JOSEPH SIBANDA
And
WEDGEWALL INVESTMENTS (PRIVATE) LIMITED
Versus
MAKONDE INDUSTRIES (PRIVATE) LIMITED (in liquidation)
And
GLEN MOOR TRADING LIMITED
And
NATIONAL SOCIAL SECURITY AUTHORITY OF ZIMBABWE
And
ZIMBABWE REVUNUE AUTHORITY
And
MARTUN DRIVE (PRIVATE) LIMITED
And
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 4 MARCH 2020 AND 29 JULY 2020

Court application

T. Mpofu, for the applicants
E. Matinenga, for the 2nd respondent
Ochieng, for the 5th respondent

DUBE-BANDA J. This is an application for the setting aside of a winding up order and everything done in pursuant to it. This application is anchored on section 227 of the Companies Act [Chapter 24:03] (the Act), which provides that 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 order sought is that the provisional order granted on the 20 March 2013 under case number 1578/13 and confirmed on the 8th of May 2013 be set-aside; the liquidator of first respondent Mrs. T. Grimmel be discharged from office; all acts done by the liquidator pursuant to the order be set-aside and that costs shall be borne by any party that opposes the application.

The liquidation order is sought to be set-aside on the allegation that it has no legal foundation. It is alleged that it is a nullity. It is contended that at law, Glen Moor Trading

Limited, the company that applied for the liquidation, could not seek and obtain the liquidation of the Makonde Industries (Private) Limited unless it was a creditor. It is then argued that at the material time Glen Moor was not a creditor but a shareholder for Makonde Industries, the company placed under liquidation.

This application is opposed by Glen Moor and the fifth respondent. The other respondents did not participate in these proceedings, and no further reference shall be made to the absentee respondents.

For ease of reference and where the context permits, first respondent shall be referred to as Makonde Industries or first respondent, and second respondent shall be referred to as Glen Moor or second respondent.

The factual background

This matter was heard in this court on the 5th March 2015. A judgment covering sixteen pages was handed down on the 25th March 2015. This court dismissed the application with costs on a legal practitioner and client scale. Aggrieved by the dismissal of its application, the applicants escalated the matter to the Supreme Court. The Supreme Court allowed the appeal; set-aside the judgment of this court; remitted the matter to this court to hear oral evidence on the question of whether or not Glen Moor is a shareholder or creditor of the Makonde Industries. The Supreme Court ordered that this matter be determined in accordance with the provisions of section 227 of the Companies Act [Chapter 24:03].

The second applicant is a private company with limited liability and duly registered in terms of the Companies Act. The first applicant is the major shareholder of the second applicant. He deposed to the founding affidavit on his behalf and on behalf of the second applicant. He describes himself as the *alter ego* of the second applicant. He averred that he was Makonde Industries' largest creditor, which company owes him the sum of USD 486 818.48. It is his further contention that Makonde Industries is indebted to second applicant in the sum of USD 241 616.61.

Until its liquidation, Makonde Industries was engaged in the manufacture of specified food items under a contract with the World Food Programme (WFP). It is common cause that in order to enable it to perform its obligations under the contract with WFP, Makonde Industries sought and obtained a loan from Glen Moor in the sum of USD 200 000.

Among its asset base, Makonde Industries owned an Extruder Plant. This is the plant that it used in the manufacturing process. The security for the loan was registered over the

plant, by means of a Notarial General Covering Bond. This bond was registered on the 4th December 2009. The significance of this Extruder Plant seems to be that it was the main asset in the asset register of Makonde Industries. Makonde Industries made certain re-payments towards the servicing of the loan, but soon encountered challenges and defaulted.

In the meantime, Makonde Industries' landlord sought and obtained a judgment against it in respect of arrear rentals. As a result of this judgment, it obtained a writ of ejectment against Makonde Industries. In the execution of the writ, the Extruder Plant was placed under judicial attachment. It became apparent to Glen Moor, that the Extruder Plant, the main asset of Makonde Industries was facing the hammer. This is what appears to have jolted Glen Moor into action.

On 20 March 2013, Glen Moor sought and obtained an order for the provisional liquidation of the Makonde industries. The application for a provisional order was granted unopposed. The provisional order for liquidation was confirmed on the 8th May 2013, again the confirmation proceedings were not opposed.

Applicants now contend that Makonde Industries sought to oppose the liquidation proceedings and a notice of opposition was drawn and filed. However such notice was later withdrawn on the advice of Makonde Industries' erstwhile legal practitioners. Applicants now contend that, on reflection and with the advantage of hindsight, the advice to withdraw the notice of opposition was legally wrong. However, this realisation does not alter the position that the liquidation proceedings were concluded unopposed.

The applicants' cause of action

On 20 December 2013, applicants launched this application. The applicants' claim is founded on section 227 of the Companies Act [Chapter 24: 03]. As alluded to *supra,* this application is anchored on the contention that Glen Moor was not, at law, entitled to seek and obtain the liquidation of the Makonde Industries. It is contended that Glen Moor is a shareholder in Makonde Industries, and in that capacity it lacked standing to motivate an application for the liquidation of Makonde Industries. Section 207 of the Companies Act precludes a shareholder from seeking the liquidation of a company, except in limited circumstances which are not present in this case. In the factual matrix of this case, Glen Moor could only apply for the liquidation of Makonde Industries if it qualified as a creditor.

As a result, the applicants contend that the order for liquidation of the Makonde Industries was invalid by virtue of the lack of standing by Glen Moor to seek it. First and second applicants now seek the liquidation order to be set-aside.

The issues

It is important to crystalize the issues for determination in this matter. There has been an artificial argument between the parties in respect of the characterisation of issues for determination by this court. I say artificial because the Supreme Court, in its judgment remitting this matter to this court, set out the issues for determination by this court. This court is actually operating on a proverbial straight jacket. It cannot depart from the issues identified and formulated by the Supreme Court.

According to *Mr Mpofu*, for the applicants, the Supreme Court has resolved certain key factual issues which have a bearing in the resolution of this matter. It is contended that the Supreme Court has found that the 12 September 2009 agreement (will deal with this agreement later in this judgment) was not cancelled, and that it was consummated. It is argued that this court cannot plough ground that has already been ploughed and of which factual findings have already been made.

Mr Matinenga, for Glen Moor, in his written submissions makes the point that the Supreme Court did not resolve the dispute of fact in favour of either litigant. It is argued that this court, aided by oral evidence and the documents on record, and documentary exhibits produced during the hearing, has the opportunity to closely scrutinise the respective claims of litigants and make factual findings.

I take the view that the status of the 12 September 2009 agreement, and whether it was consummated or not, are critical issues in the resolution of this dispute. They are germane to the resolution of the main issues before court. The Supreme Court expressed its *prima facie* views on the basis of the papers filed of record. This court aided by the papers filed of record, the oral evidence of the parties and the documentary exhibits before court, is in a position to answer these critical factual issues.

Mr Mpofu's argument, extended to its logical conclusion, means that the Supreme Court has sealed this dispute, and therefore there was no purpose for a remittal. If the Supreme Court had resolved these factual issues, there could have been no useful purpose of remitting this matter to this court. *Mr Mpofu's* argument is incongruous to the order of the Supreme Court.

In this matter, there are two issues for determination, these issues have been cut out explicitly and succinctly by the Supreme Court in *Joseph Siband (2) Wedgewall Investments (Private) Limited v Makonde Industries (Private) Limited (in liquidation (2) Glen Moor Trading (Private) Limited (3) National Social Security Authority of Zimbabwe (4) Zimbabwe Revenue Authority of Zimbabwe (5) Martin Drive (Private) Limited (6) Master of the High Court of Zimbabwe SC 50/17.*These issues are:

1. Whether on the factual matrix of this case, second respondent is a shareholder or creditor of the first respondent.
2. Whether applicants have made a case in accordance with section 227 of the Companies Act [Chapter 24:03].

In answering these issues, this court will have to consider the status of the 12 September 2009 agreement and whether or not it was consummated. These are the issues that this court will answer. To aid in the answering of these issues, are the following; the affidavits and documentary exhibits filed by the parties; the oral evidence presented in this court and the documentary exhibits produced therein.

Applicants' case

Applicants rely on the affidavit of Joseph Sibanda; oral evidence of Dr Casper Mombeshora and a number of documentary exhibits placed before court. Mr Sibanda, the first applicant, in his founding affidavit says he is a shareholder and director of Makonde Industries. He holds 54% shareholding in the company. He says the company is indebted to him in the sum of USD 486 818. 48 and to second applicant (Wedgewall Investments Private Limited) in the sum of USD 241 616. 61. He contends that second applicant is essentially his *alter ego,* and that makes him the largest creditor of Makonde Industries.

He makes the point that Makonde Industries was advanced a sum of USD 200 000.00 by Glen Moor. It made payments towards the servicing of the loan, but soon ran into difficulties, and then defaulted. He says by agreement dated 12 September 2009, Makonde Industries and Glen Moor agreed that should the former fail to repay the loan, the latter would take 25% shareholding in it. In this regard it was agreed that one of the shareholders of Makonde Industries would have to make over the 25% equity to Glen Moor. Mr Sibanda says Makonde Industries failed to repay the loan, and as a result Dr Mombeshora, a shareholder made up the 25% equity to Glen Moor. He says the transfer of shares to Glen Moor is reflected

in annexure E, in the application. No such annexure is attached to the application. He says the share certificates and the share transfer forms were lodged with Glen Moor. He then contends that, as a result Glen Moor ceased to be a creditor and became a shareholder of Makonde Industries.

Dr Mombeshora, gave oral testimony in support of the application. He says he established Makonde Industries in 1986. He described himself as the chief executive officer or managing director and one of the shareholders of Makonde Industries. He says he had 8 241 shares, representing 34.40% shareholding.

This witness identified the agreement of the 12 September 2009, as the loan agreement between Glen Moor and Makonde Industries. The loan was for USD 200 000.00. The funds arising from the loan were disbursed in two tranches, of USD 100 000.00 each. He says at each disbursement Makonde Industries signed "a kind of agreement or acknowledgment of that disbursement." On the 14 September 2009, the parties signed an agreement opening with these words "This loan agreement is made this 14th day of September two thousand and nine." An identical agreement was signed on the 5th October 2009. These are the agreements that Dr Mombeshora calls "a kind of agreement or acknowledgment of that disbursement." Each such agreement speaks to a loan of USD 100 000.00.

The 12 September 2009 agreement provides that in the event that Makonde Industries default on the payment of $230 000.00 within 45 days, Glen Moor will give written notice that they have 15 days to rectify the default, failing which Makonde Industries selected shareholders agree to give a 25% equity stake in Makonde Industries to Glen Moor Trading Ltd.

This witness says upon Makonde Industries failing to re-pay the loan in terms of the 12 September 2009 agreement, he handed over the share certificate to Glen Moor. He further signed a transfer form in favour of Glen Moor. Applicants produced through this witness Exhibit A2, a copy marked Transfer of Shares, Stock, Debentures or Options. He further placed before court Exhibit A4, being a copy of a share certificate. He says he signed the originals of these documents and handed them over to a representative of Glen Moor. He says he did not get the documents back from the representative of Glen Moor. Like Joseph Sibanda, Dr Mombeshora contends that as at the date of the filing of the liquidation application, Glen Moor was a shareholder and not a creditor of Makonde Industries. He says this was as *per* the agreement of the 12 September 2009.

Glen Moor's case

Second respondent, Glen Moor, is a company registered in the island of Guernsey. The company placed oral evidence before court through one Mr Booth. He is the deponent to the opposing affidavit to the application, and is the witness who placed oral evidence before court.

According to this witness, at the material time, i.e. at the time of the transaction, he was the representative of Glen Moor in Zimbabwe. He says Makonde Industries, represented by Dr Mombeshora, sought a loan from Glen Moor. Makonde Industries alleged that it had won a tender from the WFP. Makonde Industries needed a loan for the purposes of acquiring raw materials to meet its obligations to the WFP. Glen Moor, knowing how the WFP operated, believed that there would be no problems with repayment of the loan. Glen Moor then advanced the loan to Makonde Industries.

This witness, on behalf of Glen Moor, signed the agreement of the 12 September 2009. He says he presented the agreement to his principal, Glen Moor. The agreement was not acceptable to Glen Moor. Glen Moor then produced the agreements of the 14 September 2009 and 5 October 2009, referred to *supra.* He says he sat down and discussed the developments with Dr Mombeshora. This witness says be believed that Dr Mombeshora fully understood that these two agreements superseded the 12 September 2009 agreement.

He denied that the agreements of the 14 September and 14 October were merely "agreements or acknowledgement of disbursements" of the advancement of the loan in batches of US$100 000.00 each. He accepted that the 12 September 2009 agreement was not officially cancelled. He denies that Glen Moor is a shareholder, but it is a creditor of Makonde Industries.

The onus

This case requires this court to determine, as a threshold issue, whether Glen Moor is a shareholder or creditor of Makonde Industries. Applicants contend that Glen Moor is a shareholder. The burden or *onus* in a civil claim is determined by the pleadings, and generally the *onus* lies with the party who applies for a remedy. Consequently, such party must prove that it is entitled to the remedy. In *Pillay v Krishma* 1946 A.D. 946 at 952, the court stated that *onus* is the duty cast upon a particular litigant in order to be successful of finally satisfying the court that it is entitled to succeed on its claim. In *casu*, the *onus* is on the applicants to prove, on a balance of probabilities, that they are entitled to the relief sought. It is a two-tier proof, first applicants must prove that Glen Moor was a shareholder, and secondly, whether they have

made out a case for setting aside the liquidation order in terms of section 227 of the Companies Act. This matter turns on these issues.

Creditor or shareholder?

The Supreme Court remitted this matter to this court to hear oral evidence on the question whether or not Glen Moor is a shareholder or creditor of Makonde industries. Applicants called the evidence of Dr Mombeshora for the purposes of answering this question. Glen Moor called the evidence of Mr Booth for the same purpose of answering the creditor or shareholder question. Therefore, the answer to the first question posed must, in the main be located in the testimony of Dr Mombeshora and Mr Booth.

Mr Mpofu argues that, the 12 September 2009 agreement was meant to be binding and is indeed binding. It is contended that being a binding agreement, it cannot be resiled at the whim of Glen moor. He argues that the later agreements i.e. the 14 September 2009 and 5 October 2009 are effectively disbursements agreements. They were signed because the money was not made available all at the same time. They could not have had the effect of supplanting an extant agreement, i.e. the 12 September 2009 agreement.

Mr Booth says the two agreements superseded the 12 September 2009 agreement. Dr Mombeshora says that the two agreements merely recorded the loan disbursements in accordance with the first agreement. In his evidence in chief Mr Booth says "the purpose of this agreement was simple. I firstly produced the first agreement which was not acceptable to Glen Moor Trading. Glen Moor trading then subsequently produced official loan agreements which I set and discussed with Dr Mombeshora because it was my belief that he fully understood that this superseded the first agreement." In cross examination he was asked Q: So according to you when did the agreement of the 12 of September die? A: When I took the other two agreements for Dr Mombeshora to sign and he was well aware. We discussed it at the time."

It was put to Mr Booth, that it was incorrect that Dr Mombeshora was told and he knew that the 12 September 2009 agreement had been rejected by Glen Moor. Mr Booth says Dr Mombeshora knew that the later agreements superseded the 12 September agreement. This was not challenged in cross examination. It is trite that a failure to challenge an opponent's version in cross examination, in an appropriate case, implies acceptance of such version. I therefore accept the version of Mr Booth, that Dr Mombeshora was advised and accepted that the two later agreements superseded the first agreement of the 12 September 2009.

Dr Mombeshora's description of the later agreements cannot possibly be true. Firstly, the two agreements do not describe themselves as recording disbursements. They describe themselves as loan agreements.

Mr Joseph Sibanda contradicts the evidence of Dr Mombeshora in respect of the purpose of the two later agreements. He says it appears that those agreements were prepared for some other purpose which had nothing to do with the relationship that had already existed between the parties. He says while he is reluctant to make serious allegations in an answering affidavit, it is apparent to him that they were prepared for an illegal purpose and had to be used by Glen Moor in furtherance of such purpose.

They are now two contradictory versions before court, in respect of the purpose of the location of the later agreements, i.e. of the 14 September and 5 October 2009. Both these versions are applicants' versions. Which version must the court relate to? A litigant cannot put contradictory versions before court, and expect the court to pick and choose one from the other. There is not even an attempt to explain this dichotomy. Both versions must fall.

Glen Moor's version is simple. Mr Booth concedes that he *erred* in not formally cancelling the 12 September agreement. He worked on the premise that Dr Mombeshora understood that the later agreements had superseded the first agreement. He says the two were business friends. He says he even used to lend Dr Mombeshora money. Which implies that he did not anticipate a dispute. This was not disputed in cross-examination. I agree with Mr *Matinenga* that the signing of the two agreements on the 14 September and 5 October 2009 naturally cancelled the 12 September 2009 agreement. This was the agreement between the parties as represented by Mr Booth and Dr Mombeshora.

The *dicta* in *Chikoma v Makweza* 1998 (1) ZLR 541 (SC) is apposite in this case. The court said, not to be overlooked as well, are the wise words of Lord Wright in *Hillas & Co. Ltd v Arcos Ltd* [1932] AII ER Rep 494 (HL) at 5031.

> "Business often record the most important agreement in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat".*

Mr Booth concedes that the agreement of the 12 September 2009, was not formally cancelled. However, it was an agreement between him and Dr Mombeshora, that the latter agreements superseded it. My view is that this was a result of two business men, who trusted each other, had become friends and did not anticipate any dispute arising from the transaction. It is not an ideal way of doing business, it is imprecise. I reject Dr Mombeshora's version, it is an afterthought designed to anchor the contention that Glen Moor was a shareholder and not a creditor of Makonde Industries. I accept Mr Booth's version and find that it sits well with the probabilities of this case.

According to Mr *Mpofu*, the fact that the 12 September 2009 agreement survives is reflected in the Notarial General Covering Bond (NGCB) registered on the 4th December 2009. The NGCB was filed after the signing of the agreements of the 14 September and 5 October. However, the *causa* of the NGCB was still the 12 September agreement.

In cross-examination, Mr Booth was taken to task about the 12 September 2009 agreement, the NGCB and the two latter agreements. The thrust of the attack was that the NGCB does not speak to the two latter agreements, it speaks to the 12 September agreement. The witness says, it was a mistake that the NGCB referred to the 12 September agreement. He was constant and consistent that the 12 September agreement was superseded by the latter two agreements. He says this was understood and agreed with Dr Mombeshora. This was not disputed in cross examination.

In civil proceedings, a witness's account which has not been disputed in cross-examination, indicates an acceptance of the evidence. Such acceptance may be equated with tacit admission and the result may be that such evidence cannot later be doubted. See *R v Motehen* 1949 2 SA 547 (A) 550, *R v M* 1946 AD 1023, *S v Moloi* 1966 (2) PH H 399 (N).

I have no reason to disbelieve Mr Booth on this point. I accept his evidence as reflecting the truth. Further, it sits well with the probabilities of this case. There was just a lack of precision and accuracy in executing these agreements between Mr Booth and Dr Mombeshora. See *Chikoma v Makweza (supra).*

According to *Mr Mpofu*, the two latter agreements are said to be governed by the law of Guernsey, and this court cannot assume that such law is the same as our law on the effect of the agreements. This argument is supposedly anchored on section 25(1) of the Civil Evidence Act [Chapter 8:01], which provides that a court shall not take judicial notice of the law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe. It is further contended that such law should be placed before

the court so that the court can decide the effect in law of those agreements. According to *Mr Matinenga*, the applicants' argument that the two agreements be disregarded as Guernsey Law has not been placed before the court is just a red herring. I agree.

It is not about the law of Guernsey. The dispute is not about the law of Guernsey. The dispute is whether, in terms of Zimbabwean law, Glen Moor is a shareholder or creditor of Makonde Industries. This case does not require the analysis and application of the law of Guernsey. It requires the application of the law of Zimbabwe. What the agreements show, is that Makonde Industries was advanced a loan of USD$ 200 000.00 by Glen Moor. That such loan was disbursed in trenches of USD$100 000.00 each. Applicants admit that the loan has not been re-paid. The agreements are before court to show that Glen Moor is a creditor not a shareholder of Makonde Industries. I agree that this issue of the law of Guernsey, is just a red herring or a deviation.

I take the view that the 12 September 2009 agreement was superseded by the two latter agreements, i.e. 14 September and 5 October 2009.

Even if I have *erred* in my finding that the signing of the two agreements on the 14 September and 5 October 2009 cancelled the 12 September 2009 agreement, I proceed to deal with the aspect of whether the 12 September 2009 was consummated.

Mr Mpofu submits that the 12 September 2009 agreement was consummated. He anchoes this submission on the judgement of the Supreme Court. The Supreme Court remitted this matter to this court for a useful purpose. To hear the evidence and make factual and legal findings. Correct, the Supreme Court made certain observations on the basis of the record, however accepted that justice of this case requires the hearing of oral evidence. This court has the distinct advantage that it has the record, it has exhibits and oral evidence of the parties, and it can then make findings on the basis of these.

Consummation means the completion of a thing. A contract is said to be consummated, when everything to be done in relation to it, has been accomplished. The meaning of the word "closing or consummation" according to Black's Law Dictionary, is: "The final meeting between the parties to a transaction, at which the transaction is consummated; esp., in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred." Black's Law Dictionary 272 (8th ed. 2004). Furthermore, courts have applied this common understanding of "closing" to judicial interpretation of real estate transactions, noting a distinction between an acceptance of an offer to purchase and the closing of a sale, after the option has been exercised. The acceptance of an

offer to sell real estate creates a binding obligation on both parties. The consummation of the sale thereafter is the fulfilment of the obligations created by the contract. *Benavidez* cited *McMillan Ltd v Warrior Drilling & Eng's CoMcMillan Ltd v Warrior Drilling & Eng's Co* 512 So 2d 14, 23 (Ala 1986) where the court said that the acceptance of an offer to sell 'real estate' creates a binding obligation, and that consummation is the fulfilment of the obligations created.

The agreement of the 12 September 2009 is specific. It says in the event that Makonde Industries default on the repayment of $ 230 000 within 45 days, Glen Moor will give written notice that they have 15 days to rectify the default, failing which Makonde Industries selected shareholders agree to transfer a 25% equity stake in Makonde Industries to Glen Moor Trading Ltd. The accepted agreement of the 12 September 2009 created a binding obligation between Glen Moor and Makonde Industries, however that is not consummation of the agreement.

I take the view that the consummation of this agreement would be at the point the 25% shares in Makonde Industries are transferred to Glen Moor. No shares were transferred to Glen More. I take the view that the agreement of the 12 September 2009 was not consummated. Consummation is the fulfilment of the obligations created. In this instance consummation would be the transfer of a 25% equity stake in Makonde Industries to Glen Moor Trading Ltd. See also *Grey Global v Khumalo* (725/10) [2011] ZASCA161 (28 September 2011). No shares were transferred. Then there was no consummation.

In case I have *erred* that the agreement of the 12 September 2009 was not consummated, I now turn to look at whether there is any evidence of transfer of the 25% shares from Makonde Industries to Glen Moor.

In his written submissions, *Mr Mpofu* argues that Dr Mombeshora made over his 25% shareholding in Makonde Industries to Glen Moor who accepted the shares, did not return them and never cancelled the 12 September 2009 agreement. Mr *Mpofu* accepts, in his written submissions, that after the "handing over of shares" to Glen Moor, Makonde Industries continued to make efforts to pay the "debt." It is argued that this was for the purpose of getting the shares back. It is contended that the reality of the matter however, being that Glen Moor was a shareholder.

Mr Mpofu argues that Dr Mombeshora accepted that he might have failed to properly characterise the situation but the consistent position taken even in the aborted opposition filed in the liquidation proceedings was that Glen Moor was a shareholder. It is argued that he could not state when that had happened given that he had signed transfer forms and it was up to Glen

Moor to decide when it would actually take transfer of the shares. It is said he did not know when the transfer happened or if it did. The point made is that he was not given his shares back, and such shares had not been tendered back.

Dr Mombeshora was asked in cross examination: -

Q: Dr Mombeshora, when do you say that Glen Moor became a shareholder?

A: My Lord, I know when I gave the share transfer authority for them to take the shares. What happened and when they became shareholders, I cannot say, I do not know. The specific date when that would have happened, I do not know.

Q: Whether Glen Moor was a shareholder or a creditor at any given time, you do not know?

A: We have evidence here that says what transpired. So I do not think I will be able to say things that I do not know.

Dr Mombeshora is the chief executive officer or managing director of Makonde Industries. He is the person who was the face of the company. He is the person who says facilitated the transfer of the shares to Glen Moor. In fact, he says he transferred his 25% shares to Glen Moor. Now he says he does not know when Glen Moor became ashareholder. He says the specific date when they became shareholders, he does not know. Whether Glen Moor is a shareholder or creditor of Makonde Industries, his answer is vague and non-committal, he says "we have evidence here that says what transpired. So I do not think I will be able to say things that I do not know." If Dr Mombeshora, does not know when Glen Moor became a shareholder, who would know? The answer is simple, no one will know. He is the person, by virtue of his position in the company, and at the centre of the negotiations, who must know everything. He must know the date of the share transfer. In fact, he must have produced a copy of the share certificate in the name of Glen Moor. Transferring company shares, is not like buying tomatoes at the market. There must be a paper trail.

Exhibit B1 is a loan / interests schedule. It was prepared by Glen Moor, confirmed by Dr Mombeshora, as an acknowledgement of Makonde Industries' indebtedness to Glen Moor. He was asked in cross examination:

Q: So those three pages which were done in 2013 set out what was owed Glen Moor by Makonde?

A: That is right.

Q: And you signed that document?

A: Yes, I did.

Dr Mombeshora confirmed and signed Exhibit B1 on the 26 February 2013. The exhibit provides that Makonde Industries was indebted to Glen Moor in the sum of US$ 323 112.03. This was long after the agreement of the 12 September 2009 was signed. This was after he says he had handed over Exhibit A2 and A4 to Glen Moor. He was asked in cross examination a specific question:

Q: We are now in 2013, why did you not say hang on, you are a shareholder not a creditor as those pages now show?

He gave a long rambling answer, which, and I take the view that, he understood the question, and chose to avoid it. He accepted that Makonde Industries had to pay interests on the loan, all this is consistent with Glen Moor being a creditor, not a shareholder.

All the correspondence marked Exhibit B2 to B9 refer to Glen Moor as a creditor. There is no single reference to it as a shareholder. In a letter dated 30 November 2009, Exhibit B2, a specific point is made that "with reference to the funds that have been loaned to Makonde Industries, total overdue as at 19 November 2009 is $230 000.00." It was put to Dr Mombeshora in cross examination as follows:

Q: "On the 30 November 2009, did you not respond to Glen Moor and say remember you are now a shareholder at all?

A: I did not respond in that specific manner."

It should have been very simple, if Glen Moor was indeed a shareholder, for Dr Mombeshora to say, hold on, you are not a creditor, but a shareholder. Dr Mombeshora is not an illiterate person. He is very articulate. He knows without any equivocation the difference between a shareholder and a creditor.

Following the confirmation of the liquidation order, on the 26 June 2013, the Master of the High Court held a Creditor's Meeting. Mr Joseph Sibanda in his founding affidavit is very clear about the position of Glen Moor *vis a vis* Makonde Industries. This is what he says "both applicants and second (Glen Moor) to fifth respondents are first respondent's creditors who had their claims accepted by the Master at the Creditor's meeting of the 26 June 2013." These are the same people who now come to this court and change goal posts, and contend that Glen Moor was a shareholder. They do so because it suits the narrative they have placed before court.

The liquidation order was confirmed on the 8 May 2013. Here is Mr Joseph Sibanda, in June 2013 confirming that Glen Moor is a creditor of Makonde Industries. In fact in the Creditor's Schedule placed before the Master of the High court, Glen Moor is listed as a major creditor being owed US$313 632.51. Under the heading "Transaction description" it quoted

"loan," this document was prepared by Makonde Industries and placed before court by Makonde Industries. It is again Makonde Industries which now makes a U-turn in this court and says, no Glen Moor is a shareholder not a creditor.

On the 12 September 2009, Dr Mombeshora, signed Exhibit A1. In this exhibit, he says he holds 8241 shares representing 34.4% of the total shares in issue for Makonde Industries. He says in guaranteeing the loan from Glen Moor to Makonde Industries as per the agreement dated 12 September 2009 for USD 200 000.00, he pledges 5985 shares from his shareholding in Makonde Industries to Glen Moor Trading Limited. He says in the event of a default in repayment of the loan, 5985 shares will be transferred to Glen Moor Trading Limited.

Exhibit A2 is a copy of a Transfer of Shares, Stock, Debentures or Options. The Exhibit opens like this "I Casper Mombeshora, hereinafter called the Transferor, in consideration of the sum of (*blank*). Paid by Glen Moor Trading Limited. " The amount paid is blank; the number of shares to be transferred is blank; Certificate number is blank; Reference or Distinctive Numbers is blank; date in blank; the document is supposed to have four signatures, however there is only one signature for Dr Mombeshora. The signatures of the witnesses are missing. This is the document that Makonde Industries elevates to a transfer of shares to Glen Moor. *Mr Mpofu*, submits that Dr Mombeshora did not know when the transfer happened or if it did.

Dr Mombeshora confirmed that he had no knowledge of the date Glen Moor became a shareholder. All he knew was he left a share certificate and share transfer form as security for the debt. Mere possession of those documents did not make Glen Moor a shareholder of Makonde Industries. The evidence shows that there was no transfer of shares from Makonde Industries to Glen Moor.

The question at this stage is what weight should this court attach to Exhibit A2? It is a photocopy, there is no indication of the amount paid, no certificate number, no date, no signature of Dr Mombeshora's witness and no signatures of transferee and witness. This is an incomplete document. A document produced for the truthfulness of its contents must be complete and satisfactory. Exhibit A2 falls far short of such a requirement. As a result of the above, this court cannot attach any weight to such a document.

Exhibit B2 is a letter dated 30 November 2009. It is a letter written by Glen Moor to Makonde Industries. It says with reference to the funds that have been loaned to Makonde Industries, please note that the repayment of these funds were due as follows: 1. Loan and interest due on 20 October 2009 $115 000 00; loan and interest due 19 November 2009 $115

000-00; total overdue as at 19 November 2009 $230 000-00. In the letter it is said, the funds were loaned to Makonde Industries in good faith, due to the relationship between Gath Booth and Dr Mombeshora, and hence no formal collateral was requested.

Exhibit B3 is a reply by Makonde Industries to Glen Moor, it is dated 6 October 2010. In brief the letter says, we are very sorry that we have to date failed to repay the loan that was extended to our company in good faith and trust. The contract with the WFP ran into some unforeseen trouble, hence the current unfortunate situation. Our proposal is that Glen Moor agrees to a conversion of the principal of USD200 000 into equity.

This is now 6 October 2010, there is still talk of the principal debt being converted to equity. There is no reference by Makonde to the 12 September 2009 agreement. No mention to say we are shareholders and not creditors.

All the correspondence in Exhibit B, save for exhibit B2, are from Makonde Industries to Glen Moor. I agree with *Mr Matinenga*, that a single thread runs through all these letters: seeking an opportunity to be given more time to service the debt, putting proposal and options for the payment of the debt. The proposal over payment were never met. The options suggested never materialised to enable Makonde to meet its obligations to Glen Moor. *Mr Matinenga* argues that the allegation by Mr Sibanda that Glen Moor was a shareholder in Makonde Industries is not supported by the objective facts. I agree.

Furthermore, Glen Moor is a company registered in Guernsey. It is therefore a foreign company. Mr Booth testified that the second respondent could not validly get transfer of the shares for want of exchange control approval. Further, Mr Booth says Glen Moor did not take up the shareholding option. He says Glen Moor had no right to take up the option. To take up the shareholding option, Glen Moor would have had to go through the relevant legal procedures, i.e. the Zimbabwe Investment Centre and securing the Reserve Bank's approval. This is so because, Glen Moor is a foreign registered company. There is no evidence that the procedures outlined in section 13 and 15 of the Zimbabwe Investment Authority Act [Chapter 14:30] where complied with. There was no application for approval for Glen Moor to invest in Zimbabwe.

Mr Mpofu, argues that the court must not give weight to Mr Booth assertion in relation to exchange control approval, for the following reasons; that this is not Glen Moor's pleaded position; he accepted that he was *au fait* with exchange control laws; essentially held himself out as an expert in the field and cannot raise issues of non-compliance against applicants. It is argued that if Mr Booth's position is correct, it would have a boomerang effect of making

second respondent a non-creditor given that there is no evidence that exchange control authority was sought in the giving of the loan. The loan agreement would consequently be invalid and nothing could be put thereon.

First, it is important to understand the seat of the *onus* in this case. It is for the applicants' to prove that Glen Moor was a shareholder and not a creditor. It is for the applicants to prove that at law, Glen Moor had the shares transferred to it. This is a legal requirement and the court cannot ignore it. A party cannot plead law. Second, when Mr Booth raised this issue in his evidence in chief, *Mr Mpofu* did not object. The evidence is admissible. Third, *Mr Mpofu* cross examined on this issue, he asked;

Q: "Your position is that Glen Moor could not take transfer?"

A: "I was told we need to go through Zimbabwean Investment Centre. It was an error, we could not take transfer." Glen Moor did not take transfer of shares in Makonde Industries.

Section 104(1) of the Companies Act provides that under the heading "Certificate to be evidence of title" that a certificate under the seal of the company if it has a seal, and signed by one of its directors or, if it does not have a seal, signed by two of its directors or by one director and the secretary, specifying any shares or stock held by any member in that company shall be *prima facie* evidence of the title of the member to such shares or stock. No such certificate has been produced in the name of Glen Moor.

The point is that, the 25% shares referred in the 12 September 2009 agreement were not transferred from Makonde Industries to Glen Moor. I take the view that, whatever the reasons are, the point still remains that Glen Moor did not at law, take transfer of the 25% shares. An agreement to take up shares does not make one a shareholder. An attempt to take transfer of shares does not make one a shareholder. One becomes a shareholder by registering a transfer of shares in its name.

No share certificate was placed before court to show that indeed Glen Moor is a shareholder of Makonde Industries. What is placed before court is Exhibit A2, which I have alluded to *supra.* This document does not take applicants' case any further.

A certificate is evidence of title. At law, without a share certificate, they is no shareholding. No company books were placed before court to show the shareholding of Glen Moor in Makonde Industries. Even if for a moment I were to accept that the transfer documents given to Mr Booth were properly executed, still possession of transfer documents does not translate or equate to being a shareholder.

I find that even on the applicants' version, the 12 September 2009 agreement does not make Glen Moor a shareholder in Makonde Industries. There is thus no evidence that Glen Moor ever became a shareholder of Makonde Industries. The factual matrix of this case, point to Glen Moor as a creditor, not a shareholder of Makonde Industries.

Has a case been made for a section 227 remedy?

The legal foundation of the application itself has not been made an issue by the litigants to this dispute. The parties confined themselves to the question whether or not the applicants had met the jurisdictional requirements of section 227 of the Companies Act.

Section 227 avails an applicant a unique remedy for the setting aside of a winding up order and is not related to an application for rescission of a default judgment. The provision does not confine itself to orders granted in default of any party affected by it. See *Joseph Sibanda (2) Wedgewall Investments (Private) Limited v Makonde Industries (Private) Limited (in liquidation) (2) Glen Moor Trading (Private) Limited (3) National Social Security Authority of Zimbabwe (4) Zimbabwe Revenue Authority of Zimbabwe (5) Martin Drive (Private) Limited (6) Master of the High Court of Zimbabwe SC 50/17.*The provision encompasses all orders either granted in default or through contestation.

The import of s 227 was canvassed in the High Court case of *Khuzwayo* v *Assistant Master of the High Court & Ors* 2007 (1) ZLR 34 (H) 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 as 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.

See also *Ward & Another* v *Smit & Others*: In *Re Gura* v *Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) where it was held that "exceptional circumstances" had to be disclosed in order to grant a discharge of a winding up order which was in effect a rescission.

The question in *casu* is not whether the application is properly before court, but whether it meets the requirements of section 227 of the Act. The legal basis of the application is that Glen Moor could not have sought the liquidation of Makonde Industries unless it was a creditor. It is contended that at the time it sought liquidation, it was no longer a creditor but a

shareholder. It is contended that as a shareholder it had no standing to seek the liquidation of Makonde Industries.

I have found *supra* that Glen Moor is a creditor of Makonde Industries. Mr Joseph Sibanda in his founding affidavit says that Makonde Industries was advanced a sum of US$200 000.00 by Glen Moor. It made payments towards servicing the loan, but then soon ran into difficulties, and defaulted. The loan has not been re-paid. Makonde Industries is unable to pay its debts. It has not re-paid the loan amount due to Glen Moor. It has not paid arrear rentals due to its landlord. The landlord instituted legal proceedings, obtained a judgment, and caused the attachment of the plant. Joseph Sibanda further says Makonde Industries is indebted to him in the sum of US$486 818.48 and to second applicant in the sum of US$241 616.61. All these debts remain due and payable. Therefore, it cannot be that Makonde Industries, in the meaning of section 205 of the Act, is a company that is unable to pay its debts. I find that the applicants have not met the jurisdictional requirements of section 227.

Conclusion

Mr Booth was subjected to tactful and determined cross-examination. He made several concessions favourable to the applicants' case. He is a truthful witness. At the end of the day I find that he is a credible witness. The same cannot be said in respect for Dr Mombeshora. He was evasive, not ready to concede and appeared geared to push his version through the throat of the court at whatever cost. He is not a truthful witness and I find that he is not credible. Where his evidence contradicts that of Mr Booth, I reject it. The contention that Glen Moor is a shareholder of Makonde Industries, is just an after-thought, calculated to mislead. It is clearly flawed.

After examining the documents, the affidavits before court, the evidence of witnesses, the court finds that Glen Moor was on the date it filed and obtained a liquidation order of Makonde Industries, a creditor of Makonde Industries, and as such had *locus standi* to launch such an application. Further, the court finds that applicants have failed to prove a case for the setting aside, in terms of section 173 of the Companies Act, of the order of liquidation. Applicants have not discharged the *onus* of proving that Glen Moor is a shareholder, and not a creditor of Makonde Industries.

Applicants had to prove that Glen Moor was a shareholder, and not a creditor of Makonde Industries. They have come nowhere near discharging that onus. The applicants misconstrued the law. The possession of transfer documents does not translate to or equate being a shareholder. Even

on applicants' own version, the 12 September 2009 agreement do make Glen Moor a shareholder. Applicant numerous letters before court point to Glen More as a creditor, not a stockholder.

Consequently, this application must fail. The applicants have failed to obtain the relief they sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. Respondents are therefore entitled to their costs of suit.

Disposition

In the result, I order as follows: this application is dismissed with cost of suit.

Gill, Godlonton & Gerrans,1st, 2nd and 3rd applicants' legal practitioners
*Atherstone & Cook, 2nd*respondent's legal practitioners
Coghlan, Welsh & Guest 5th respondent's legal practitioners