MEMBER CHIPAMBA
and
LINDA DEWA
versus
MCDOWELLS INTERNATIONAL (PRIVATE) LIMITED
(Under Provisional Liquidation)

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 March & 8 June 2016

Opposed Application

T Mpofu for applicants
L Uriri for Respondents

TSANGA J: This is an application for rescission of judgment under case HC 9189/13 which was granted on 11 March 2015. It removed the respondent company from the status of provisional judicial management and placed it under provisional liquidation. The applicants are its directors. The basis of the application is that the decision was granted in error because the applicants as the directors of the respondent company were not aware of the proceedings that converted the order for provisional judicial management into an order for provisional liquidation. This was because the notice of set down for the hearing 11 March 2015, had been served on 17 February 2015 on their erstwhile legal practitioners *Matutu and Mureri Legal Practitioners*, a Masvingo based firm, through their corresponding legal practitioners in Harare, *Zuze Law Chambers*. On that same day *Matutu and Mureri* renounced agency and *Muzenda and Partners* had simultaneously assumed agency on behalf of applicants. Proof was provided that their erstwhile lawyer had renounced agency and that new lawyers had assumed agency and that the respondent's lawyers as interested parties had been served, in

addition to the Registrar being notified. As such, the order of 11 March 2015 is said to have been granted in error as applicants were not aware of the set down of the matter.

The application for rescission is made in terms of order 49 r 449 on the basis that the judgment was given in error as the judge would not have granted the order had she known that the applicants practitioners who were handling the matter, had not been served.

The respondent raises several points *in limine* upon which it resists the setting aside of the provisional liquidation order. Respondent argues that applicants have adopted an improper procedure by using r 449 in seeking to set aside the winding up order. Through the liquidator who deposed to its affidavit, respondent is of the view that where a provisional order is sought to be set aside, the applicable provision is s 227 of the Companies Act [*Chapter 23:03*] or rescission that is sought under common law. It is therefore emphasised that applicants have an alternative remedy and the order they seek is said to be incompetent.

Respondent further argues that the creditors should have been joined as virtually all but one were in favour of the liquidation. Additionally, respondent points out that the application contravenes s 213 (a) of the Companies Act [*Chapter: 23:03*] which prohibits a party from commencing proceedings against a company in liquidation without obtaining the leave of the court. Lastly, respondent points out that if the court were to rescind the order, then the status *quo ante* would be restored - in this instance provisional judicial management. It is said that the order sought does not cater for the return date wherein the provisional order should be confirmed or discharged meaning that the company would remain under provisional liquidation indefinitely.

WHETHER THE PROCEDURE IS INCOMPETENT BY VIRTUE OF S227

Section 227 of the Companies Act [*Chapter 23:03*] reads as follows:

> **"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 deems fit."

The gist of respondent's argument is that the applicants have a remedy as laid out in this section in terms of setting aside the provisional liquidation order. Thus this application

for rescission is said to be off side in the face of an enabling the legislative provision.[1] Still on this point, and drawing on WA Jobber's book, *The law of South Africa, Companies Close Corporations,* respondent argues that where a party seeks to set aside a winding up order on the grounds that they should never have been liquidated, then they are subject to judicial limits similar to those laid done in respect of an application or rescission of judgment at common law. It is argued that *in casu,* the applicants have not addressed the requirements for rescission under common law. Relying on the case of *Aubrey M Cramer Ltd* v *Wells No*[2] respondent emphasises that the order for setting aside a winding up order is an extraordinary one and should not be granted lightly.

The import of s 227 was canvassed in the High Court case of *Khuzwayo* v *Assistant Master of the High Court & Ors* [3] where the court held that s 227 provides an alternative remedy to an application for rescission of judgment as provided for in the High Court rules. Bere J unpackaged the import of this provision thus:

> "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 arises, a litigant has this option at his or 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."

The possibility of use for setting aside a winding up order may very well be there in terms of s 227 of the Companies Act. However, this must be in the context where the order granted would, at the very minimum, have been granted procedurally. A party cannot be expected to harness s 227 in circumstances where they point to a procedural error in the granting of the order in the initial instance. Simply put, it is not an applicable provision where the quest to set aside liquidation proceedings is on the basis of procedural shortcomings in the obtainment of that order. The provision is applicable where there have been supervening events that have unfolded since its granting. As such, it is therefore only in instances where an applicant is not pointing to a procedural error but to factual realities that the procedure in s 227 would be applicable.

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[1] The following cases were relied upon by the respondent Re Telescriptor Ltd 1903 2 Ch 174; Re Calgary & Edmonton Land Co. Ltd 1975 1 ALL ER 1046 at 1050; Herbst v Hessels 1978 (2) SA 105 (T)
[2] 1965 (4) SA 304 at 305
[3] 2007 (1) ZLR 34 (H)

In the South African case of *Storti* v *Nugent & Ors*[4] which dealt with a similarly worded provision[5] it was made clear that the provision is intended to cater for an attack on a winding–up order on the basis that supervening events render it necessary to set aside the winding up proceedings. It was equally made clear that the provision is not for rescission of an assailable order. The head note to that case captures this position thus:

> "The section may not be invoked for the rescission of a winding up order on the basis that it should never have been granted in the first place due to some defect in the procedure or merits of the application, but only where the winding up order is in itself unassailable, and supervening events render it necessary to desirable to set aside the proceedings. **If the winding up order is itself assailable, it may be rescinded under common law**….. "

Gautschi J explains on p 795 D-E of that judgment:

> "A moment's reflection reveals that an application to set aside or stay winding-up proceedings may arise in two broad situations. On the one hand, the winding-up order may be attacked on the basis that it should never have been granted, by reason of some defect in the procedure or the merits of the application. On the other hand, the winding up order may be unassailable in itself, but later events may render a stay or setting aside of the winding-up proceedings necessary or desirable. In my view, the section is intended to cover the later situation, and not the former. My reasons for this view are the following. Firstly, if the winding up order is itself assailable, it may be rescinded under common law and there is no need for the Companies Act to provide for such a situation."

He also pointed out that from the provision, the company represented by its board of directors has no *locus standi in judicio* under the section. Furthermore, he also emphasised that the provision as so worded, cannot possibly apply to the setting aside a procedurally defective order because reference is made to setting aside proceedings as opposed to setting aside "an order". Of critical suasion is that the procedure where an order is assailable, is by way of rescission at common law. This is significant in that although the respondent clearly fails in its argument on the applicability of s 227 because a procedural defect is alleged, it also rests its case on the argument that rescission of a winding up order should be sought under common law and that the applicant *in casu* has not shown at all how its application meets the common law requirements.

As to what is involved in making such an application under common law, again drawing on the elucidation in the *Nugent* case supra, the following are the principles:

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[4] 2001 (3) SA 783 W at p

[5] The provision discussed was s354 (1) of the Companies Act 61 of 1973. It provides that the court 'may at any time after the commencement of a winding up , on the application of nay liquidator, creditor or member, 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 or setting aside the proceedings…."

> "That involves establishing sufficient "cause" which in turn involves two essential elements: 1) the party seeking relief must present a reasonable and acceptable explanation for his default and 2) such a party must on the merits have bona fide defence that *prima facie* has some prospects of success which in the case of an application for the rescission of a winding –up order, means **that the applicant must show *prima facie* that the company is solvent**."

Principally, applicants have sought to rely on r 449 whereby they do not have to show good cause and merely have to show that the judgment was granted in error or that the order sought was sought in the absence of the other party. The relevant provision reads thus:

> ***"449. Correction, variation and rescission of judgments and orders***
> (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
> (*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby;"

They draw on the case of *Banda v Pitluk*[6] for the argument that once the court has established that the judgment was granted in error, then that is the end of the matter and the court should rescind the judgment. Rescission, on account of the identified error, is essentially granted without further ado.

Applicants also argue that their application is against the liquidator's conduct in proceeding to bring provisional liquidation against the company without according the applicants sufficient opportunity to be heard and to address the court on the proposed course as interested parties. Whilst drawing on a number of cases for these arguments (*African Gold (Zimbabwe) (Pvt) Ltd v Modest (Pvt) Ltd*[7]*;* on the need for notice of motion for liquidation; *Ex Parte Smith N.O; In re Dodge Mineral Production Company (Pvt) Ltd*[8] on the centrality of the right to be heard; *ABSA Ltd* v *Rhebosloof (Pty) Ltd* on residual power of directors) they are particularly bolstered in their argument by the successful outcome of their application in the case of *Member Chipamba and Anor* v *Lees Inn Hotel Pvt Ltd*[9] in which they were also the applicants in that matter. Rescission of provisional liquidation was granted essentially because no official notice of set down confirming a provisional liquidation in a company in which they were directors had been served upon them. Whilst they were aware of the return date, the *dies induciae* for the filing of any objections following the placing of the advert, was

[6] 1993 (2) ZLR 60
[7] 1999 (2) ZLR 61 (SC)
[8] 1964 RLR 93
[9] HH 134/16.

also insufficient. The thrust of their argument was therefore that without proper service on the other party, the court lacked competence to make the order it did, placing the company under provisional liquidation without any notice to the applicants who were interested parties. Munangati J held in that case that although it is the prerogative of the judicial manager to apply for cancellation of the relevant judicial management order and the issue of an order for winding up in accordance with s 306 (m) of the Companies Act, this has to be done procedurally with relevant notices being given and with due compliance with the rules.

In this case before me, applicants equally adopt a similar argument as in their previous case before Munangati J, essentially that they are coming from a vested interest angle and that no notice of set down was received.

The respondent's argument, as pointed out is also that the applicants cannot proceed under r 449 to set aside the provisional liquidation order as they must proceed under common law so that they not only give an adequate explanation for the default, but also show prospects of success, meaning they must show solvency where setting aside a winding up order is sought for whatever reason.

A winding-up order does not operate in a vacuum. It comes into play where a company is clearly no longer able to pay its debts. Proceeding under common law for its rescission even for procedural reasons holds merit since it would make no sense to simply set aside a winding up order on account of procedural defects if the company was at the same time unable to pay its debts. Since the rationale of granting a provisional liquidation order would have been evidence of failure to pay debts, in my view it makes absolute sense for a party who seeks to set aside a provisional liquidation order for whatever reason, to show in equal measure that they have a bona fide defence which *prima facie* carries prospects of success. At the core of the provisional order are interested parties and as such a court is unlikely to grant rescission purely on the basis of a procedural error where creditors remain unpaid and where the court has not even been furnished with satisfactory evidence that provision has been made for the payment of their claims.

In this instance, the respondent company was initially placed under judicial management in November 2013. It was only in March 2015 that the judicial management order was converted into a provisional liquidation order, thus having given it ample time to turn around its fortunes. In weighing prospects of success, the injustice that a party complains

of must therefore also be considered against the backdrop of that of creditors. Furthermore, this is not the kind of situation where a party would have had absolutely no knowledge of the matter at hand. In my view, it is for these reasons that the application is made under common law and not under r 449 for instance, which sets aside an order on the basis of error or absence of the other party from the proceedings.

I am therefore in agreement with the respondent on the point that the application for rescission should have been made under common law so as to not only to explain the defect but equally significant, to also show that on merits the applicants have a *bona fide* defence (solvency) which carries some prospect of success. Secondly, I am in agreement with respondent that the creditors did of necessity, need to be joined to the application. The creditors had met. To seek to set aside the provisional liquidation order without any involvement of the creditors would hold no logic when the process itself has been at their instigation. It is not enough to merely put forward that views of creditors were not properly considered and that they were not afforded an opportunity to be properly heard. They must speak for themselves and ought to have been joined. Those creditors who swore to affidavits opposing this application averred that there are no prospects of the company operating profitably. Respondent was a money lending business whose licence was revoked by the Reserve Bank for taking money from the public. It cannot operate as a money lender. This court would essentially be acting irresponsibly were it to rescind to the provisional liquidation on the basis of the reasons adduced for default, without any *prima facie* evidence whatsoever having been adduced in this application, to support genuine solvency and support from creditors.

Having said that, it is also important to point out that the order that the applicants seek to set aside is provisional in nature. There is no reason why the liquidator would refuse to stop the liquidation if, between now and its confirmation, creditors are paid. After all, debts owing are at the centre of the provisional winding-up order.

The third point *in limine* relates to the need to seek the court's leave before commencing action. Whilst indeed the provisions of ss 209 and 213 of the Act, provide that where a company is being wound up no action may be commenced against the company without the leave of the court, in light of the finding that the applicants in any event have not made a case for rescission under common law, the issue need not detain us.

It is accordingly ordered that the application be and is hereby dismissed with costs.

Muzenda & Partners: Applicants Legal Practitioners
GN Mlotshwa & Company Respondent's legal Practitioners