

REPORTABLE (15)

DAVID GOVERE
v
(1) ORDECO (PRIVATE) LIMITED
(2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & PATEL JA
HARARE, SEPTEMBER 23, 2013

T. Magwaliba, for the appellant

E. T. Moyo, for the first respondent

PATEL JA: At the beginning of the hearing of this matter, counsel for the appellant sought to introduce a point of law, pertaining to the validity of the proceedings in the court below, as a new ground of appeal. For the reasons given at the hearing, we declined the application.

Thereafter, following argument on the merits of the appeal, the Court unanimously dismissed the appeal with costs, except in relation to the fifth ground of appeal. The reasons for our decision are as follows.

BACKGROUND

This is an appeal against the whole judgment of the High Court in Case No. HC 9257/12 handed down on 5 June 2013. Prior to that judgment, on 8 November 2011, the High Court granted an order by consent in Case No. HC 3159/11. In terms of that order, the company known as Coldrac (Pvt) Ltd t/a Tacoola Beverages (hereinafter referred to as “Coldrac”) was required to pay the first respondent its outstanding rentals, operating charges and wasted costs, totalling US\$112,000.00, in 13 monthly instalments commencing in December 2011. The appellant, who was a party to those proceedings, was absolved from the instance.

Following the failure by Coldrac to meet its payment obligations, the first respondent applied to the High Court for an order, in terms of s 318 of the Companies Act [*Cap 24:03*], declaring the appellant personally liable for the judgment debt of Coldrac. The appellant admitted that he was a director of Coldrac between 2003 and 2007, in what he described as an unofficial capacity, and that he had acquired 80% of the shareholding in Coldrac. However, the relevant CR 14 forms filed with the Registrar of Companies did not reflect his directorship in Coldrac.

The court *a quo* found that the appellant held himself out as a director of Coldrac both through the earlier consent order and by virtue of the continuing tenancy with the first respondent. He was therefore estopped from relying on the failure to comply with the relevant statutory requirements to furnish proper updated records and returns. Moreover, he had failed to notify the Registrar of Companies and Coldrac itself of any

resignation as a director and was therefore still bound by his duties as director in terms of s 187(7) of the Companies Act. Consequently, because he carried on the business of Coldrac recklessly and with intent to defraud, the court held that he was not protected by limited liability and was liable for the company's debts under s 318(1) of the Act. He was accordingly ordered to pay the claimed amount of US\$112,000.00 together with interest and costs on a legal practitioner and client scale. In the event of his failure to pay, the first respondent was entitled to execute the order for payment against his two immovable properties.

ISSUES FOR DETERMINATION

The notice of appeal filed of record contains five grounds of appeal. At the hearing of the matter, counsel for the appellant conceded that the second ground of appeal referred to the wrong section of the Companies Act and that the third ground, as it was framed, was utterly nonsensical. Therefore, he quite properly abandoned both grounds of appeal.

In the event, the principal issue for determination is whether the court *a quo* misdirected itself by finding that the appellant was a director of Coldrac at the material time. The remaining two issues relate to the propriety of the order for special execution of the appellant's properties and the award of costs on a higher scale.

DIRECTORSHIP OF COMPANY

In paragraph 6 of his opposing affidavit, the appellant admits that he was a director of Coldrac between 2003 and 2007 "although unofficially". The import of this

qualification is not at all clear for the simple reason that it is not recognised in company law or corporate parlance. Be that as it may, it is common cause that there is no CR14 return confirming the appellant's position as a director of Coldrac. However, the relevance of that omission appears to be outweighed by the documentary evidence adduced in the court below. Firstly, there is a letter dated 17 May 2010 from Tacoola Beverages to the first respondent's estate agent, setting out a payment plan for the repayment of its outstanding debt. Secondly, there is a company resolution dated 10 June 2011 made by Coldrac (Pvt) Ltd t/a Glendale Springs. Both documents clearly identify the appellant as a company director. This accords with the requirements of s 188(1) of the Companies Act with respect to the details of directors names to be included on all corporate business letters.

On the available evidence, therefore, there can be no doubt that the appellant represented or held himself out as a director of Coldrac and its trading subsidiaries at the relevant time. Consequently, third parties dealing with him were entitled to rely upon that representation for the purposes of legal liability in terms of s 12 of the Companies Act (which codifies the long established *Turquand* rule).

In any event, even if it were to be accepted that the appellant was not a director of Coldrac, this would not absolve him from personal responsibility for the company's debts and liabilities under s 318(1) of the Companies Act. This is because that provision extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [its] business" recklessly or with gross negligence or with intent to defraud.

It follows from all of the foregoing that the principal ground of appeal is utterly devoid of merit and cannot be upheld.

EXECUTABILITY OF IMMOVABLES

As I have already indicated, the court *a quo* granted an order entitling the first respondent to execute the order for payment in the sum of US\$112,000.00 against the appellant's immovable properties, in the event that he failed to pay that sum. For the appellant, Mr. *Magwaliba* argues that an order for special execution against immovables is normally only granted for preferential or secured creditors, such as mortgage bond holders. His further submission in that regard is that execution must first be applied against the judgment debtor's movables before it can be effected against his immovables. He relies for this proposition on Rule 326 of the High Court Rules.

In the present matter, it is common cause that there was no *nulla bona* return in respect of the assets of Coldrac and no attempted attachment of the appellant's movables. The order of the court *a quo*, so it is contended, entitles the first respondent, without any qualification, to execute against the appellant's immovables, thereby circumventing the requirements of Rule 326.

I am unable to agree with that contention for the simple reason that the order for execution granted by the court *a quo* only comes into operation in the event that the appellant fails to pay the judgment debt. The order is clearly conditional and contingent upon such failure. Therefore, the appellant is perfectly at large to tender his movables in

satisfaction of the judgment before any process for the execution of his immovables is initiated.

In any event, the interpretation of Rule 326 propounded by Mr. *Magwaliba* is clearly not supported by the wording of that rule. It deals with the attachment of immovable property in the following terms:

“It shall not be necessary to obtain an order of court declaring a judgment debtor’s immovable property executable or to sue out a separate writ of execution in order to attach and take in execution the immovable property of any judgment debtor, but where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property:

Provided that the sheriff or his deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he has by due inquiry and diligent search satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ.”

First and foremost, the rule patently does not, as is contended for the appellant, differentiate as between secured and unsecured creditors. It applies to both without distinction. Secondly, the plain meaning of this rule is that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceeding to attach immovable property, the sheriff or his deputy is enjoined to satisfy himself that the judgment creditor does not own any or has insufficient movable property to satisfy the judgment debt.

For the above reasons, the fourth ground of appeal cannot be sustained and must be dismissed.

SCALE OF COSTS

The fifth and final ground of appeal is that the court below erred in ordering the first respondent to pay the costs of suit on a legal practitioner and client scale. In this regard, the court relied upon the fact that the parties had already agreed to an award of costs on a higher scale as against the first respondent in the earlier order by consent.

That order, granted in Case No. HC 3159/11 on 8 November 2011, clearly cannot be applied in respect of any subsequent costs incurred by the first respondent in later proceedings. More pertinently, the award of costs is imposed as against Coldrac *per se* and does not extend to the appellant himself. In the premises, as was properly conceded by Mr. Moyo for the first respondent, the punitive award of costs made by the court below was improper and cannot be sustained. It must therefore be set aside.

For all of the above reasons, the appeal was dismissed with costs, except in relation to the fifth ground of appeal. Accordingly, the decision of the court *a quo* is upheld in its entirety, save for para 3 of the court order, which is set aside and substituted as follows:

“3. The first respondent shall pay the costs of this application on the ordinary scale.”

ZIYAMBI JA: I agree.

HLATSHWAYO JA: I agree.

Bvekwa Legal Practice, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners