

REPORTABLE (142)

THE GARRAT TRUST
v
CREATIVE CREDIT (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE**BHUNU JA****HARARE: 23 NOVEMBER 2020, 24 NOVEMBER 2020, 8 OCTOBER 2021, 18
OCTOBER 2021 & 15 NOVEMBER 2021**

V. Mhongo with *Makamure*, for the applicant

I. Musimbe with *Ranganai*, for the respondent

CHAMBER APPLICATION**BHUNU JA:****Primer**

[1] This is an application for condonation of late noting of appeal and extension of time within which to note the appeal in terms of r 43 of the Supreme Court Rules 2018. The application is opposed.

[2] The matter was argued on 24 November 2020. At the conclusion of argument the parties were granted the opportunity to canvas the possibility of an amicable settlement. The matter was then postponed *sine die* pending settlement failure of which the court would proceed to determine the application.

[3] The parties did not however come back to the court within a reasonable time to advise it of the outcome of their negotiations. Prompted by the inordinate delay, on 1 June 2021 I asked the Registrar to write to the parties enquiring about the outcome of the envisaged settlement. The enquiry elicited no response. Having received no response, I directed that the matter be set down for 11 October 2021. At that hearing the parties again agreed to a further two weeks postponement to canvas settlement. The matter was then postponed to 18 October 2021 by consent of the parties.

[4] At the resumed hearing on 18 October 2021, the applicant was in default. Counsel for the respondent however advised that the parties had failed to settle their dispute thereby paving the way for me to determine the application. I now proceed to determine the application on the merits.

FACTUAL BACKGROUND

[5] The applicant is a trust duly registered in terms of the laws of Zimbabwe whereas the respondent (the company) is a duly registered juristic person in accordance with the laws of Zimbabwe.

[6] It is common cause that the applicant owns 50 per cent shares in the respondent. On 19 February 2019 the applicant made an application in the High Court (the court *a quo*) for the liquidation of the respondent company. It sought liquidation of the company on the basis that the directors had irretrievable differences as they were deadlocked on the management of the company.

[7] The respondent opposed the application raising a counterclaim coupled with a point *in limine* in the process. It is convenient to deal with the point *in limine* first before delving into the merits of the application.

THE POINT IN LIMINE

[8] The point *in limine* raised by the company is procedural in nature. Counsel for the company submitted that the application before the court *a quo* was fatally defective for failure to comply with the mandatory provisions of s 5 (4) (a) and (b) of the Insolvency Act [Chapter 6:07]. The court *a quo* upheld the point *in limine* hence the appeal.

[9] The section provides as follows:

“5 Application by debtor for the liquidation of a trust, company, private business, corporation, co-operative or other debtor other than a natural person or partnership

- (1) ...
- (b) By the company, or one or more directors or by one or more members for an order to wind up the company on the grounds that –
- (i) The directors are deadlocked in the management of the company, and the members are unable to break the deadlock and
- A. irreparable harm is resulting or may result from the deadlock; or
- B. the company business cannot be conducted to the advantage of members generally, as a result of the deadlock:
- or
- (ii) the members are deadlocked in voting power, and have failed for a period that includes at least two financial years to elect successors to directors whose terms have expired; or
- (iii) it is just and equitable for the company to be liquidated.
- ...
- (4) Every application to the court referred to in subsection (1) except an application by the registrar of companies in terms of subsection 1(e) and the Master in terms of paragraph (h) of that subsection **must** be accompanied by - (My emphasis)
- (a) a statement of affairs of the debtor corresponding substantially with Form A of the First Schedule; and
- (b) a certificate of the Master, not issued more than four days before the date on which the application is to be heard by the Court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant.”

- [10] It is common cause that the applicant did not comply with the mandatory provisions set out in s 5(4) (a) and (b) of the Act in so far as the application was not accompanied by a statement of affairs of the debtor corresponding substantially with Form A of the First Schedule. That omission was in contravention of para (a) above. Secondly, there was no Master's certificate as is required by para (b).
- [11] In para 5.9 of its heads of argument the applicant concedes that the application before the court *a quo* was in fact a nullity where it says:
- “*In casu*, the application *a quo* was fatally defective and same should have been struck off the roll and not determined on the merits.”
- [12] On that score counsel for the applicant argues that the court *a quo* committed a gross irregularity by proceeding to deal with the merits of proceedings which were a nullity at law.
- [13] It is correct to say that the learned judge *a quo* found that the applicant failed to comply with the strict mandatory provisions of the law and that therefore the application before him was a nullity. At page 5 of his cyclostyled judgment the learned judge properly relied on the dictum in *Air Duct Fabricators (Pvt) Ltd v A M Machado & Sons (Pvt) Ltd*¹. That case is authority for the proposition that failure to comply with a mandatory course of action invalidates the thing done.
- [14] Having correctly articulated the law the learned judge *a quo* appreciated that he ought to have struck the application off the roll as a nullity for want of compliance with the law. He however did not strike off the application but went on to consider the company's counter application. In his own words this is what he had to say²:

¹ HH 54/16

² At page 5 of HH – 606 - 20

“So much for the preliminary point which the entity raised. It is not without merit. But for the need on my part to consider the application as a whole, **the same would have been struck off the roll with costs.** I remain alive to the fact that the parties placed before me an application and a counter-application. It is therefore necessary for me to consider both and make a determination which in my view serves the interests of the parties.”

[15] Having said that the learned judge *a quo* went on to consider the merits of the counter application and issued the following order³:

“I have considered all the circumstances of this case. I remain alive to the fact that the counter-application in favour of the entity in terms of para (d) of subs (2) of s 197 of the Companies Act. I am satisfied that the requirements which are mentioned in s 196 of the Companies Act are met.

It is in the result ordered that:

- (a) The main application be and is hereby dismissed with costs.
- (b) The main order in the draft of the counter application be and is hereby granted.”

Thus the learned judge *a quo* determined both the main application and the counter-application notwithstanding the fact that he had previously observed that the proper course of action to take was to strike off the main application for want of compliance with the mandatory provisions of the law.

ANALYSIS OF THE FACTS AND THE LAW

[16] On the facts before him, the learned judge was undoubtedly correct in his view that the main application ought to be struck off for none-compliance with the law. The applicant’s failure to comply with the mandatory procedural requirements of the law meant that the application was not properly before the court *a quo*. The proper order in that regard is to strike off the proceedings as a nullity. In *Chirosva Minerals (Pvt) Ltd v Minister of Mines and Ors*⁴, the court held that, **the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected.**

³ At page 17 of HH - 606 - 20

⁴ 2011 (2) ZLR ZLR 274

[17] What this means is that the main application that was launched in the court *a quo* without the statement of affairs of the debtor and the master's certificate as required by law was void and to that extent a legal nullity.

[18] The leading case on the effect and import of void proceedings is *Mcfoy v United Africa Co Ltd*⁵. In that case Lord DENNING observed that:

“If an act is void, then, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court for it to be set aside. It is automatically null and void without more ado, although it is sometimes more convenient to have the court declare it to be so. **And every proceeding which is founded on it is also bad. You cannot put something on nothing and expect it to stay there. It will collapse.**” (My emphasis).

[19] On the basis of the law as articulated through the cases once the learned judge had taken the correct view that the main application upon which the counter application was founded was a nullity, he ought to have declared the application a nullity and stop there. Since the counterclaim was founded on a nullity it had no independent existence of its own. It would therefore have collapsed together with the main application as it was riding on the back of the main application. Faced with the same situation in *Care International Zimbabwe v ZIMRA & Ors*⁶ MTSHIYA J sitting in the same court had this to say:

“I agree with the first respondent that there is no valid application before the court and accordingly the rest of the issues raised by the respondents cannot be delved into. The finding estops me from going any further.”

MTSHIYA J was undoubtedly correct that once an application is found to be fatally defective the court cannot go on to determine any other issues based on the defective application.

⁵ [1961] 3 ALL ER 1169 at 1172

⁶ HH – 373 – 15 at p 9 2015(1) 567 p577 A

[20] In light of established precedent, it is plain that the learned judge *a quo* strayed into the morass of irregularity when he proceeded to determine both the main application and the counter application in circumstances where it was clear to him that the main application was a nullity.

[21] There is therefore merit in the applicant's complaint that the court *a quo* could have misdirected itself by failure to strike off the main application and by extension the counter application.

DISPOSITION

[22] For the foregoing reasons I find that the applicant has bright prospects of success on appeal. It is accordingly ordered that:

1. The application for condonation of late noting of appeal and extension of time within which to note the appeal be and is hereby granted.
2. The notice of appeal shall be filed and served within 5 days of this order.
3. There shall be no order as to costs.

Messers Mlotshwa & Muguwadze, applicant's legal practitioners.

IEG Musimbe and Partners, respondent's legal practitioners