

FUSS DIAMONDS (PRIVATE) LIMITED
(IN LIQUIDATION)
versus
MARANGE RESOURCES (PRIVATE) LIMITED
and
ZIMBABWE CONSOLIDATED
DIAMOND COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MABHIKWA AND MUZENDA JJ
HARARE, 13 FEBRUARY 2018 AND 24 OCTOBER 2018

Opposed Matter

Professor W. Ncube for the plaintiff
Mr G. Gomwe for the 1st defendant
Mr A Kalira for the 2nd defendant

MABHIKWA J: This is a claim against the defendants, jointly and severally, the one paying and the other being absolved, for payment of an amount of USD1 242 778 plus 5% per annum on the said amount calculated from 1 January 2015 until full and final settlement, together with costs of suit on a legal practitioner and client scale.

The defendants raised a special plea in bar. The defendants had pleaded three (3) grounds but abandoned the 3rd ground which this judgment will thus ignore.

ISSUES

The court has to decide the following issues.

1. Whether a foreign company (*peregrinus* entity) in liquidation can sue in Zimbabwe in its own name.
2. Whether, in so suing the foreign liquidators of that entity must seek leave of the court before instituting proceedings.

Let me deal with the issue of *locus standi in judicio* from the onset as it may then not be necessary to go on to the next stage.

FACTS

The plaintiff's claim arises from the following brief facts:

The plaintiff is an Israeli Company in liquidation having been placed under liquidation by an Israeli Court at Tel Aviv, the liquidators being Uri Gil and Amit Pines. The defendants

are *incola* companies duly registered in Zimbabwe. On 4 July 2014 at Harare, prior to the plaintiff's liquidation, the first defendant and the plaintiff entered into an agreement wherein the plaintiff would purchase rough diamonds from the first defendant to the value of USD5 000-000-00 (Five Million US dollars).

Pursuant to the agreement, the plaintiff duly paid the sum of USD5 080 427. The first defendant fulfilled its obligation only to the extent of USD3 837 649 before it stopped mining operations.

The plaintiff company, now in liquidation as stated above, seeks to recover, from the defendants, jointly and severally the outstanding amount of USD1 242 778-00.

DOES PLAINTIFF COMPANY HAVE *LOCUS STANDI* BEFORE THE COURT

In raising a plea in bar, in terms of r 137 (1) of the High Court Rules, the defendants have contended that the plaintiff company, a *peregrinus* entity in liquidation, has no *locus standi* to institute the current proceedings as the liquidators have not been specifically cited in the proceedings. The defendants contend that this renders fatal the claim. It is the defendants' argument that a company in liquidation lacks *locus standi* to institute proceedings in that it is fully subject to the control of its liquidators who are solely entitled to liquidate on its behalf. They further argue that as a result therefore, the plaintiff, in the absence of the liquidators does not have power even to direct its legal practitioners of record to institute proceedings. The assumption is that in the absence of the liquidators, Messrs Thompson Steven and Associates were instructed by the directors and shareholders of the plaintiff company when they at law ceased to exist at the time of the winding up order.

This argument by the defendant is premised on their interpretation of s 218 (2) (a) of the Companies Act [*Chapter 24:03*] and s 221 (1) of the same Act.

THE LAW

From the onset, let me state that I do not agree with the defendants' interpretation of s 218 (2) (a) of the Companies Act which simply states what should happen to the property of a company at the time of a winding up order with no one as yet acting as liquidator of the Company. It simply states that all the property shall be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed (the emphasis is mine). The section does not refer to litigation after liquidation as is the case *in casu*.

Section 221 (1) of the same Act simply details the powers of a liquidator in a winding up by the court. That is, the power to

“execute in the name and on behalf of the company all deeds, receipts and other documents and for the purposes to use the company’s seal.”

I am not persuaded to conclude that the above two sections of the Companies Act envisage the defendant’s rather “stretched” interpretation. I will subscribe to the views of CHAREWA J in *Kingdom Bank Limited v The Right Investments (Pvt) Ltd and 2 Ors* – HH 273-16 at p 5 of the judgment where she points out that a distinction must be made between the issue of *locus standi* and that of citation so that the two are not confused or used interchangeably. She goes on to quote Herbstein and Van Winsen in *The Practice of the High Courts in South Africa* (5th Ed. Vol 1. at p 179) which states that;

“When a company is in liquidation and the liquidator sues on the company’s behalf for debts owing to the Company, the company should be cited by its name with the subjoining expression “in liquidation”. However, where the liquidator is enforcing rights as liquidator then the name of the liquidator should be cited as nominee officer.”

I understand the above section to mean simply that where a company is in liquidation and the liquidator wants to sue on behalf of the company, for debts owing to the company, then the company should be cited by its name with the subjoining expression “in liquidation”. That is sufficient citation. It is not necessary to cite the names of the liquidators. In fact, the defendants seem to believe that it is the liquidators that need to be cited, not the company in liquidation.

SEEKING LEAVE OF THE COURT BY FOREIGN LIQUIDATORS FOR RECOGNITION

I am not persuaded either that s 19 (1) of the Companies (Winding Up) Rules, 1972 makes it mandatory for a foreign company to seek leave of the court, or as argued by the defendants that the foreign liquidators must in suing, first seek leave of the court for recognition by the Zimbabwean court before instituting proceedings and representing the company in liquidation. The defendants argue that in terms of s 19 (1) of the Companies (Winding Up) Rules, “the recognition of the joint foreign liquidators Uri Gil and Amit Pines is pivotal and at the epicentre of the *locus standi* of the plaintiff. They further argue that there is no indication on record that the joint liquidators have authorised the launch of the current proceedings as they could not even have given such authority before their own recognition by this Honourable Court. They argue that for that reason also, the plaintiff’s purported summons and declaration are incurable and fatally defective.

My reasons for disagreeing with the above averments by the defendants are as follows:

Firstly, s 19 (1) of the Companies (Winding Up) Rules 1972, cited by the defendants refers to contempt of court committed by a person examined under the provisions of s 235 of

the Companies Act before the Master or some other designated person. The examined person commits the offence of contempt of court if he refuses to answer questions lawfully put to him by the Master or some other designated person to the extent that upon a report being filed with the court by the Master, that person shall be treated as having refused to answer questions in court. The above section has no bearing in this case as it does not refer to seeking leave to sue or to be recognised.

The defendants probably intended to refer to s 9 (1) of the Companies (Winding Up) Rules, 1972 which reads,

“9. RECOGNITION OF FOREIGN LIQUIDATORS

(1) Where a foreign company has been placed in liquidation elsewhere than in Zimbabwe, the liquidator thereof may apply by petition for an order recognising his appointment and declaring that he be entitled to the sole administration of all the assets of the company in Zimbabwe, both movable and immovable. The petition may be made by the liquidator himself or by his duly authorised agent within Zimbabwe. The petitioner shall set out *inter alia*-

- (a) the name of the company;
- (b) the extent of its share capital, and, if possible, the extent to which such capital is held by residents of Zimbabwe;
- (c) the circumstances leading up to the order of winding up;
- (d) such other facts as would justify the court in granting the order sought.

The petition shall be supported by a balance-sheet or statement prepared as at the date of liquidation, or some convenient date as near as possible thereto, reflecting not only the general position of the company but the extent of the assets and liabilities of the company in Zimbabwe.”

Assuming that the defendants intended to rely on s 9 (1) of the said Act, it will be noted that even that section does not make it mandatory for the foreign liquidators to apply for leave to be recognised let alone to institute proceedings such as the current one. It is my finding that the defendant has not placed before the court sufficient argument or evidence that the section applies to proceedings such as the current one. More so, they have not shown, to the satisfaction of the court that the section makes it peremptory that leave should have been sought first and that the current proceedings should not have been instituted in the current form.

I find that the summons and declaration were sufficient in citing the plaintiff company with the subjoining phrase “in liquidation” as they did. I further find that there was no legal basis for the individual liquidators to be cited or that they first seek leave of this Honourable Court for recognition. See also MAKONESE J’s comments in *Intro Wise Catering (Pvt) Ltd v Cosira Communications Global and Others* HB 10/15.

The third ground that one Mr Fadi Khartown a signatory to the agreement had also filed a similar action which is pending before this Honourable Court and which according to the

defendants had to be concluded first was abandoned. I need not therefore waste any further time on that ground.

Consequently, the court orders as follows;

- a) The defendant's special plea in bar be and is hereby dismissed with costs.
- b) The defendant's file their plea (s) to the plaintiff's summons and declaration in this matter within 10 days of this order.

Muzenda J.....agrees

Thompson Stevenson & Associates, plaintiff's legal practitioners
Mutamangira and Associates, 1st defendant's legal practitioners
Matsikidze and Mucheche, 2nd defendant's legal practitioners