

DISTRIBUTABLE (27)

STAND FIVE FOUR NOUGHT (PRIVATE) LIMITED

v

SALZMAN ET CIE SA

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & UCHENA JA
HARARE, MARCH 14, 2016**

Miss *F Mahere*, for the appellant

A de Bourbon, for the respondent

UCHENA JA: On 14 March 2016 we heard the appellant's appeal against the decision of the High Court. After hearing the parties we dismissed the appeal with costs on a legal practitioner and client scale. We indicated that detailed reasons for judgment would follow. These are the reasons for our decision.

The appellant Stand Five Four Nought (Pvt) Ltd is a company registered in terms of the laws of Zimbabwe. It owns the property known as Stand 540 Salisbury Township. It entered into a surety-ship agreement in which it bound itself as a co- principal debtor and surety in the sum of \$750 000-00 to the respondent Salzman ET CIE S.A. a company registered in terms of the laws of the Republic of Panama in respect of a loan of US\$1 245 000.00 granted by Salzman ET CIE S.A to Myramar Farming (Pvt) Ltd. Myramar Farming (Pvt) Ltd failed to pay the debt and has since been placed under judicial management. The appellant was, by letter of demand dated 25 February 2014 and summons

filed on 8 September 2014, called upon to pay the debt. To avoid its liability it secretly by *ex parte* application sought and obtained a provisional judicial management order. On the return day the court *a quo* dismissed the provisional judicial management order.

The appellant appealed to this Court against the dismissal of the provisional judicial management order. The appeal is premised on the following grounds of appeal.

1. The learned judge *a quo* erred at law in failing to appreciate that:-
 - 1.1 The deponent to the Opposing Affidavit filed by the Intervener, Salzman ET CIE SA was not properly authorised by the company to represent it in proceedings against the Appellant. The Intervener was improperly before the court.
 - 1.2 The shortened form of the provisional judicial management order published in the Government Gazette and Herald newspaper created a *dies induciae* for interested parties to file opposing papers and consequently that the intervener was barred for failure to file its Notice of Opposition before the 30th of September, 2014.
 - 1.3 The appellant has an intention to discharge the debt owed to Salzman ET CIE SA in a manner that will ensure the company does not plunge into liquidation. Consequently it is just and equitable to place the company under final judicial management.

The issues which fall for determination in this appeal are;

1. Whether the deponent to the opposing affidavit by the respondent had proper authority to represent the respondent in the proceedings.
2. Whether the respondent was barred for failure to file its notice of opposition by 30 September 2014.
3. Whether it is just and equitable to place the appellant under final judicial management.

AUTHORITY TO REPRESENT THE RESPONDENT

The respondent's opposing affidavit was deposed to by Melina Matshiya on the strength of the authority granted to her by respondent's special Power of Attorney dated 24 and 26 June 2014.

The court *a quo* held that she was, by that Power of Attorney, properly authorised to represent the respondent. Miss *Mahere* for the appellant submitted that she was not authorised to represent the respondent because the Power of Attorney was granted in respect of proceedings by or against Myramar Farming (Pvt) Ltd. She further submitted that the power of Attorney was not lawfully granted because it was signed by the respondent on 24 June 2014 while the Notary Public signed it on 26 June 2014. She submitted that it was not properly authenticated as it should have been signed by the representatives of Salzman ET CIE SA before the Notary Public.

Mr *de Bourbon* for the respondent conceded that the Power of Attorney was granted in respect of proceedings by or against Myramar Farming (Pvt) Ltd, and was not properly authenticated. The concession was properly made. It is apparent that Melina Matshiya was granted authority in respect of Myramar Farming (Pvt) Ltd. That authority cannot be extended to the respondent, as suggested by the court *a quo*, when it does not mention the respondent by name or reference. The Power of attorney was granted long before issues arose between the appellant and the respondent.

The authentication of the Power of Attorney calls for comment as the ruling thereon by the court *a quo* may create a wrong precedent. In determining the issue of

whether or not the power of attorney was properly authenticated in view of the two dates, the court *a quo* said:-

“I do not intend to be detained by an argument which appears to have been conjured by a desperate litigant clutching on straws. Even the untrained eye can see that the special power of attorney was typed and printed with a date of 24 June 2014 for the signature of the creditor. The Notary Public who authenticated the signatures appended his own date stamp with 26 June 2014 and signed. There is therefore no basis for suggesting that the document was signed on different days. I am prepared to surmise that the correct date of signing by all the parties was 26 June 2014 and reject the suggestion that the document was signed on different dates. Errors of that nature do occur in the heat of the moment and are so insignificant that they should not be allowed, on their own to decide the outcome of important litigation.”

The Power of Attorney was allegedly executed before a Notary Public in the Republic of Panama. No evidence was led from the signatories on the assumed error. Even if it were to be accepted without evidence that such errors occur in our jurisdiction, which I hold should not be accepted, can the courts take judicial notice of them and determine issues in the absence of evidence proving such errors? I am of the view that if an error occurs evidence should be led before the document can be relied on. A court cannot take judicial notice of the occurrence of such errors. The proper authentication of a document gives it validity. Once the authentication is rendered questionable the court cannot rely on such a document.

C. H. Van Zyl in his work “The Notarial Practice of South Africa” at p 81 says:-

“The object of authentication is to ensure the genuineness of the signatures to deeds. Prima facie this authentication is a guarantee that all the required solemnities or requisites of the law in due execution of a deed have been complied with and that the parties therein named have duly signed it in the presence of the witnesses and that the notary in whose presence it was signed was qualified to act as such.”

In this case we are dealing with a document authenticated in the Republic of Panama. Even if the courts could take judicial notice of errors which occur in the confirmation of documents locally, which they in my view should not, they can certainly not assume that the same errors occur in the Republic of Panama and take judicial notice of them. I am therefore satisfied that the court *a quo* misdirected itself when it held that the two dates are a result of an error and do not invalidate the power of attorney. Assuming as the court *a quo* did that the 24th was merely typed in as part of the document and is not the date of signing by the respondent's representatives it should have been cancelled and counter signed by the representatives and the notary public. C.H. Van Zyl in his Book "The Notarial Practise of South Africa" commenting on how alterations should be done says:-

"If before a deed is signed, an alteration is necessary, words deleted should be done in such a way that they can still at all times be read and understood, and the alterations, additions, or variance should appear in the margin of the deed or at the end, and be duly attested by the appearer, the witnesses, and the notary".

Section 3 of the High Court (Authentication of Documents) Rules, 1971 (RGN No 995 of 1971), provides that any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated if it is authenticated by a notary public, or specified officers of the Zimbabwean Embassy in that country. It provides as follows:-

"3. Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated —

- (a) by a notary public, mayor or person holding judicial office; or
- (b) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, by the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general, consul or vice-consul."

In terms of s 2 of the High Court (Authentication of Documents Rules 1971) the word authenticate in relation to a document is defined as meaning “the verification of any signature thereon;” A signature cannot be said to have been verified if it is not clear whether or not it was signed in the presence of the Notary Public.

The respondent’s power of Attorney filed of record is afflicted by a further problem. The portion after the words “Salzman ET CIE SA” is written in a foreign language. It is a legal requirement that deeds executed in foreign languages and documents in foreign languages must be translated into the English language. Section 49 of the High Court Act [Chapter 7:06] provides for the language in which proceedings in the High Court should be conducted. It states:-

“Save as is otherwise provided in rules of court or in any other enactment, all proceedings in the High Court shall be carried on in open court **and the pleadings and proceedings thereof shall be in the English language.**” (emphasis added)

English is the language through which proceedings are conducted. Evidence should be presented in English. If a witness uses a language other than English his evidence should be led through an interpreter who understands that language and is able to interpret it into the English language. This also applies to documentary evidence presented in a foreign language. An interpreter must translate it into the English language.

This was not done. We therefore have on record a power of attorney that the court can understand up to the words “Salzman ET CIE SA,” after which the rest is unknown. The part in the foreign language is crucial because I assume it deals with the authentication and the qualification of the person before whom the authentication took place if it did. This renders the Power of Attorney of no legal value.

WHETHER OR NOT THE RESPONDENT WAS BARRED

Miss *Mahere* for the appellant submitted that the respondent filed its notice of opposition when it had already been barred for failing to file it by 30 September 2014. In terms of the short form annexed to the court order published through the Government Gazette and the Herald any notice of opposition should have been filed by 30 September 2014. Paragraph 3 of the provisional judicial management order reads as follows:-

“This order shall be published once in the Zimbabwe Government Gazette and once in the Herald newspaper. Publication **shall be in the short form annexed to this order.**” (emphasis added.)

Mr *de Bourbon* for the respondent submitted that the provisional order granted by the Court *a quo* was not in form 29 D as provided by r 247(3) of the High Court Rules 1971, and therefore the respondent was not barred as the *dies induciae* in terms of para 1 of the provisional judicial management order was 26 November 2014. Paragraph 1 of the provisional judicial management order reads as follows:-

“Any interested party shall **show cause to this Court sitting in Harare on the 26th day of November 2014**, why an order should not be made in the following terms...” (emphasis added)

A correct reading of the provisional judicial management order indicates 26 November 2014 as the date of hearing and 30 September 2014 as the date by which opposing papers should have been filed. There seems to be a misconception that 30 September 2014 appears in the appellant’s shortened form of the provisional order and not in the court’s order. I say it is a misconception because the court in para 3 specifically said, “Publication **shall be in the short form annexed to this order.**” This means the annexure became part of the court’s order. The Court therefore, irrespective of whether or not r 247(3) was complied with, ordered that any opposing papers should be filed by 30 September 2014. The respondent filed its opposing papers on 20 November 2014, when it had already been barred.

The respondent's papers were therefore not properly before the court *a quo*. Its submissions through them should not have been relied upon by the court *a quo*.

It was however conceded by Miss *Mahere* for the appellant that the respondent as creditor was entitled to appear before the court on the return day in person or through counsel who had properly assumed agency on its behalf, and to make representations in person or through counsel.

Wilmot & Bennett, legal practitioners for the respondent, filed a notice of assumption of agency on behalf of the creditor in HC 7596/14, on 1 June 2015. They were therefore entitled to appear in court on 23 September 2015 the date to which the return day was extended and make representations on behalf of the respondent. This they could do in spite of the defective special power of attorney as a legal practitioner does not need a Power of Attorney to assume agency on behalf of a client. There is unfortunately no record of the respondent's counsel's submissions before the court *a quo* from which its opinion can be gleaned.

WHETHER IT IS JUST AND EQUITABLE FOR THE APPELLANT TO BE PLACED INTO FINAL JUDICIAL MANAGEMENT

Miss *Mahere* for the appellant and Mr *de Bourbon* for the respondent agreed that this issue should be resolved by considering the provisions of s 305 of the Companies Act. Miss *Mahere* submitted that final judicial management should have been granted because Myramar Farming (Pvt) Ltd may in future be able to pay the debt. In response Mr *de Bourbon* submitted that the appellant is seeking judicial management to avoid paying a due debt. He further submitted that the appellant's offer to pay the debt while under final judicial management if Myramar fails to pay, would not be just and equitable as the appellant would

pay the debt over a period of about 30 years from its rentals of US\$15 000-00 per year, when the appellant had contracted to pay on Myramar's Farming (Pvt) Ltd's failure to do so.

The appellant's appeal must, as a result of its success on the first two grounds of appeal, be determined on the merits of its own case. The common cause facts on which such determination should be made are:-

1. The appellant bound itself as a surety and co-principal debtor to the respondent for a loan of US\$1 245 000-00 advanced by the respondent to Myramar Farming (Pvt) Ltd.
2. Myramar Farming (Pvt) Ltd is the appellant's sister company. The deponent to appellant's founding affidavit Serish Pershotam Ranchod is the common denominator between the two sister companies. He holds a 20 percent shareholding in Myramar Farming (Pvt) Ltd and a 50% shareholding in the appellant. He thus has interests in both companies.
3. The appellant registered a mortgage bond against its property Stand Five Four Nought as security for the payment of the loan advanced to Myramar Farming (Pvt) Ltd.
4. Myramar Farming (Pvt) Ltd failed to pay the debt and placed itself beyond immediate execution by obtaining an order of judicial management.
5. The respondent turned to the appellant for payment of the debt in terms of the surety ship and mortgage agreements.
6. The appellant being privy to the avoidance of the debt by Myramar Farming (Pvt) Ltd sought to employ the same trick against the respondent.
7. It initially succeeded and was granted a provisional judicial management order.
8. On the return day the court *a quo* identified the appellant's trickery and dismissed the provisional judicial management order. Right from the outset on page 1 of its judgment record page 161 the court reasoned as follows;

“The basis for seeking that order is contained in paragraph 10 of the founding affidavit of Serish Pershotam Ranchod, a director of the applicant. He says:

‘10. the application is made on the following basis:

10.1 Applicant company registered a mortgage bond over its sole immovable property as security for a

loan extended to an affiliate company, Myramar Farming (Pvt) Ltd by Salzman ET CIE SA a company registered in Panama.

10.2 Myramar Farming (Pvt) Ltd has since been placed under judicial management under case No HC 5914/14 because it is currently unable to pay its debts although it has high prospects of discharging its debts under judicial management. (Refer to Annexure D). Consequently, Applicant's property faces execution by Salzman ET CIE SA.

10-3 Execution of applicant's sole property will result in applicant plunging into certain liquidation as it will no longer be able to conduct its main objective of holding and managing the immovable property.

10.4 It is therefore just and equitable that the applicant be placed under provisional judicial management as a moratorium granted by judicial management will prevent execution of applicant's property whilst Myramar Farming (Pvt) Ltd the principal debtor to Salzman ET CIE SA liquidates its debt under judicial management.'

One should give credit to the applicant; at least it is brutally honest. Judicial management is not being sought for any other reason than to circumvent the consequences of a surety ship which the applicant went into wherein it secured a huge loan taken by its sister company from a creditor who has been unable to realise any outlay from the principal debtor because it has also sought and obtained a judicial management order under case number HC 5914/14. It is therefore not paying the debt of \$750 000-00 which it owes to the creditor. Although the applicant stood as surety for the due settlement of that debt and registered a surety mortgage bond over its immovable property, being stand 540 Salisbury Township in favour of the creditor, it has no intention whatsoever to pay the debt.

It is for that reason that it has elected to shelter under judicial management for no other reason than to ensure that its property is safe from execution while Myramar Farming (Pvt) Ltd, the principal debtor, hopefully pays the debt owed to the creditor. It has not escaped my gaze that the deponent of the founding affidavit is the common denominator in all this in that he holds a 20% shareholding in Myramar Farming (Pvt) Ltd, the principal debtor which benefitted from the loan. He also has an interest in the applicant hence he has already avoided paying the debt under Myramar Farming (Pvt) Ltd by obtaining a provisional judicial management order. Using the same *modus operandi* he has moved quickly to avoid paying the same debt under the present applicant by securing a provisional order for judicial management for all the wrong reasons, that way a creditor which entrusted a large sum of money to these companies has to be left without a remedy when Ranchod and his associates have fully benefitted

from the loan. Is that the reason why the procedure for judicial management was invented?”

The court *a quo* was alive to what is an apparent abuse of the judicial management procedure. It chronicled the history of the debt. The appellant secured the debt to enable Myramar Farming (Pvt) Ltd to be granted the loan. It promised the creditor payment secured by mortgaging its only property Stand 540 Salisbury Township. The eventuality for which the bond was registered arrived. The appellant now wants to avoid doing what it contracted to do. It now argues that stand 540 is its only property when it has always been its only property. The appellant now seeks to shift goal posts. That is a clear violation of its contract with the respondent. The courts cannot assist a party to avoid its liability. The court *a quo* posed the question is this why judicial management was invented? An answer to that question will determine this appeal. The court *a quo* on p 2 of its judgment answered its question by considering what the court should consider in an application for provisional judicial management. It considered the provisions of s 300 of the Companies Act [Chapter 24:03] which provides as follows:

“The court may grant a provisional judicial management order in respect of a company —

- (a) on an application referred to in paragraph (a) of subsection (1) of section *two hundred and ninety-nine*, if it appears to the court—
 - (i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and
 - (ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and
 - (iii) that it would be just and equitable to do so; or
- (b) on an application referred to in paragraph (b) of subsection (1) of section *two hundred and ninety-nine*, if it appears to the court that—

- (i) if the company is placed under judicial management the grounds for its winding up may be removed and that it will become a successful concern; and
- (ii) that it would be just and equitable to do so.”

In terms of s 300 a provisional judicial management order can be granted, **if it appears to the court**; that due to mismanagement or other cause the company is unable to pay its debts and is being prevented from becoming a successful concern, and there is hope that judicial management will enable it to pay its debts, meet its obligations and become a successful concern; and that it would be just and equitable to do so.

Or if it appears to the court that; placing it under judicial management may remove the grounds of its being wound up and it will thereafter become a successful concern; and that it would be just and equitable to do so.

The court should therefore carefully consider an application for provisional judicial management before making a determination. If the court which granted the provisional judicial management order had carefully considered the application it would not have granted it because it was apparent that the appellant was merely seeking shelter from having to pay a due debt in terms of surety ship and mortgage bond agreements. There was no allegation of mismanagement being the cause of its failure to pay the debt. The appellant’s business is simply to maintain and rent out its property and receive rentals. No explanation was given as to why such a simple operation needed the involvement of a judicial manager for it to succeed. All the applicant was asking for a moratorium to hide under judicial management until Mayramar Farming (Pvt) Ltd pays its own debt. The court *a quo* correctly assessed this when it said;

“To grant such relief would therefore be contrary to all notions of security for debt and the principles of freedom and sanctity of contract. In addition the application

constitutes an abuse of court process in order to frustrate and/or delay a just claim while not laying out a proper case for the grant of a judicial management order.”

This answers Miss Mahere’s submission that the court *a quo* did not consider the equitability of the appellant’s application. The above proves that it did and found that it was not just and equitable to grant the appellant’s application.

Section 305 of the Companies Act provides for the circumstances under which final judicial management can or cannot be granted. It provides as follows:

- “(1) On the return day fixed in the provisional judicial management order, or on the day to which the court or a judge may have extended it, the court, after considering—
- (a) the opinion and wishes of the creditors and members of the company, and;
 - (b) the report of the provisional judicial manager prepared in terms of section *three hundred and three*, and;
 - (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims; and
 - (d) the report of the Master, and;
 - (e) the report of the Registrar; may grant a final judicial management order **if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order, or it may discharge the provisional judicial management order or make any other order that it thinks just**”

In terms of s 305 of the Companies Act, the court should on the return day take the following into consideration; opinions of creditors and the company’s members, report of the provisional judicial manager, the number of creditors who did not prove their claims, the Master’s report and the Registrar’s report. These should enable the court to decide whether or not to grant a final judicial management order. It will grant a judicial management order if it appears to it that, **if placed under judicial management, the**

company will be enabled to become a successful concern and that it is just and equitable to grant such an order. If not it should discharge the provisional judicial management order or make such other order, as it thinks just.

THE OPINION AND WISHES OF THE CREDITORS AND MEMBERS OF THE COMPANY

It is apparent from the appellant's frantic efforts to hide under judicial management that the respondent has called upon it to pay after Myramar's failure to pay the debt. Its knowledge of the creditor's intention to sue for the debt, is disclosed in paras 21 to 29 of its founding affidavit where appellant details the predicament into which its debt to the respondent has placed it. It seeks a moratorium through judicial management. Its conduct is indicative of a debtor who had to resort to under hand dealings to avoid meeting its creditor in court. It made an *ex parte* application for provisional judicial management when it was aware that the creditor had made demands for payment and issued summons. It did so without even citing the respondent. The mortgage bond agreement makes it clear why the appellant did not want to meet its creditor in court. It states in para 8:- Default and Breach;

“vi. Should the Mortgagor at any time; commence proceedings for its liquidation, judicial management, scheme of arrangement or winding up; then and in any of those events the full amount of the Capital Sum and interest then outstanding under this Bond shall become immediately due and payable and lawfully claimable without the necessity of prior demand to the Mortgagor and the Mortgagee shall have the right forthwith to proceed for the recovery thereof.”

The *ex parte* provisional application for judicial management was therefore made to deliberately avoid this clause. The appellant was, through an abuse of process, circumventing contractual obligations. It therefore cannot be just and equitable to grant it a final judicial management order.

The appellant avoided having to serve the creditor with the provisional order as required by r 247 3) (c) by misleading the court into ordering it to make adverts through the Government Gazette and the Herald which it obviously knew could not inform the respondent a foreign based creditor. The appellant's argument on appeal that this rule is not mandatory cannot stand scrutiny in view of the provisions of the mortgage Bond agreement which clearly spells out the effect of such an application.

It is unfortunate that the court which granted the provisional judicial management order did not pursue its concern about the creditor not being served with the application. That inquiry was necessary because *ex parte* applications by their nature should not be lightly entertained as they breach the *audi alterum partem* rule. They are provided for by r 242 in respect of chamber applications in specified circumstances and on the strength of a legal practitioner's certificate explaining why the respondent or interested persons have not been or should not be served.

Mr *de Bourbon* correctly submitted that the appellant's application was a Court application which in terms of r 131 of the High Court Rules 1971 should have been served on the respondent. The court application on record does not cite a respondent. This demonstrates a deliberate avoidance aimed at getting a provisional judicial management order without alerting the respondent that such an application was being made. This again proves that the application is one which cannot justly and equitably be granted.

THE REPORT OF THE PROVISIONAL JUDICIAL MANAGER

The report of the provisional judicial manager on record thoroughly discredits the appellant's appeal. It gives the value of buildings on Stand 540 as \$650 000-00. This contradicts the value of \$1 900 000-00 given in the appellant's Statement of Financial

Position as at 30 June 2014. The wide discrepancy in the value of the same buildings given within three and half months of each other betrays an intention to mislead the court into granting a final judicial management order on the pretext that the proceeds of the sale of the property will not be sufficient to pay off the creditor when in actual fact it can, leaving the appellant with a healthy balance from which it can pick its pieces and move on.

Commenting on the general state of the company, the provisional judicial manager said:

“No proper handover takeover has been conducted. The members have been very difficult in meeting appointments for the exercise”

This suggests that the members of the company after obtaining the provisional judicial management order, were not cooperating with the judicial manager to advance the recovery of the company to a successful concern. The provisional judicial management order was granted on 10 September 2014. The provisional judicial manager’s report is dated 13 October 2014. This means the members of the company were deliberately delaying handing over the operations of the company to the provisional judicial manager, when in view of their having applied for the order, they should be co-operating and assisting him to take over the management of the company. The above confirms the court *a quo*’s view that judicial management is not being sought for genuine reasons.

As to the circumstances preventing the company from being a successful concern, the judicial manager commented as follows:-

“The company is not involved in serious trading other than simply managing the rentals from its sole asset. The company had found itself in dire straits because of the mortgage bond it extended to an offshore bank on behalf of a sister company Myramar.”

This confirms that the company's operations are simple and need no judicial manager to turn the company around. It also shows that the company does not have other debts or problems necessitating the appointment of a judicial manager. Its only problem is the creditor whom it does not want to pay in terms of the suretyship and mortgage bond agreements.

Regarding the measures intended to be taken in order to turn round the company's fortunes, the judicial manager further commented:-

“There is not much that the provisional judicial manager can do in the premises other than taking control of the property management, that the members seem to be dragging their feet on. The company's fate is determined by the success of Myramar's judicial management which it has no control over.”

This demonstrates the hopelessness of the appellant's application for a final judicial management order. The provisional judicial manager said it all, “there is not much that he can do”. He is further hampered by the members who over and above not cooperating with him as earlier said are dragging their feet showing signs of not wanting to give him control. He then says all depends on the judicial management of Myramar. This proves the appellant does not genuinely need judicial management.

The following are the recommendations of the provisional judicial manager:-

“The company is more of an asset holding company and survives from the rentals it receives. The rentals will remain constant for a while under the prevailing environment and to imagine that the company can realize enough to settle the Salzman dues would be farfetched. The company's survival from the jaws of liquidation is highly dependent on the prospects of Myramar. In my opinion, the company should be placed into final judicial management until the picture at Myramar is clearer.”

I find this recommendation to be both frank and misleading. It says nothing about what the judicial manager will do to turn the appellant around. He acknowledges his

limitations and hopelessness due to the current economic environment. His recommendation for judicial management until the picture at Myramar is clearer, is not what judicial management is about. His comment that, “to imagine that the company can realize enough to settle the Salzman dues would be farfetched” confirms Mr de Bourbon’s submission that it would take about 30 years for the appellant to pay the debt through rentals. That makes the appellant’s last resort offer to pay through rentals while under judicial management if Myramar fails to pay, unjust and inequitable.

Section 300 clearly provides that the purpose of judicial management is to take a company from mismanagement into proper management with a view to turning around the company and enabling it to become a successful concern which will be able to pay its debts. The provisional judicial manager does not explain how this can be done. He merely pleads for the appellant’s placement under judicial management pending the outcome of Myramar Farming (Pvt) Ltd’s judicial management.

Judicial management’s prospects of success or lack of it should be based on the circumstances of the applicant and not that of a third party. In this case the court *a quo* correctly found that judicial management was being sought for the wrong reasons. This has been confirmed by the appellant’s own papers. There is no need to inquire into the other requirements of s 305. The application was an abuse of process. It was correctly dismissed by the court *a quo*.

The appeal is accordingly devoid of merit.

ZIYAMBI JA: I agree

GOWORA JA: I agree

G.N Mlotshwa & Co, appellant's legal practitioners

Wilmot & Bennett, respondent's legal practitioners