

TRIANGLE LIMITED
versus
ROMSDALE INVESTMENTS (PRIVATE) LIMITED
and
31 OTHERS

HIGH COURT OF ZIMBABWE
MWAYERA, MATANDA-MOYO, KWENDA JJJ
HARARE, 6 February 2018 & 25 April 2018

Civil Appeal

E. T Moyo, for the plaintiff
T. Zhuwarara, for the respondent

KWENDA J: The facts in this matter are common cause. The appellant instituted proceedings in the magistrate court sitting at Chiredzi for the eviction of the respondents and all those claiming occupation through them from leased premises situated at Lot 11 A and Lot 12 A of Triangle Ranch Triangle Township, Triangle.

The first respondent is a company duly registered in terms of the laws of Zimbabwe. It is presently under Judicial Management. The 2nd to 32nd respondents are either farmer or current employees of the 1st respondent who occupy separate dwellings situated on the leased premises described above and are in occupation in terms of the lease agreement between the appellant and the 1st respondent.

It is common cause that the first respondent has failed to pay rentals and other charges contemplated in its lease agreement with the appellant and the appellant seeks eviction on that basis. The amount owing at the inception of the proceedings was \$492 405-00. However the appellant did not seek recovery of the amount outstanding, ONLY seeking eviction of the respondents and costs to be paid by the respondents jointly and severally one paying the others to be absolved.

The 1st respondent opposed the application on the merits but after raised a point *in limine*. The ground for the objection *in limine* is essentially the substance of the defence on the merits and it is that the appellant was precluded by the High Court order which placed the 1st respondent under final judicial management from commencing any proceedings against it. In

response, the appellant argued that such leave was not necessary because the judicial management order affects only proceedings pending at the time the order is made. In this case the judicial management order preceded the eviction proceedings in the lower court. Indeed the appellant did seek or obtain leave of this court to commence proceedings against 1st respondent.

1st respondent was placed under judicial management in terms of the order of this court in case No. HC 6814/14. Paragraph 6 thereof reads as follows:

“All actions and applications and execution of all writs summons and other process against the applicant (1st respondent) shall be stayed and not proceeded with without leave of this court.” I have underlined the basis of the objection.”

After hearing argument, the court *a quo* arrived at the conclusion that the appellant required leave of the High Court before instituting the eviction proceedings and thus upheld the point *in limine*.

The parties have maintained their respective positions on appeal. This appeal must resolve that dispute.

The wording of the contentious paragraph of the order placing the 1st respondent under judicial management is a verbatim reproduction of the provisions in s 301 (1) of the Companies Act [*Chapter 24:03*]. The effect to be given to the court order quoted above which hinges on the correct interpretation of s 301(1) of the Companies Act has been subject to different interpretations by this court.

I will begin with the early decisions. Identical enabling provisions were previously contained in s 272 of the now repealed Companies Act [*Chapter 190*]. The Honourable SMITH J was called upon to consider the import of the provisions in the matter of *Agree and Sons (Private) Limited* (under judicial management) v *Lever Brothers (Private) Limited* 1981 ZLR 532. In that case the Honourable judge arrived at the conclusion that a judicial management order similar to the one under consideration applies to all proceedings whether instituted prior or after the order placing a company under judicial management.

A close reading of the judgment however reveals that in the matter before the Honourable SMITH J it is the company under judicial management which had instituted the proceedings for protection against execution. In that case the debt had arisen after the judicial management order and proceedings had been instituted initially with the leave of the court. The issue therefore before the Honourable Justice SMITH was therefore whether leave granted to commence proceedings against the company under judicial management extended to

execution. The Honourable Judge found that separate or additional leave was required to execute judgment. In other words leave granted at the commencement of proceedings did not extend to execution unless the court is specific in that regard. In the exercise of his discretion the Honourable Judge concluded that allowing execution to proceed was tantamount to giving the particular judgment creditor preference over others.

It is therefore clear that facts of the matter of *Agree and Sons (Private) Limited* (under judicial management) v *Lever Brothers (Private) Limited (supra)* are distinguishable from this case. Be that as it may, the Honourable Judge seemed to approve of earlier decisions whose ratio was that the statutory provision under discussion applied with equal force to both pending and future litigation. In other words interpreting the provisions in such a way as to exclude their application to fresh proceedings would produce anomalous results. The cases he cited with approval *Samuel Osborn (SA) Ltd v United Stone Crushing Company (Pvt) Ltd (under judicial management)* 1938 WLD 229 and *Ross v Northern Machinery and Irrigation (Pvt) Ltd*, 1940 TPD 119. The reasoning in both cases cited is that the provisions contemplate that litigation can ensue against a company under judicial management arising from debts prior and after the judicial management order excluding the application of the order from such litigation will result in preference of one creditor over others. Therefore before such litigation is commenced, the court has to be called upon to exercise its discretion whether to allow commencement of proceedings and execution to proceed.

There are however recent judgments of this court in which the provisions have been interpreted differently see cyclostyled judgments of the Honourable CHIWESHE JP in case of *Kenneth Raydon Sharpe v Tetrad Investments Bank Ltd* (under judicial management) and *Tetrad Holdings Limited and Eugene Mlambo* HH 559/17 and ZHOU J in the case of *ZFC (Ltd) v K M Financial Solutions (Pvt) Ltd & Anor* HH 47-15.

In both cases the Honourable judges arrived at the conclusion that leave of the High Court is not required before fresh proceedings can be commenced. The restriction applies to legal proceedings, summons or writ existing at the time the judicial management order was granted. The judges point out that there is a clear distinction between statutory provisions relating to judicial management and those relating to winding up. Section 213 (a) of the Companies Act which relates to winding up of companies is worded drastically differently. It provides that:

“no action or proceeding shall be proceeded with or commenced against a company except by leave of a court--”

The legislature, by using different words could only have intended that the provisions will have different application. Clearly commencement of proceedings against a company that is being wound up requires leave of the court but that does not apply to a company under judicial management. A judicial management order stays ONLY existing actions, summons or wits etc and future or fresh proceedings can only or stayed at the discretion of the court like what happened in the matter of *Agree & Sons (Pvt) Ltd* (under judicial management) v *Lever Brothers (Pvt) Ltd* (*supra*).

The common thread in all the case law referred to above is that the wording of the standard judicial management order is borrowed from specific enabling provision in the Companies Act (currently s 301 (c)). The import of the judicial management order therefore must accord with a correct an interpretation of the specific provision.

A company is placed under judicial management if there are prospects that it can be made viable again. In light of that consideration, a company under judicial management enjoys limited protection granted at the discretion of the court with the knowledge of the extent of its indebtedness on the date the order is made. The company therefore does not enjoy a blanket protection. I have borrowed the words used by then Honourable CHIWESHE JP in the matter *D Kenneth Raydon Sharpe v Tetrad Investment Bank Ltd & 2 Others* (*supra*).

It appears to me that a blanket protection would have the effect of concealing the true position of a company struggling to pay debts. If the situation obtaining is that the correct remedy at law is winding up then indeed such situation must be allowed to manifest and the route of winding up taken.

It must be noted that in the matter decided by the Honourable SMITH J, it is the company under judicial management which approached the court for protection and the court exercised its discretion.

In the result it is ordered that:-

- (1) The appeal succeeds and the judgment of the court *a quo* upholding the point *in limine* is set aside and substituted with the following:
“The point *in limine* is dismissed”
- (2) The matter is remitted to the trial magistrates court for determination on the merits
- (3) The 1st respondent shall pay appellant’s costs of appeal.

MWAYERA J agrees

MATANDA-MOYO J agrees

Scanlen & Holderness, appellant's legal practitioners
Mawere & Sibanda, 1st -32nd respondents' legal practitioners