

CHANDRA MOHAN GOYEL
versus
MYRAMMAR FARMING (PVT) LTD T/A COTTZIM
and
VIRENDA RANCHORD
and
MANOJKUMAR JAVAN
and
JAYPRUKASH PATEL
and
VINODKUMAR RAMA
and
SERISHE PURSHOTAM RACHORD
and
GLOW ORD INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 10 May 2022 & 23 February 2023

Civil Trial

Adv Mahere for the plaintiff
Advocate Uriri for 3rd, 4th and 5th defendants

KATIYO J; The plaintiff issued summons against the defendants on a suit involving One million United States dollars which amount was advanced to the first defendant to fund her business. Wherefore plaintiff' claim against all defendants jointly and severally, the one paying the other to be absolved is for

1. Payment of the sum of US\$ 1 000 000.00
2. Interest thereof at the rate of 18% per annum from December 2011 to the date of full and final payment
3. An order declaring specifically executable the remaining extent of stand 7489 Salisbury Township, measuring 583 square meters held by Glowrm Investments (Pvt) Ltd under deed of transfer No.8677/97
4. Costs of suit on a legal practitioner and a client scale.

Background facts of the suit

On or about December 2011, the Plaintiff lent and advanced an amount of US\$1 000 000.00 (one million United States Dollars) to the first defendant to fund its seed cotton purchase for 2012 buying season. A copy of proof of the transfer was attached to the summons as annexure A.

The first defendant duly represented by the second and sixth defendants undertook to pay this amount in full on or before December 2012. The 1st defendant failed to abide by the terms of the agreement by failing to pay back the full amount as had been agreed. The first defendant was placed under judicial management.

It is further averred that the second, third, fourth, fifth and sixth defendants duly executed personal guarantees in which they jointly and severally bound themselves as sureties and co-principals for punctual repayment on demand of the said loan. The second, third, fourth, fifth and sixth the defendants each bound themselves in varying amounts in respect of the loan as per the Board Resolution attached hereto (Annexure B). The 7th defendant tendered stand number 7489 of Salisbury Township held under Title Deed number 8677/97 as security for the loan as provided for in annexure B. Written demand calling upon the defendants to repay the entire loan and interest was effected on several occasions but despite all this the defendant have failed to pay the amount due.

The first defendant duly represented by the second defendant executed an acknowledgment of debt in respect of this loan in November 2013. The amount due to the plaintiff by the defendant is therefore US \$1000 000 plus interest. The matter was due for trial however due to other developments it could not commence. Defendants raised points of law as follows

1. Prescription
2. Exchange Control violation
3. The first defendant is under Judicial Management and cannot be sued without leave of the court.

General Observation

Let me emphasize from the beginning that whilst the court does appreciate that points of law can be raised anytime I feel that sometimes this can be open to abuse. This is so because trials are delayed as there will be preliminary issues to be resolved before the actual trial. Parties are given ample time to reflect on their issues well before the commencement of the actual trial, more importantly the Pre-trial conference (PTC) which offers parties an opportunity to settle their matter. It is through such platform that

such issues should be ironed out and save everyone's time. That is the opportunity for such preliminary issues should be resolved and reserve trial for real issues. This is not to say where there are genuine points of law should not be pointed out. It is trite law that a point of law can be raised anytime during the proceedings, moreso where it goes to the root of the matter.

Prescription

As has been submitted by counsel to the plaintiff the issue of prescription falls away as counsel for the defendants did not pursue the point. The counsel made it clear that all what he intended to submit had been concluded. I agree on that aspect that the court needs not detain itself on that issue. It therefore falls away.

Exchange Control violation

In passing let me point out that the issue to do with exchange control violation will only be dealt with should the issue to do with leave to sue has been discussed. I say so because that issue is capable of resolving this matter without the need to explain further should the court make a positive finding on that aspect. I will now turn to that preliminary point on leave to sue.

The first defendant is under Judicial Management and cannot be sued without leave of the court.

Counsel for the plaintiff argues that the said order was not produced in court as the submissions were made from the bar. She contends that the confirmation order confirming the judicial management was also never shown to the court. She however concedes that the court can take judicial notice of the court order that was referred to namely *Myrammar Farming (Pvt) Ltd v Master of the High court* HC 5914/14. This court order is at p 2 of the third and fifth defendants' bundle of documents. This order was made in terms of the old s 301(1)(c) of Companies Act [*Chapter 24:03*] which empowered the court to give such directions as to the management of the company as the court deemed necessary. The provisional judicial management order provides as follows;

“all actions and applications and the execution of all writs, summons and other processes against the applicant company shall be stayed and not be proceeded with without the leave of this Honourable court”

Counsel argues that this leave is only required in respect of already existing

proceedings at the time the provisional order is granted and that no leave is required for new suits.

Counsel for the plaintiff went on to cite the popular case of *Zambezi Gas Zimbabwe (pvt) Ltd and Another SC 3 /2020*. According to her the court held that provisional judicial management order such as cited above does not apply to proceedings that were not pending at the time the provisional order placing the company in judicial management was issued. According to her submissions this principle was reinforced by Supreme Court in *MCA Venture Capital (Pvt) Ltd v Secretary for Mines SC 43/21*. In *Chingozho N.O v Goyel and Others HH51/21*

Court held as follows:

“The court order placing the company under judicial management.....has no effect of barring the institution of fresh proceedings while the company is under judicial management. The stay of proceedings does not extend to new actions and future proceedings.”

The counsel for the plaintiff avers that the summons was issued on 8 June 2016 almost 2 years after the order for provisional management. The provisional management order was given on the 30 of July 2014. She argues that on that basis alone this point should fall away

On the other hand the 1st defendant argues that leave to sue was necessary and failure to do so is fatal. Argued further that the plaintiff doesn't rebut the submission made on the basis of the *Al Shams* judgment that the whole of the pleading is invalid. It is further submitted that the rationale for judicial management, is an endeavour to resuscitate a company and avoid liquidation. Thus the existence of a court order which clearly provides for the need to seek leave before proceeding against a company under judicial management. In *G N Mlothswa & Co v David Whitehead Textile Ltd & Ors HH 78-17*. On p 3 of the judgment the judge agreed with the submission that once a company is placed under judicial management or liquidation, that company is just not placed into the hands of the judicial manager or the liquidator, it is also placed in the hands of the court. The court has a duty to protect the company even from the judicial manager or the liquidator. It was held that the intention of the legislature when it enacted s 301(1) was simply to protect companies that are under judicial management from litigation without the leave of the court. It was argued in that case that it was illogical that the legislature would intend to halt legal proceedings which had already commenced before the company was placed under judicial management but would give the green light to legal proceedings which are commenced after the company has been placed under judicial management. It was clarified as follows;

“To begin with, the aim of the judicial management is to allow a financially distressed company to return financial health with the supervision of the courts. An order for judicial management is granted if the court satisfied that the company is unable to pay its debts.

One of the advantages of judicial management is that the company may be provided with protection against creditors’ claims. Protection may be given against legal proceedings. This credit protection allows the company to continue business and provide it with a much needed reprieve while attempts to nurse itself back to financial health. The judicial management process is meant to ensure that there is little or risk of asset depletion from creditors’ claims.”

The court still went on to make the following comments;

“Since the objective of the Judicial management is to give viable companies which are in financial trouble a chance to rehabilitate themselves and be restored to profitability that is why s 301(1) of the same act provides that in some cases of judicial management the court order may contain directions for stay of all writs against the company. In that regard all legal proceedings and all execution of judgments cannot be commenced or continued with unless with the leave of the court.”

It will be therefore be illogical to distinguish the two sets of proceedings, that is those which had commenced and new proceedings for it would defeat the very purpose of that judicial management. At the end of the day it becomes the discretion of the court and the onus is with the plaintiff, in that, in her circumstances leave to sue ought not to be sought. It was also submitted that the legislature could have intended to separate legal proceedings that were in existence from those that would commence. The requirement that the leave of the court be obtained first seeks to protect the company in that without the restriction, the distressed company can be subjected to a multiplicity of legal proceedings which can be both expensive and time consuming thereby taking away the available funds and the judicial manager’s attention from concentrating on issues that lead the company back to recovery. Some legal proceedings may not even be necessary to say the least. It was further submitted that this should then be left to the discretion of the court.

In *Roswell Mitchel Enterprises (Pvt) Ltd t/a Metal Components v Mildred and Mathias (Pvt) Ltd (under Judicial Management) & 2 Ors* HH 463/19 ZHOU J commented as follows;

“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) 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 proceedings is to be preceded with or commenced against the company except by leave of the court and subject to such terms as the court imposes”

The judge went on to distinguish the position between Australian positions to ours.

“Whereas in Australia 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, summons 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 the effect is the same.

Having discussed the authorities above as submitted in the heads of arguments this court takes a slightly different view from certain pronouncement on the subject. I don't think the Supreme Court was directing that it is a one size fit all scenario but that in certain circumstances a court can find it otherwise. In other words a one size fit all approach may jeopardize the very reason for placing the companies under liquidation. The circumstances of this case are somehow different from other scenarios. Without necessarily going into the merits of the matter the origin of the debt in question is not very clear let alone how it was executed. It is not denied a provisional order placing the first defendant into provisional liquidation was issued and up to the time of these current proceedings had not yet been discharged. So under those circumstances to allow litigation against such an entity may bring disastrous effects on the first defendant. I am not convinced that the applicant has followed due process of the rules and in commencing this litigation.

The applicant argues further that he can still sue the other defendants as co-principal debtors having bound themselves as sureties to the first defendant. While that can be the case it has not been demonstrated that the applicant has gone through all the due processes before resorting to other defendants. The court is alive to the fact that there has been some settlement already with the other once defendants but does not necessarily mean those who have yet settled admit liability on that basis. If it was the case then the plaintiff should have proceeded against those ones separately from the first defendant. In my view this is a proper case where leave to sue was supposed to be sought before issuing out summons. Allowing the present scenario to stand will tantamount to opening floodgates of litigation thereby jeopardizing any prospects rescue. In the final analysis I am persuaded by the point *in limine* that leave to sue was supposed to be sought. Having stated so I order as follows:

It is ordered that:

1. The point *in Limine* for leave to sue be and is hereby sustained
2. Costs to be awarded on ordinary scale.

Atherstone & Cook, plaintiff's legal practitioners
Titan Law, third to fifth defendant's legal practitioners