason the 10 days during which to file opposition expired on 30 September 2014 meaning that, the creditor is barred as the papers were filed 50 days out of time. Appearing to contradict himself, he also submitted that the opposing papers should have been filed by 30 October 2014 but were filed 20 days out of time.

I agree with Mr *Mpofu* for the creditor that the issue of service of the provisional order for judicial management is governed by r 247 (3) (c) of the High Court of Zimbabwe Rules, 1971 which provides:

“Where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall specify the manner in which the provisional order is to be published and, where appropriate, the persons on whom copies of the provisional order, together with all supporting documents are to be served”

Unfortunately the provisional judicial management order whose confirmation is being contested is not in the usual Form 29 D of the Rules of Court. So in determining whether the creditor is barred, it is to that order that one must find the answer. The relevant provisions of that order are the first sentence of para 1 para(s) 3 and 4 which I reproduce hereunder verbatim:

“IT IS ORDERED THAT:

Any interested party shall show cause to this court sitting in Harare on this 26<sup>th</sup> day of November 2014, on why an order should not be made in the following terms.....

2.....

3. This order shall be published once in the Zimbabwe Government Gazette and once in the Herald newspaper. Publication shall be in the short form annexed to this order.

4. Any person intending to oppose or support the application on the return day of this order shall:- :-

(a) Give due notice to the applicant at care of its legal practitioners, Messrs G. N. Mlotshwa & Company of Titan Law Chambers, 8<sup>th</sup> Floor Gold Bridge, Eastgate, Harare.

(b) Serve on the applicant a copy of any affidavit which he files with the Registrar of the High Court.”

That is all that the order directs a person desirous of opposing the confirmation of the order to do, to show cause why the final order should not be made on the return date, to give

notice to the applicant through its legal practitioners at the given address and to serve a copy of any opposing affidavit filed on the applicant. Nowhere in that order is a *dies inducae* created. Such is only referred to in the publication that was published in the Herald and Government Gazette which called upon interested parties to file opposition by 30 October 2014 and serve it upon the applicant's legal practitioners. The proof of publication is only attached to the answering affidavit. Mr *Uriri* conceded that there is nothing on the papers to suggest that the publication's parentage can be found in the court order.

It is important that in terms of the founding affidavit, the sole reason for approaching the court for an order for judicial management was that the applicant owed the creditor money secured by a surety mortgage bond which debt it did not want to liquidate after the co-principal debtor became incapacitated. The creditor was the only interested party and it boggles the mind therefore why the applicant preferred to proceed *ex parte* without citing the creditor. It is also significant that there is no proof that even after the order was granted it or the application were served upon the creditor. Instead the applicant expected the creditor to know of the application through publication together with the whole world. There is merit therefore in the submission by counsel for the creditor that the applicant was proceeding with remarkable stealth in order to prevent the creditor from contesting the order.

I have already made reference to r 247 (3) (c) which requires that the provisional order should, "where appropriate", specify the persons on whom it should be served along with the supporting documents. There is no doubt in my mind that in the circumstances of this matter it was appropriate for the creditor to be specified and to be served with the order and the application, instead of placing reliance only on publication as the applicant did. It is for that reason that the judge who granted the provisional order did in fact query, as appears from his endorsement on the record cover, that:

"Why should this application be filed without notice to Salzman CT CIE SA?"

The fact that he subsequently granted the provisional order, does not obliterate the onus resting upon the applicant to comply with r 247 (3) (c). What we therefore have is a party who has failed to fully comply with the procedure set out in the rules under circumstances suggesting a deliberate attempt to incapacitate a creditor from contesting the application, now trying to rely on its own default to snatch at a final order unopposed. That cannot be allowed to happen.

I therefore come to the inevitable conclusion that there was no *dies inducae* imposed by the provisional order which would result in the creditor being barred as it was only

imposed by a notice of publication which was prepared in complete disregard of r 247 (3)(c) requiring that the creditor be specified and served with both the order and the application. The order itself may be said to have been incomplete by reason of failure to direct service upon a known sole creditor mentioned in the application.

Even if I am wrong in that finding, I would still not uphold the point *in limine* for another reason namely that it is trite that a creditor is entitled to appear on the return day of a provisional order for a winding up or judicial management and show cause why the order should not be confirmed. That is the spirit of subrule 3 or r 247 para (a) of which requires the provisional order to be in Form 29 D (it was not) while para (b) requires it to specify the date and place at which the court will hear argument on confirmation. I therefore dismiss that point *in limine* as well.

On the merits of the application it was argued half-heartedly in support of confirmation in the heads of argument that I must consider the interests of both the creditor and the shareholders in deciding whether it is just and equitable to grant the order, that there are other sureties that can discharge the debt instead of the applicant and that the illiquidity of the applicant is temporary, even though throughout the application the applicant does not propose to pay the debt at all. In fact the thrust of the application is that the applicant should be sheltered by the order while someone else pays the debt at a later date. Reliance was placed on the authority of *Repp v Ondundu Goldfields* 1937C PD 375, *Millman v Swartland Huis Meulbileerdere (Edms) Bpk* 1972 (1) SA 741 and *Gutman v Sunlands Township (Pvt) Ltd* 1962 (2) SA 348 (C)

In terms of s 305 of the Companies Act:

“the court [.....] may grant a final judicial management order if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management will be enabled to become a successful concern and that it is just and equitable to grant such an order.”

Earlier in this judgment I alluded to the main reasons for seeking judicial management as set out in the founding affidavit as being a moratorium to prevent execution against the mortgaged property of the applicant. Clearly therefore it has nothing to do with the acceptable grounds provided for in the Act. It has nothing to do with enabling the applicant to be a successful concern. In fact it has not even been shown that it is not a successful concern or that whatever problems it faces are a result of mismanagement to be cured by the involvement of a judicial manager. Mr *Uriri* relied solely on “the just and equitable” provision.

The applicant simply does not want to pay a debt which has benefited its shareholders who appear to have taken a loan in the name of one company in which they have beneficial interest, secured it by virtue of a property of another company in which they have beneficial interest. When the time to pay came they did not do so, in fact they probably have no desire to pay, but rushed to shelter under judicial management both for the principal debtor and the surety. An abuse of court process has never been so crass. The use of court process for the purpose for which it was never meant, that is abuse.

I therefore have no hesitation in concluding that it is not just and equitable to grant the final order. The authorities relied upon cannot serve the applicant. It has proceeded in bad faith and this court cannot be seen to lend assistance to a bad debtor who contemptuously does not intend to settle a debt lawfully owed but wants to use the process of the court as a shield against foreclosure.

In the result, it is ordered that:

1. The provisional order for judicial management granted on 10 September 2014, be and is hereby discharged.
2. The application is hereby dismissed.
3. The applicant shall bear the costs of suit.

*GN Mlotshwa & Company*, applicant's legal practitioners  
*Wilmot and Bennett*, respondent's legal practitioners