REPORTABLE (17)

TETRAD INVESTMENT BANK LIMITED
(Under Judicial Management)
v
(1) BINDURA UNIVERSITY OF SCIENCE EDUCATION (2) THE SHERIFF OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & MAVANGIRA JA
HARARE, JANUARY 29, 2018 AND FEBRUARY 22, 2019

T. Zhuwarara, for the appellant
N. Chamisa, for the first respondent

MAVANGIRA JA: This is an appeal against the decision of the High Court granting the respondent leave to proceed with the execution of a judgment that it obtained against the appellant bank which is under judicial liquidation.

The appellant, Tetrad Investment Bank Limited (under Liquidation) is a bank duly registered under the laws of Zimbabwe. It was placed under provisional judicial management by an order of the High Court on 29 January 2015. The first respondent, Bindura University of Science Education, is a university duly established under the Bindura University of Science Education Act [*Chapter 25:22*]. The second respondent is the Sheriff of Zimbabwe cited in his official capacity.

The appellant and the first respondent were involved in a dispute which culminated in a judgment under HC 2106/14 on 2 April 2014 in favour of the first respondent, for the payment of the sum of US$473 025.52 together with interest and collection commission. Thereafter, the appellant filed an urgent chamber application in the High Court for stay of execution of the said judgment. The application was removed from the roll on 17 April 2014 on the ground that the matter was not urgent. The appellant then filed an appeal against the decision of the High Court. The appeal was struck off the roll by this Court on 30 June 2014.

After the matter was struck off the roll, the first respondent issued a writ of execution for the attachment of the appellant's property on 16 September 2014. Whilst the first respondent was attempting to execute on the appellant's property, the appellant filed an application for a scheme of arrangement which stayed all execution. The application was granted on 24 September 2014. The appellant was placed under provisional judicial management on 29 January 2015. Paragraph 1 (f) of the order placing the appellant under provisional liquidation provides as follows:

> "All actions and applications and the execution of all writs, summons and other processes against the Applicant shall be stayed and not proceeded with without leave of this court"

The first respondent approached the High Court on 18 November 2015 with an application for leave to execute its judgment against the appellant. In its application the first respondent submitted that it was just and equitable that it be granted leave to execute in view of the fact that it was in a unique position in comparison to other creditors as it had in its favour a court order which had been confirmed by the Supreme Court. The amount that was owed to it was thus a confirmed amount or figure that was no longer open to contestation. The first respondent further submitted that its operations were suffering and it was struggling to keep

running many of them as they have been paralysed by lack of funds; which funds are held up in the appellant bank. Furthermore, the first respondent averred that it was just and equitable for the court to grant it leave to execute as that would not result in the appellant suffering any irreparable harm.

The application was opposed by the appellant who submitted that the first respondent cannot seek leave to execute its judgment for the reason that the appellant is a bank. The appellant also disputed that the first respondent was on the brink of collapse. The appellant further contended that it would suffer irreparable harm if leave to execute was granted in favour of the first respondent. It prayed for the dismissal of the application for leave to execute.

The court a *quo* found in favour of the first respondent and granted leave to execute. The court found that it was just and equitable for the first respondent to execute its judgment against the appellant particularly when consideration was given to the period that had lapsed since the placing of the first respondent under judicial management. The court also found that the granting of leave to execute would not defeat or frustrate the reason for the placement of the appellant under judicial management. It also considered that the appellant would not be going into liquidation.

The appellant was aggrieved by that decision and it filed this appeal on the following grounds:

1. The High Court erred in placing the *onus* on the appellant to prove why execution should not have been undertaken by the first respondent pending the judicial management.

2. The High Court grossly misdirected itself in granting the first respondent an advantage over other creditors simply because the appellant is a bank and the first respondent an investor which is a public institution.
3. The High Court further grossly erred in finding that the operations of the first respondent were hampered in any way in the absence of any evidence to that effect from the first respondent.
4. The High Court further grossly erred in the exercise of its discretion in finding that the first respondent was entitled to an order for leave to execute its judgment there being no special circumstances justifying the grant of such leave.

Although the notice of appeal raises 4 grounds of appeal, these grounds raise only one issue for determination by this Court. The issue is whether the court a *quo* erred in finding that the first respondent was entitled to execute its judgment.

During the hearing of the appeal, Mr *Zhuwarara* for the appellant placed great reliance on the case of *Samuel Osborn (SA) Ltd v United Stone Crushing Co (Pty) Ltd (Under Judicial Management)* 1938 WLD 229. He submitted that although the court a *quo* exercised its discretion in granting the first respondent leave to execute its judgment against the appellant, the appellant took issue with the manner in which such judicial discretion was exercised. Firstly, Mr *Zhuwarara* argued, the court a *quo* erred in placing on the appellant the onus to prove why execution should not granted. Secondly, he submitted, the court a *quo* erred in finding that the operations of the first respondent would be hampered if leave to execute was not granted.

He submitted that there was no evidence to show that the operations of the first respondent would be hampered if leave to execute was not granted. He also submitted that the order granting leave to execute should be set aside because it gave the first respondent advantage over other creditors when no special circumstances justifying such an order have been proven.

In response, Mr *Chamisa* for the first respondent submitted that the court a *quo* properly exercised its discretion in granting leave to execute. He submitted that the court a *quo* considered all the circumstances of the case and properly exercised its discretion. On the issue of *onus*, he submitted that there had been no reversal because at all material times the *onus* to prove that leave should be granted was upon the first respondent (who was the applicant in the court a *quo*). As a result, Mr *Chamisa* submitted, nothing had been shown to warrant this Court's interference with the exercise of discretion by the court *a quo*. He accordingly prayed for the dismissal of the appeal.

From the submissions made, the parties are *ad idem* on the position of the law to the effect that an application for leave to appeal entails the exercise of discretion by the court in deciding whether or not to grant such leave. In *Mupini v Makoni* 1993 (1) ZLR 80 (S) the court stated at p83:

> "Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it."

As noted from the above case, when the court a *quo* was called upon to determine whether the first respondent was entitled to execute its judgment against the appellant who is under judicial management, the court was called to exercise its discretion. As such the principles relating to interference with the exercise of judicial discretion apply in this case. This Court as an appellate court should be slow to interfere with the exercise of that discretional power. See the case of *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S) at page 63 where the court said that:

> "The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first — one which clearly involved the exercise of a judicial discretion — may only be interfered with on limited grounds. See Farmers' Co-operative Society (Reg.) v Berry 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing" (emphasis added)

On the basis of this position which is settled at law, it is clear that for this Court to interfere with the exercise of judicial discretion by the court *a quo*, it must be proved that some error was made in the exercise of that discretion in the manner enunciated in the case authorities. In this regard, it is necessary to consider whether the court *a quo* grossly misdirected itself in the manner in which it exercised its judicial discretion, as alleged by the appellant.

It is not in dispute that where a company is under judicial management, all processes which defeat the purpose of judicial management should be avoided. Judicial

management is defined in *Feigenbaum & Anor v Germanis N. O & Ors* 1998 (1) ZLR 286 (H) at 294 in the following terms:

> "Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes: *Silverman v Doornhoek Mines Ltd 1935 TPD 349*. The procedure is only adopted when the court is satisfied, on the facts contained in the application, that there is a reasonable probability that if placed under judicial management, the company which is unable to pay its debts will be able to pay its debts in full, meet its obligations and become a successful concern."

The purpose of judicial management was explained in *Cellular (Pvt) Ltd v Post and Telecommunications Corporation* SC 77-04 where the court said the following at page 10 of the cyclostyled judgment:

> "The object of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on."

Thus, the main goal of a judicial management order is to provide a company sufficient time to make a financial recovery and so avoid liquidation. This is why judicial management has also sometimes been referred to as business rescue; see *Energy Drive System (Pty) Ltd v Tin Can Man (Pty) Ltd & Ors* 2017 (3) SA 539 (GP). The effect of a judicial management order is that, subject to certain exceptions, a general moratorium on legal proceedings against the company comes into effect and the property and interests of the company are protected. See *Diener N.O v Minister of Justice & Ors* 2018 (2) SA 399 (SCA).

However, in the case of *Energy Drive System (Pty) Ltd v Tin Can Man (Pty) Ltd & Ors (supra)* it was stated that the purpose and context of business rescue are not aimed at the destruction of the rights of a secured creditor. This is why the law allows the court when placing a company under judicial management to order that 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. (See s 301 (1) of the Companies Act [*Chapter 24:03*]). Thus the law allows parties who wish to proceed against a company under judicial management to approach the court for leave to proceed against that company. This is what the first respondent did in the present case.

Where a party applies for leave of the court to execute a judgment against a company under judicial management, the onus of satisfying the court that it should allow the institution of processes for the execution of the judgment rests upon the applicant. For the court to exercise its wide discretion whether or not to grant leave, the applicant must have a claim against the company. It is irrelevant whether the claim arose before or after the company was put under judicial management. The applicant also has to show to the court that it might suffer irremediable loss and that no injustice would be done if leave to proceed with the action were granted. See *Samuel Osborn (SA) Ltd v United Stone Crushing Co (Pty) Ltd (Under Judicial Management)* 1938 WLD 229 at 235 where the court held that:

> "There is, however, great force in the contention advanced on behalf of the applicant that it is inequitable that by the refusal of leave, the applicant should be deprived of the possession and use of the property, with at least the potential risk of depreciation, for the benefit of creditors, of whom it is not one when the applicant stands to gain nothing by the eventual success of the judicial management."

In this case, it is alleged that the onus of proving that leave to execute must be granted was shifted to the appellant. The appellant is not correct in this regard. A reading of the record and the judgment of the court a *quo* shows that at all material times, the onus was upon the first respondent to prove the existence of special circumstances which justified the granting of leave to execute. The first respondent alleged that it was suffering and that its operations were being paralysed because of lack of funds which were being held by the

appellant. The first respondent also contended that if leave to execute was granted the appellant would not suffer any irreparable harm.

The appellant relied on the order placing it under judicial management and denied that the first respondent would suffer irreparable harm if leave to execute was not granted. The order placing the appellant under judicial management cannot help the appellant in this case simply because that order noted the need for the first respondent and other creditors to approach the court for leave to execute their judgment. In addition, the order placing the appellant under judicial management was granted in 2015 and the court a *quo* heard the application for leave in 2017, a period of two years after the appellant was placed under judicial management. There has been a change of circumstances and therefore the appellant cannot rely merely on factors which were considered when it was placed under judicial management.

As the first respondent approached the court *a quo* and applied for leave to execute its judgment on the strength of the allegation that its operations were severely compromised and that the appellant would not suffer any irreparable harm if leave was granted, it was for the appellant to have rebutted that allegation. It is trite that he who alleges must prove. In *casu*, the first respondent set out facts that entitled it to the relief sought. The facts that it alleged in support of its application having stood unrebutted by the appellant, were, as provided at law, taken as accepted. This is clearly articulated in the case of *Chihwayi Enterprises (Pvt) Ltd v Attish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S) at 93E-F where the court said the following;

> "It is pertinent to note that the averments made by Patel in para 23 of the founding affidavit were not denied by the Hardware in its opposing affidavit. What that means is that the averments were admitted by the Hardware."

As McNALLY JA said in *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

Given the allegations set out by the first respondent, we find that the first respondent established a *prima facie* case which was accepted by the court a *quo*. Such allegations ought to have been rebutted by the appellant with clear evidence. The appellant had a duty to rebut the respondent`s averments and evidence. It cannot be said that the court a *quo* shifted from the first respondent, the *onus* of proving that leave to execute was warranted.

Contrary to the submission made by the appellant that there were no special circumstances justifying the grant of leave to execute, we find that the first respondent managed to establish its entitlement to the relief that it sought. The court a *quo* considered the duration of the judicial management, the effect of the order granting leave to execute on the stability of the appellant and the interests of the first respondent and it found that it was just and equitable for it to grant leave to execute. The court a *quo* assessed the evidence that was before it and found that the first respondent was entitled to leave to execute its judgment. That assessment cannot be regarded as grossly unreasonable and thereby empowering and enabling this Court to interfere. The court a *quo* applied the correct principles and exercised its discretion reasonably.

For these reasons, we find that the appeal is without merit. The settled grounds for interference with the exercise of judicial discretion have not been established in this appeal.

Accordingly, it is ordered as follows:

"The appeal is dismissed with costs."

GWAUNZA JA: I agree

GUVAVA JA: I agree

Maware & Sibanda, appellant's legal practitioners

Mutangamira & Associates, 1st respondent's legal practitioners