GODFREY NYAKUDYA
versus
THERESA GRIMEL N.O
and
THE MASTER OF THE HIGH COURT
and
CHAFERFLY ENTERPRISES (PVT) LTD
(under Liquidation)
and
METMAR ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 February and 9 March, 2016

Urgent Chamber Application

D. T. Mwonzora, for the applicant
Ms C Mabhande, for the respondents

MANGOTA J: Sometime last year, the fourth respondent applied for confirmation of the provisional liquidation of the third respondent. Its application was premised on the allegation that the third respondent had failed to pay its debt.

The court confirmed the provisional order for the liquidation of the third respondent. It did so on 16 December, 2015. The first respondent was appointed the provisional liquidator of the third respondent.

Following the confirmation of the provisional order for the liquidation of the third respondent, the applicant filed an application with the court. He filed it under case number HC 113/16. His aim and object were to move the court to set aside the confirmation of the provisional liquidation of the third respondent. The reasons which he advanced for his prayer were that:

(a) as the application which should have been heard on the set down date was postponed to a future date, an advertisement of the date to which the same had been postponed should have been done and it was not;

(b) proceedings which related to confirmation of the provisional liquidation of the third respondent contained some irregularities (emphasis added)

The applicant made submissions on what he said constituted the urgency of the application. He stated that, notwithstanding the fact that the first respondent opposed the application which he filed under case number HC 113/16 and received his Heads of Argument, the first respondent advertised for a sale in liquidation the property of the third respondent. The sale, according to him, was scheduled for 18 February, 2016. He submitted that he would suffer irreparable harm if his present application was not heard on an urgent basis. He said, once the sale was allowed to proceed, he would not be able to recover the sold items. He, therefore, moved the court to grant him the following order(s):

"TERMS OF FINAL ORDER SOUGHT

1. Pending finalization of the application in terms of section 227 of the Companied Act [*Chapter 24:03*] HC 113/16 1st respondent be and is hereby ordered to cancel any sale in liquidation of 3rd respondent's property upon service of this order.
2. 1st respondent pays costs of suits.

TERMS OF THE INTERIM ORDER GRANTED

Pending determination of this matter, the applicant is granted the following relief:

1. That the 1st respondent be and is hereby ordered to suspend any sale in liquidation of the 3rd respondent forthwith."

The first and the third respondents opposed the application. The second and the fourth respondents did not. The court remains of the view that the last two mentioned respondents would abide by the decision of the court.

The respondents who opposed the application raised a number of *in limine* matters. They stated that the application was not urgent. They submitted that the sale of the assets complained of was extensively advertised in the local paper in Bulawayo before the actual date of the sale. They attached to their opposing papers Annexures A and B. The first Annexure is an advertisement of the sale of some of the third respondent's movable property. The advertisement was placed in the *Chronicle* of 12 February 2016. The second Annexure are further advertisements of the sale of the third respondent's other movable goods. The advertisements

which were inserted in the same newspaper were for the following dates: 14, 15, 17 and 18 February 2016. They stated that the applicant filed the present application on 19 February, 2016 after the sale had already been conducted. They argued that the applicant did not treat the matter with any urgency. They stated that the process of selling the third respondent's goods had already been completed. They contended that any order for a stay would amount to a *brutum fulmen*.

The fourth respondent was the effective cause of the third respondent's being placed under liquidation. The third respondent owed a debt to the fourth respondent which issued not less than four warrants of execution in an effort to recover what was owed to it by the third respondent.

The record does not show whether or not the fourth respondent recovered any or all of what the third respondent owed to it. The probabilities are that it recovered a substantial portion of the debt. If it had not, it would not have remained silent when the applicant applied for the setting aside of the confirmation of the liquidation of the third respondent. It would, in the court's view, have made a stiff opposition to the application.

The present application was served on the fourth respondent. It did nothing about it. Its attitude to the urgent chamber application is indicative of the fact that its debt against the third respondent was, to a greater degree, satisfied through the warrants of execution which it caused to be issued against the third respondent. The observed position leaves the first and the third respondents in the equation.

The relationship which existed between the applicant and the third respondent was not clearly pleaded in the applicant's founding affidavit. However, the Sheriff's return of service number 069257B which appears at p 33 of the record clarified the relationship which exists between the two. The remarks portion of the return reads:

> "copy of the court application served on Mr G Nyakudya (the Director at Chaferfly"
> [emphasis added].

It is evident that the applicant has an interest in the third respondent. He said the application which he filed under case number HC 113/16 was made in terms of s 227 of the Companies Act [*Chapter 24 : 03*]["the Act']. The section reads:

> "The court may at any time after making 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 applicant does not fall into the category of a creditor or a liquidator of the third respondent. He falls into the category of a contributory of the same. The term contributory is defined in s 202 of the Act to mean:

> "every person liable to contribute to the assets of a company in the event of its being wound up and, for purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are deemed to be contributories, includes any person alleged to be a contributory."

When s 202 of the Act is read with s 201 of the same, the applicant's interests in the third respondent become clearer than otherwise. The heading of the section makes reference to **liability as contributories of present and past members**. It reads, in part, as follows:

> "In the event of a company being wound up, every present and past member shall, subject to this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustments of the rights of the contributories among themselves …"

It follows from the foregoing that the applicant did, and does, have *locus standi* to file the application which he made under case number HC 113/16 as well as the present urgent chamber application. His submission was that he got to know of the confirmation of the provisional order for the liquidation of the third respondent on 16 December, 2015. He stated that the confirmation in question was set down for 9 December 2015. He said the matter did not kick off on the mentioned date. He submitted that it was postponed to 16 December, 2015 when it was heard and determined.

The first and third respondents agreed with that stated position of the matter. They said the matter which was scheduled for the 9th was postponed to the 16th of December 2015.

It was on the basis of the postponement of the matter from 9, to 16, December 2015 that the applicant argued that the application for confirmation of the provisional order was erroneously entertained as well as granted and should, therefore, be set aside. He stated that the hearing and determination of the application contravened s 210 (3) of the Act. He submitted that the new date of hearing [i.e. 16 December, 2015] should have been advertised as per the requirements of the law.

Section 210 (3) of the Act reads:

> "Where the court adjourns the hearing of an application for the winding up of the company by the court, the applicant shall, unless the court orders to the contrary, advertise the application and the adjournment in the Gazette." [emphasis is added]

The law makes it mandatory for persons who apply for the winding up of a company to advertise the application in the Gazette where, as *in casu*, the application was, for one reason or the other, adjourned. It follows from the stated legal position that failure to advertise renders the adjourned proceedings and their outcome incurably defective. They remain a nullity.

The first and third respondents' arguement which was to the effect that the applicant should have acted when the advertisements which appeared in Annexures A and B were inserted in the *Chronicle* is sound. However, that arguement cannot stand in the way of clear provisions of s 210 (3) of the Act which the respondents did not comply with. Their submissions would have held if they showed that they, for a start, complied with the mandatory provisions of s 210 (3) of the Act.

It is of paramount importance that litigants comply with the law before they proceed to argue on technicalities on a matter which they place before the court for determination. The respondents *in casu* failed to comply with the law. They centered their arguments on known and accepted technicalities which related to the dates as to when the applicant should have acted. He, on his part, gave cogent reasons for his inaction. He said he did not act as he remained of the view that the matter which was then before the court would be discussed and settled with a view to avoiding liquidation of the third respondent.

The parties appeared to have shared a common position. Their view was that innocent third parties who purchased the third respondent's movable goods on the strength of an invalid court order should not be adversely affected by the outcome of this application in the event that the applicant's prayer was granted.

The parties' view does, in the court's view, resonate with the principles of justice, equity and fairness. That is so as the purchasers have nothing to do with the wrangle which exists between the applicant and the respondents. It follows from the parties' apparently agreed position that no sale of the third respondent's unsold property would be allowed to take place until the applicant's application under case number HC 113/16 has been heard and determined.

In the result, the applicant's application for the interim relief is granted as prayed subject to the condition that the property which third parties purchased from the third respondent pursuant to the order of 16 December, 2015 remains with those who purchased it.

Gill Godlonton & Gerrans, 1st respondent's legal practitioners
Mwonzora And Associates, applicant's legal practitioners