

G.N. MLOTSHWA & COMPANY
LEGAL PRACTITIONERS
versus
DAVID WHITEHEAD TEXTILES LIMITED
and
DWT HOLDINGS (PRIVATE) LIMITED
and
DWT SPINNING (PRIVATE) LIMITED
and
DWT COTTON WOOLS (PRIVATE) LIMITED
and
DWT FABRICS (PRIVATE) LIMITED
and
DWT HOSIERY (PRIVATE) LIMITED
(All Under Final Judicial Management)
and
KNOWLEDGE HOFISI N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 January 2017 & 8 February 2017

Opposed Application – Provisional Sentence

Ms F. Mahere for the plaintiff
F.G. Gijima, for the defendants

MUREMBA J: It is the plaintiff's averment that between 4 January 2011 and 19 March 2014 it rendered legal services to the DWT Companies whilst they were under provisional judicial management. The legal fees for the services rendered amounted to US\$250 000.00. On 1 November 2013 Winsley Militala, the then provisional judicial manager wrote an acknowledgement of the debt, but since then the debt has not been paid despite several undertakings having been made to pay it. The defendants' failure and or refusal to pay the debt prompted the plaintiff to issue summons for provisional sentence. However, the DWT Companies are now under final judicial management under a different judicial manager, the seventh defendant, Knowledge Hofisi.

In response to the summons the defendants raised 2 points *in limine*. Firstly, that the plaintiff has not obtained the leave of the court to sue the first to sixth defendants who are

under judicial management yet para 5 of the court order placing the companies under judicial management states that, “all actions and applications and execution of all writs, summonses and other process against the first, second, third, fourth, fifth and sixth respondent companies shall be stayed and not proceed without the leave of this court”.

The second point in *limine* was to the effect that the document that the plaintiff is relying on is not an acknowledgement of debt as it is not clear and certain on the face of it and would require extrinsic evidence to prove the indebtedness. However, the point in *limine* was abandoned at the start of the hearing after it was agreed that this is an issue on the merits of the matter.

In the answering affidavit and in response to the first point in *limine* the plaintiff averred the following. There is no need to seek the leave of the court for legal proceedings which commence after the judicial management order has been granted. It is only legal proceedings which were pending before placement under judicial management that are stayed and not fresh proceedings which are being commenced. The court order in issue was granted on 19 March 2014 yet these proceedings were commenced on 11 March 2016. The plaintiff averred that the court order does not say legal proceedings shall not be commenced against the companies, meaning that fresh legal proceedings can be commenced against the companies.

In support of the plaintiff’s argument that the leave of the court is only required to continue with legal proceedings that had commenced before the order for final judicial management was granted and not for legal proceedings that had not yet commenced, Ms *Mahere* argued that you cannot stay something that is not yet in existence or something that has not yet started. She compared the wording used in s 301 (1) of the Companies Act which deals with judicial management of companies and the wording used in s 213 (a) of the same Act which deals with winding up of companies. In s 301 (1) it is stated that, “a provisional order may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court” whilst in s 213 it is stated that, “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”. (My underlining)

It was Ms *Mahere*’s argument that the distinction in the choice of words that were used in the two sections clearly conveys the intention of the legislature. She said that if the

legislature had intended to stop fresh proceedings from commencement in judicial management orders it would have clearly done so by using the correct words as it did in the section which deals with winding up orders. She said that it would not have used the word ‘stayed’ but would have used the appropriate words like it did in s 213.

To buttress her argument Ms *Mahere* referred to the case of *ZFC Ltd v KM Financial Solutions Pvt Ltd* HH 47/15 where a similar scenario arose and the same point in *limine* was raised by the defendant company which was under provisional judicial management and was now being sued by the plaintiff which had not first obtained the leave of the court to sue. The same arguments like in the present case were made. The court held:

“It is only an action, proceeding, writ, etc. which is already in existence which can be stayed. If it is not yet in existence then there would be nothing to stay. If the legislature had intended that once an order of provisional judicial management has been granted the instituting of proceedings against the affected company shall be prohibited then it would have expressed the provision in the appropriate language. The language in ss 209 and 213 of the Companies Act which relate to the winding up of a company illustrates the distinction between ‘staying’ of proceedings and prohibition of commencement of proceedings against a company. In s 213 (a) the words used are ‘no action or proceedings shall be proceeded with or commenced against the company except by leave of the court.....’

In that section the expression ‘proceeded with’ would apply to actions or proceedings already in motion at the time that the winding up process is instituted, while the term ‘commenced’ would apply to actions and proceedings which have not yet been instituted.”

Mr *Gijima* submitted that he is not in agreement with the decision in the cited case arguing that once a company is placed under judicial management or liquidation, that company is not just placed into the hands of the judicial manager or the liquidator, it is also placed in the hands of the court. The court has a duty to protect the company even from the judicial manager or the liquidator. He said that the intention of the legislature when it enacted s 301 (1) was to protect companies that are under judicial management from litigation without the leave of the court. He said that whether the legislature had used the word ‘stay’ or ‘commenced’ the effect is the same. He submitted that the intention of the legislature was to halt any proceedings against the company and only allow them to be instituted with the leave of the court. He further argued that it is illogical that the legislature would intend to halt legal proceedings which had already commenced before the company was placed under judicial management but would give the green light to legal proceedings which are commenced after the company has been placed under judicial management.

I find myself persuaded by the argument advanced by Mr *Gijima*. I believe that there are two issues that resolve the dispute. The first one is the meaning of the expression “shall

be stayed and not proceed without the leave of the court.” To find the answer there is need to examine the meaning of the word ‘stay’. The second issue is to examine the mischief that the legislature sought to deal with in s 301 (1) of the Companies Act [*Chapter 24:03*] when it said:

“A provisional judicial management order may contain directions that while the company is under judicial management all actions and proceedings and the execution of all writs, summonses and other processes against the company shall be stayed and be not proceeded with without the leave of the court.”

In the case of *ZFC Limited* supra the court defined the word ‘stay’ as ‘to stop from going on; moving or having effect; hold back as defined in the Longman Dictionary of Contemporary English. The court took these words to mean that it is only an action, proceeding, writ etc. which is already in existence which can be stayed. For legal proceedings that are not yet in existence there is nothing to stay.

Whilst I agree with the definition of ‘stay’ that is given in the Longman Dictionary of Contemporary English, I would also like to refer to the definition that is in the Cambridge Advanced Learner’s Dictionary which defines the word ‘stay’ as, “to continue to be in a particular state.” If I take this definition in the context of the court order at hand, I would interpret the word ‘stay’ to mean that all legal proceedings, those that had commenced and those that had not yet commenced, should continue to be in the state that they were in before an order for judicial management was granted. In that regard the use of the word ‘stay’ will not be confined to legal proceedings which are already in existence, but will also extend to all legal proceedings that had not yet commenced before the order for judicial management had been granted. Even when I look at the meaning of the word ‘stay’ as defined in the Longman Dictionary of Contemporary English that was used in the *ZFC Limited* case, I still arrive at the same conclusion because you can stop from going on with that which you had not commenced or started. You can stop from moving from where you are and remain stationary. When you hold back it means that you do not do anything. This therefore means to me that any person who has a case with a company which is under judicial management which has been given an order to the effect that all proceedings shall be stayed, and, not be proceeded with without the leave, should stop right wherever they are and cannot move unless they obtain the leave of the court to either institute fresh proceedings or to continue with those proceedings that had already started. To me the word ‘stay’ has a broad meaning.

I believe that this interpretation suits quite well with what I believe was the intention of the legislature when it enacted s 301 (1) of the Companies Act. To begin with, the aim of

judicial management is to allow a financially distressed company to be returned to financial health with the supervision of the courts. An order for judicial management is granted if the court is satisfied that the company is unable to pay its debts. One of the advantages of judicial management is that the company may be provided with protection against creditors' claims. Protection may be given against legal proceedings. This credit protection allows the company to continue business and provide it with a much needed reprieve while it attempts to nurse itself back to financial health. The judicial management process is meant to ensure that there is little or no risk of asset depletion from creditor claims.

Since the objective of judicial management is to give viable companies which are in financial trouble a chance to rehabilitate themselves and be restored to profitability that is why s 301 (1) of the Companies Act provides that in some cases of judicial management the court order may contain directions for stay of all legal proceedings and execution of all writs against the company. In that regard all legal proceedings and all execution of judgments cannot be commenced or continued with unless with the leave of the court. It is my considered view that if such a direction is given in an order, the objective will be to protect the company against law suits from creditors while giving the judicial manager reasonable time to craft a rescue plan or to craft strategies on the best way for the recovery of the company without being involved in litigation which may be costly and laborious. It will therefore be illogical to then say proceedings that had commenced are the only ones that are halted but the ones that had not yet commenced can be commenced. I do not believe that the legislature could have intended to separate legal proceedings that were in existence from those that would commence. I cannot think of any reason why the legislature would want to make that distinction.

I verily believe that the word 'stay' in s 301 (1) of the Companies Act is all encompassing for proceedings that had commenced and those that had not. All are stayed. This is why there is the use of the word 'All'. It says all actions, applications and the execution of all writs, summons and other process shall be stayed. The word "all" means that there are no exceptions. It means that for every legal proceeding and for every writ of execution there has to be leave of the court first. This means to me that even for debts that arise after the company has been placed under judicial management there is need to obtain the leave of the court before one sues such a company. So even in the present case where the debt arose as a result of legal services that were rendered to the DWT companies during their time of provisional judicial management, the plaintiff which provided the legal services will

need to obtain the leave of the court before suing. The argument advanced by the plaintiff that if this point in *limine* is upheld, the court will be setting a dangerous precedent of causing or encouraging companies that are under judicial management to decline or neglect to pay legal fees is without merit. I say this because by upholding this point in *limine* the court is neither saying the defendants should not pay the legal fees for the services that were rendered to them nor is it saying that the plaintiff is completely barred from suing them. The court is simply saying if the defendants have refused or neglected to pay, the plaintiff should first obtain the leave of the court before suing them as is stipulated in the order for judicial management. Section 301 (1) of the Companies Act does not say that for the recovery of legal fees that are incurred during the judicial management process there is no need to obtain the leave of the court before suing. The provision provides for no such exception as it says all actions and proceedings and the execution of all writs, summonses and other processes against the company shall be stayed and be not proceeded with without the leave of the court. As I have already said above the word ‘all’ means every; each or whatever matter. Legal fees matters fall under the definition of the word ‘all’. So for their recovery, the leave of the court is also required. If the legislature intended such fees to be an exception it would not have used the word ‘all’ and it would have clearly said so using the appropriate language.

The requirement that the leave of the court be obtained first seeks to protect the company in that without the restriction, the distressed company can be subjected to a multiplicity of legal proceedings which can be both expensive and time consuming thereby taking away the available funds and the judicial manager’s attention from concentrating on issues that lead the company back to recovery. Some legal proceedings may not even be necessary. When an application for leave to sue is made, the court will investigate the intended litigation and decide on its impact before it grants the leave. In doing so, the court will consider various factors such as the amount of the claim; the complexity of the factual and legal issues involved; the seriousness or genuineness of the claim because some claims are frivolous and futile. The list of factors that is considered by the court is not exhaustive. It is a matter of the discretion of the court and the onus is on the applicant to satisfy the court that in his or her circumstances leave to sue ought to be granted. The court will not grant such leave in a case where it is clear that litigation will needlessly diminish the assets of the already ailing company.

In view of the foregoing I thus uphold the point *in limine*. The matter is therefore struck off the roll and the plaintiff is ordered to pay costs.

G.N. Mlotshwa & Company, plaintiff's legal practitioners
F.G. Gijima and Associates, defendants' legal practitioners