

ROSELT MITCHEL ENTERPRISES (PVT) LTD t/a METAL COMPONENTS
versus
MILDRED AND MATHIAS (PVT) LTD (Under Judicial Management)
and
MRS MANDINGO N.O. (Final Judicial Manager – Mildred and Mathias (Pvt) Ltd)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 June & 3 July 2019

Opposed Application

Miss *J. Mushunje*, for the applicant
K. Gama, for the first and second respondents

ZHOU J: This is an application for leave to institute proceedings against the first respondent, a company which was placed under judicial management by order of this court. The second respondent is the duly appointed Judicial Manager for the first respondent. The claim which the applicant intends to institute is based upon an agreement in terms of which the applicant sold and delivered to the first respondent certain mining equipment as detailed in the founding affidavit. The price for the equipment was US\$534 000. The first respondent paid a deposit of US\$152 000, leaving a balance of US\$382 000 which was supposed to be paid in monthly instalments. The applicant states that the first respondent made no other payment towards the balance of the purchase price after paying the deposit. The agreement was entered into on 19 October 2015. On 17 February 2016, some four months later, an order of provisional judicial management was granted in respect of the first respondent in Case No. HC 215/16. The applicant received notification of that order on 29 March 2016. A final order placing the first respondent

under judicial management was granted on 17 August 2016. Paragraph 6 of the final order of judicial management states as follows:

“All actions and applications and the execution of all writs, summonses, and other process against the applicant company shall be stayed and not proceeded with without the leave of this court.”

The instant application is opposed by the first and second respondents.

Following the placement of the first respondent under judicial management the applicant submitted its claim as a creditor. Applicant attended some creditors’ meetings. After some engagements the first and second respondents then denied liability to the applicant for the balance of the purchase price on the basis that the applicant had not delivered all the equipment purchased and that some of the equipment delivered was defective. By letter dated 18 September 2018 the third respondent advised the applicant that its claim had been rejected. This is what triggered the filing of the instant application.

The opposition by the first and second respondents is on the grounds, firstly, that the applicant instituted another application which it withdrew and has not paid the costs for it and, secondly that the first respondent is entitled to protection from suits by virtue of being under judicial management. The respondents also challenge the reference to the application being made in terms of “section g” of the order of this court which was the provisional order granted prior to confirmation thereof.

The objection to the filing of the instant application on the ground that the costs of the withdrawn application have not been paid is misconceived. Those costs were tendered as per the notice of withdrawal issued by the registrar on 28 December 2018. It is up to the respondents to recover them in terms of the rules. Equally, the reference to section g is not material. The fact is that this is an application for leave to institute proceedings against a company which is under judicial management. The objection is vexatious. The respondents are aware that the final order has a similar provision, para 6 which stays all actions and applications and execution of writs, summonses and other process against the first respondent without the leave of this court.

At the hearing of the matter Mr *Gama* for the first and second respondents objected to the application citing the provisions of s 259 (1) as read with s 304 of the Companies Act [*Chapter 24:03*] as providing an adequate remedy by which the applicant could challenge the refusal by the second respondent to settle its claim. The effect of s 304(5) is to make the provisions of s 259

apply to judicial management. This means that by operation of the two sections read together “if a claim is rejected by the liquidator (read, judicial manager), the claimant may apply to the court by motion to set aside the rejection”. This provision gives the applicant as the claimant the right to apply to court for the setting aside of a rejection of his claim by the judicial manager. The issue that exercised the court’s mind is whether, in the light of para 6 of the judicial management order as read with the provisions of the proviso to s 301(1) of the Companies Act, the applicant would be entitled to proceed to make the contemplated application without the leave of court. It would appear, however, that leave of the court would still be required given the explicit provisions of the judicial management order in that respect. If the legislature wanted such an application to be excluded from the requirement for leave of court it would have stated so explicitly or by necessary implication. Further, the order for judicial management does not exempt such an application from the requirement to obtain leave before instituting it. This means, therefore, that the objection that these sections provide an alternative to the application for leave to institute proceedings against the first respondent cannot be sustained. In any event, the remedy provided for in s 259 (1) assumes that the claim would be simply for the setting aside of the rejection of the claim by the liquidator and that the matters raised would be capable of determination on the papers since the procedure for the remedy would be by motion proceedings. Such a procedure inevitably presents difficulties where there are allegations of breach which would require proof of the breaches alleged by both parties as well as the amount due. These are matters which in the circumstances of this case or any other similar dispute would require evidence to be led in trial proceedings. The s 259 (1) procedure would therefore be inapposite for matters where there are disputes of fact. After all, the procedure does not purport to operate to the exclusion of any other remedies which may be available to a claimant whose claim has been rejected by the judicial manager. For these reasons the objection based on s 159 (1) is dismissed for want of merit.

What has to be determined now is whether leave to institute proceedings against the first respondent must be granted it being trite that judicial management is not an absolute bar to such proceedings. This is a matter in respect of which the court has a discretion which discretion must be exercised judicially having regard to all the circumstances of the case, see *Bindura University of Science Education v Tetrad Investment Bank Ltd & Anor* 2017 (1) ZLR 193(H) at 196G-197E. Unlike in the *Bindura University of Science Education v Tetrad Investment Bank Ltd, supra*, where

judgment had already been obtained prior to the respondent being placed under judicial management, in the present case what is being sought is to institute proceedings for the liability of the first respondent to be determined. In my view the principles applicable should be the same. Neither the Companies Act nor the judicial management order provides guidelines as to the relevant principles. The judgment of the Federal Court of Australia in the case of *Rushleigh Services Pty Ltd v Forge Group Ltd (In Liq) (Receivers and Managers Appointed)*; In the matter of *Forge Group Ltd (In Liq) (Receivers and Managers Appointed)* [2016] FCA 1471, is instructive. The relevant provisions are contained in s 500(2) of the *Corporations Act 2001* which states as follows:

“After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.”

There are differences between the above provision and the one in our law relative to judicial management in that in terms of the Australian provision the civil proceedings are stayed or may not be commenced after the passing of a resolution for voluntary winding up whereas in this jurisdiction actions and proceedings and execution of all writs, summonses and other processes against the company are only stayed by an order of court, s 301 (1) of the Companies Act [*Chapter 24:03*]. However, judicial management has the same effect as in our jurisdiction once the court has ordered that all actions and proceedings and the execution of summonses against the company be stayed and not proceeded with without the leave of the court. An area of commonality is that the Australian provision cited above is similar in material respects to s 213 of our Companies Act which applies to a winding up by the court in that the effect of winding up is not just to stay or preclude proceeding with any action or proceeding against the company but also to prohibit commencement of any action or proceeding against such company. Section 213 (a) of the Companies Act provides 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 and subject to such terms as the court may impose.” In this respect the Australian provision and s 213 (a) of the Companies Act differ from the effect of an order of judicial management as envisaged by s 301(1) of our Companies Act in that in the latter provision there is no mention of “commencement” of any action or other stated proceedings being prohibited by a judicial management order. This means, therefore, that the applicant does not need the leave of this court to commence the action

or proceedings *per se* but requires the leave of the court to proceed with such action or proceeding once commenced hence the instant application. The Act does not account for this difference but it is not difficult to understand given that winding-up and judicial management differ in their nature, implications and consequences.

In the case of *Rushleigh Services Pty Ltd, supra*, FOSTER J after noting that the Corporations Act is silent as to the relevant principles to be applied to the determination of an application for leave to proceed against a company under judicial management, cited with approval the following passage on the relevant principles in para 15-18, pages 10-11:

- “15. In *Re Gordon Grant & Grant Pty Ltd* [1983] 2 Qd R 314 at 315-317, McPherson J, when sitting as a judge of the Full Court of the Supreme Court of Queensland, summarized the relevant principles. I extract the following relevant propositions from his Honour’s summary:
- (a) A decision granting or refusing leave to proceed against a corporation in liquidation involves the exercise of a judicial discretion;
 - (b) The prohibition against commencing or proceeding with an action or other proceeding against a company once a winding up order is made or the company is placed into liquidation is a feature of companies legislation of long standing;
 - (c) Without the relevant restriction, a corporation in liquidation would be subjected to a multiplicity of actions which would be both expensive and time-consuming, as well as in some cases completely unnecessary. This explanation has been accepted in a number of Canadian cases and was also accepted by Street J in *Re AJ Benjamin Ltd (In Liq)* [1969] 2 NSW 374 at 376, (1969) WN (Pt 1) (NSW) 107 at 109-110;
 - (d) Generally, what is substituted for litigation in the ordinary form is a procedure by which a claimant lodges a verified proof of debt with the liquidator, who admits or rejects it wholly or in part, and from whom an appeal lies to a judge who determines that appeal *de novo*;
 - (e) A claimant should proceed by way of lodgment of a proof of debt unless he or she can demonstrate that there is some good reason why a departure from that procedure is justified in the case of the particular claim in dispute; and
 - (f) It is impossible to state in an exhaustive manner all of the circumstances in which leave to proceed may be appropriate. However, in the past, those circumstances have been said to include factors such as the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involved and the stage at which the proceedings, if already commenced, may be progressed.
16. These remarks of his Honour were approved by the Full Court of this Court (Wilcox, Burchett and Beazley JJ) in *Vagrard Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550 at 554-555.
17. In *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356 at [22], I said:

In *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484, Lee J discussed the relevant considerations which should ordinarily guide the exercise of the discretion to grant leave to proceed against a corporation in liquidation. The following considerations may be extracted from his Honour's judgment:

- (a) The purpose of having a requirement for leave is to prevent a corporation in liquidation being subjected to actions that are expensive and, therefore, carried on at the expense of the creditors of the company and, perhaps, unnecessarily.
 - (b) In determining whether leave should be granted, the court considers whether the balance of convenience lies in allowing the applicant to proceed by way of action to judgment, or whether the applicant should be left to pursue his or her claim by lodging a proof of debt with the liquidator. The matter is one of discretion and the onus is on the applicant to demonstrate why it is more appropriate in respect of the particular claim, to proceed by way of action.
 - (c) For leave to be granted, it must be shown that there is a serious or substantial question to be tried and a real dispute between the parties. Leave will not be granted where the applicant does not have a genuine claim or where the claim would be futile.
18. One factor of importance in deciding whether leave to proceed should be granted is whether the relevant corporation was insured against the liability in respect of which the plaintiff is suing (*Re Sydney Formworks Pty Ltd (In Liq)* [1965] NSW 646 at 651; (1965) 82 WN (Pt 1) (NSW) 558 at 564 per McLelland CJ in Eq.)”

I respectfully associate myself with and endorse the above principles as articulated in the cases cited above. The idea is to strike an equitable balance between the interests of the company under liquidation and those of the creditor and other creditors bearing in mind that the purpose of judicial management is provide a moratorium for the company to enable it to meet its obligations so that it can become a successful concern thereby obviating a company's placement in liquidation if there is a reasonable probability that by proper management or by proper conservation of its resources it may be able to overcome its difficulties, see *Le Roux Hotel Management (Pty) Ltd & Anor v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (Under Curatorship), Intervening)* 2001 (2) SA 727(C) at 738.

In the present case the second respondent has rejected the applicant's claim. On the face of it the applicant's claim is easily verifiable by reference to the agreement of sale as the balance outstanding in respect of the sale is stated together with the applicant's entitlement to recover possession of the equipment from the first respondent in the event of a breach. However, the dispute has been complicated by the fact that the respondents claim that not all the agreed

equipment was delivered and also that some of the delivered equipment was defective. The respondents have not returned nor tendered to return any of the equipment which they claim to be defective. These are matters which should be determined by a court of law in a trial. The effect of that rejection is that the applicant does not benefit from the judicial management. Yet it has what on the face of it is a genuine claim which it must be given the opportunity to prove in court. It would be an injustice to deny the applicant the right to institute proceedings while at the same time it is not benefitting from the placement of the first respondent under judicial management. The avenue of seeking to recover the debt by lodgment of a claim through the judicial manager has been closed for the applicant by the rejection of its claim. The balance of convenience lies in allowing the applicant to institute the action and proceeding with it to judgment.

I find the attitude of the first and second respondents in contesting this application to be lacking *bona fides*. The respondents through their legal practitioners were the first to suggest that the dispute between them and the applicant should be resolved through litigation. In a letter dated 9 July 2018 the legal practitioners stated as follows in the last paragraph of that letter:

“Accordingly, we submit that the claimant’s legal remedy, if it so deems fit and proper, is to pursue the same through High Court summons, which will allow the parties the opportunity to ventilate their cases in support of their respective opposing positions on the matter.”

It is manifestly *mala fide* for the same legal practitioners to mount a strenuous opposition to the very process which they have proposed. The agreement in terms of which the goods were sold and delivered to the first respondent is in writing and is not disputed by the respondents. It is also not disputed that they have not paid the balance of the purchase price of as per the agreement. Their justification for not paying is what must be tested in a court of law. There is no good ground for contesting this application while at the same time refusing to acknowledge liability to pay for the goods in terms of the agreement. The respondents’ *mala fides* and the vexatiousness of the opposition justifies an award of costs on the attorney-client scale, see *Chisese v Garamukanwa* 2002 (2) ZLR 392(S); *Fuyana v Moyo & Ors* 2005 (1) ZL 302(H).

In the result,

IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave to commence or institute proceedings against the first and second respondents and to proceed with such proceedings up to the judgment stage.
2. The first and second respondents shall pay the costs of this application on the attorney-client scale.

Devittie, Rudolph & Timba, applicant's legal practitioners

Gama & Partners, first and second respondents' legal practitioners