

ALLIED BANK LIMITED
v
CELEB DENGU AND WILSON TENDAI NYABONDA

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & MAVANGIRA JA
HARARE, JUNE 30, 2016

S M Hashiti, for the appellant

E T Matinenga, for the respondents

MALABA DCJ: At the end of hearing argument for both parties, the Court allowed the appeal with costs. It was indicated that the reasons for the decision would follow in due course. These are they.

The appeal is from the decision of the High Court which upheld a point *in limine* that the appellant which was placed under liquidation in the course of proceedings had no *locus standi* ‘to continue’ with proceedings brought at its instance without the leave of the court.

The facts of the case are as follows. The appellant entered into an agreement with Onclass Investments (Pvt) Ltd (hereinafter referred to as ‘the principal debtor’) in December 2012, in terms of which it lent and advanced monies on a credit facility to the principal debtor. The respondents bound themselves as sureties and co-principal debtors under a continuous surety with the principal debtor. They guaranteed to the appellant that they would pay all amounts which may be due and owing to the appellant by the principal debtor should the principal debtor fail to pay. The principal debtor breached the agreement by failing to repay

the amount lent and advanced within the stipulated period in terms of their agreement. The principal debtor was placed under provisional liquidation. As a result of the principal debtor's status the respondents were liable to repay the sum owed by the principal debtor to the appellant in terms of the surety agreement. The appellant demanded the payment of the money from the respondents. They refused to pay.

In 2013 the appellant issued summons against the respondents in the High Court claiming the money lent and advanced to the principal debtor together with interest. After summons was issued the respondents entered an appearance to defend and filed a plea. In the plea they raised a special plea of prescription and pleaded over. When the pleadings were closed the parties held a Pre-trial Conference. Before the matter was set down for trial and on 4 March 2015, the appellant was placed under liquidation. After the appellant was placed under liquidation, the appellant's legal practitioners filed with the registrar of the High Court a notice of change of status in terms of r 85A(1) of the High Court Rules, 1971.

The matter was set down for trial. The respondent's legal practitioner wrote to the Registrar of the High Court saying that since the appellant was under liquidation, the matter could not proceed to trial without the liquidator getting the leave of the court to proceed with the proceedings. The letter was copied to the appellant's legal practitioners, who in response requested the Registrar not to remove the matter from the roll. On the date of trial the respondents raised the preliminary point that the appellant had no *locus standi* 'to continue' with the proceedings in the absence of the leave of the court. The respondents also argued that the notice of change of status which was filed pursuant to r 85A of the High Court Rules was improperly filed because that rule does not relate to juristic persons.

The appellant opposed the point *in limine* on a number of grounds. Firstly, it was argued on its behalf that an objection to *locus standi* should have been raised as a special plea in terms of r 137 and r 139 of the High Court Rules. The appellant contended that it did not lose *locus standi*. All that had changed was its status. It was argued further that there is no provision in the Companies Act [Cap. 24:03] barring the appellant from continuing litigation against its debtors. The appellant's argument was that the leave of the court is not required when a company is placed under liquidation after the commencement of proceedings. It prayed for the dismissal of the point *in limine*.

The court *a quo* found in favour of the respondents. It held that an objection to *locus standi* can be raised without following the special plea procedure where the issue arose during trial. The court *a quo* held that the words 'to bring' in s 221(2) of the Companies Act also mean 'to continue'. It came to the conclusion that the appellant could not continue with the proceedings against the respondents without the leave of the court. The matter was struck off the roll.

The appeal is premised on the following grounds:

1. The court *a quo* erred in relating to what was effectively a special plea in circumstances in which it had been taken and argued contrary to the rules of court.
2. The court *a quo* erred in failing to come to the conclusion that the objection taken on the liquidator's *locus standi* was misplaced since the litigant before the court had not changed.
3. The court *a quo* erred in concluding that a company placed under liquidation after the commencement of proceedings instituted at its instance is required to seek the leave of the court for the continuation of the proceedings.

The Court holds in respect of the first ground of appeal that although the respondents could raise the question of *locus standi* (if the question arose at all) at any stage during the proceedings, they had to raise it in a formal way by giving notice to the other party. On the second issue the Court holds that the question of *locus standi* did not arise in the circumstances of this case. It is the court's view that the change of status of the appellant in the course of proceedings did not arise in the relationship between the cause of action and the relief sought by the appellant for it to lose *locus standi*. On the last issue the court finds that the court *a quo* misdirected itself in interpreting s 221 of the Companies Act [Cap. 24:03] to include the words "to continue". The following are the reasons for the court's decision.

Counsel for the appellant argued that the issue of *locus standi* being a special plea ought to have been raised in terms of rule 137 of the High Court Rules, 1971. There is no question that a special plea can be raised after *litis contestatio*. In *Western Assurance Co v Caldwell's Trustees* 1918 AD 262 INNES CJ said that,

"... Voet (44, 1, 6) states that even dilatory exceptions might be pleaded after *litis contestatio* if they arose thereafter, or having existed before, the defendant satisfied the court upon oath that they had not previously come to his knowledge. Carpzovius (Part 1, cons. 6, def. 6, par. 4) is emphatically of the same opinion. All dilatory exceptions, he says, have this in common that where they only originate after *litis contestatio*, or where they only come to the notice of the defendant thereafter, then they may be taken during the course of the case, upon proof under oath of that special circumstances. That seems to me not only good law but sound law¹"

It is clear from authority that even if a plea can be raised after *litis contestatio*, there must be proof under oath that the exception did not come to the knowledge of the respondent before the time when it is raised. In this case, the respondents raised the plea of

¹ . 1918 AD 262 cited by Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, Fifth Edition page 601

lack of *locus standi* after *litis contestatio* without complying with the High Court Rules on the manner in which special pleas are raised. The appellant argued that since the respondents had not complied with the rules, they should have applied for condonation for non-compliance with the rules. The court *a quo* dismissed the appellant's contention. It held that since the plea arose after the Pre-Trial Conference r 137 and 139 on the manner in which pleas ought to be raised did not apply. The court went further to hold that there was no reason why the respondents should have sought condonation. The court *a quo* held that the issue raised was a question of law which could be raised at any time in the proceedings.

The Court is of the view that the fact that the appellant was placed under liquidation after the Pre-Trial Conference did not entitle the respondent to ignore the rules of the court on the procedure for raising special pleas. The issue was raised in a letter between the parties. Such correspondence would not constitute proper pleading. Pleadings are required to be raised in a formal manner for the court to rely on them. The respondents did not properly plead a special plea.

The fact that the issue of *locus standi* was a point of law which could be taken at any stage in the proceedings could not assist the respondents. Although it is trite that a point of law can be raised at any stage during proceedings, that does not mean that the point of law can be raised anyhow. In order for one to raise a point of law validly at any stage, notice must be given to the other party of the intention to raise the point. There must be a formal way of raising the point. In this case, the issue was raised in correspondence between the parties. The issue of *locus standi* was not properly pleaded by the respondent. The court *a quo* erred in accepting the plea of lack of *locus standi* which was not properly raised.

Mr *Matinenga* argued in the court *a quo* that the appellant had no *locus standi* “to continue” with the proceedings in the absence of the leave of the court. The court *a quo* understood the question to be whether the appellant had *locus standi*. During the hearing of the appeal Mr *Matinenga* shifted ground and argued that there was no issue of *locus standi* before the court *a quo* as the appellant company never lost *locus standi*.

It is quite clear that the question of *locus standi* does not arise in the present case for the following reason. The principle of *locus standi* is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought, he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject-matter of the cause of action. In the case of *Ndlovu v Marufu* HH-480-15, the court had the following to say concerning the concept of *locus standi*:

“It is trite that *locus standi* exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which is derived from the legal interest recognised by the law. In the case of *Stevenson v Minister of Local Government and National Housing and Ors* SC 38-02, the court in outlining *locus standi in judicio* stated that in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as “a real and substantial interest” or as a direct and substantial interest.”

In this case, it is not in dispute that the appellant company had a cause of action against the respondents relating to the money it lent and advanced to Onclass Investment (Pvt) Ltd under a credit facility agreement. The appellant had a direct interest in the relief sought and the interest could not be lost by change of status. It could not be said that appellant’s right to claim the money was lost because it was placed under liquidation. The appellant’s entitlement to the relief was based on the surety ship agreement which continued to be binding

on the respondents. What was supposed to be an issue before the court *a quo* was whether or not the appellant, having been placed under liquidation, could exercise its *locus standi* without the leave of the court? A court does not grant *locus standi*. *Locus standi* is a matter of law. So the contention that the leave of the court was required for the appellant to have *locus standi* was misplaced.

On the question of whether the word ‘to bring’ in section 221(2) of the Companies Act means the same as ‘to continue’, the Court holds that s 213 of the Companies Act is the relevant provision for the determination of the issue. The respondents had originally relied on s 213, but later abandoned reliance on the section in the court *a quo*. They relied on s 221(2) of the Companies Act which provides:

“The liquidator shall have power, with the leave of the court or with the authority mentioned in subsection (4) or in paragraph (a) of subsection (4) of section two hundred and eighteen-

(a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceedings.”

According to the respondents the purpose behind the company bearing the obligation to seek the leave of the Court ‘to continue’ with the proceedings is the protection of the company’s assets. Mr *Matinenga* for the respondent argued that one needs to look at the objectives of the winding up of a company; the need for the appointment of a liquidator and what is sought to be achieved by the whole liquidation process to appreciate the importance of the requirement. He went further and said that it is not part of the liquidator’s function to dissipate the company’s funds in speculative litigation, thus the need for leave to continue with the proceedings of a company placed under liquidation during proceedings.

The court was not persuaded by Mr *Matinenga*'s submissions. Section 213 of the Companies Act provides as follows;

“In a winding up by the court—

- (a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;
- (b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;
- (c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”

What can be noted from the above section is that where the company is a defendant, no action can be proceeded with or commenced against the company without leave of the court. This section states that the only circumstance in which the leave of the court is required ‘to proceed’ or ‘to continue’ with the proceeding is where the company that fell under liquidation during the proceedings, is a defendant/respondent. No mention of the words ‘to continue’ or ‘to proceed’ is made in s 221(2) of the Companies Act in respect of a company that is a plaintiff/applicant. Section 213 is differently worded from s 221(2) of the Companies Act which relates to a situation where the company is a plaintiff/applicant.

On the principle of *expressio unius est exclusio alterius* the fact that s 213 does not mention that the leave of the court is required where the company is a plaintiff or applicant means that the leave of the court is not required. The court is of the view that had the legislature intended that the company which goes into liquidation during court proceedings in which it is claiming money from its debtors needs the leave of the court to continue with the proceedings, it would have expressly provided for it. The fact that the legislature omitted the requirement of the leave of the Court in s 213 means that the leave of the court is not required where the company placed under liquidation during the proceedings is the plaintiff or applicant.

It is clear from the legal effect of liquidation addressed by section 213 that for one to proceed against a company under liquidation, one needs the leave of the court. The reason is that the mischief s 213 of the Companies Act seeks to address does not affect the right of a company to recover what it is owed by its debtors.

The court *a quo* interpreted the word ‘institute’ to mean ‘to continue’ notwithstanding the fact that the two concepts are treated as separate and distinct concepts in s 213 of the Companies Act. Section 213 is the section dealing with the effect of liquidation. It distinguishes the two concepts. It shows that under s 221(2) of the Companies Act the continuation of proceedings by a company which is placed under liquidation does not need the leave of the court, but commencement which has the same meaning as institution requires the leave of the court. In this sense instituting proceedings cannot mean the same as continuing them.

Nick Dixey and Colm Flanagan, in an article, *A Guide to the Effect of a Winding-Up Order on Existing Litigation* had the following to say concerning the question whether the company placed under liquidation during proceedings should seek leave from the court to continue the proceedings:

“Where the company is the plaintiff in an action commenced prior to the winding-up, (and there is no counter-claim made by the Defendant), there is no automatic stay, the liquidator of the company may choose either to continue the action, or to discontinue. In such circumstances, the liquidator will often take advice as to whether proceedings commenced prior to the beginning of the winding-up are likely to be successful. Typically, the decision of the liquidator is influenced by the state of the company’s assets and available funds, as well as the prospects of success in the action”.

From the foregoing, it is clear that the discretion is given to the liquidator to decide whether or not to proceed with the proceedings where the company is placed under

liquidation during proceedings. The liquidator will be guided by the nature of the proceeding to decide whether to continue or not.

It is therefore clear that s 221(2) of the Companies Act should not be read to include the words ‘to continue’. As such, a company placed under liquidation after the commencement of proceedings brought at its instance does not require the leave of the court ‘to continue’ with such proceedings. The court *a quo*’s finding in this regard cannot stand and the Kenyan case of *Trade Bank Ltd and Anor v Elysium Ltd and 2 Ors (2012) EklR* should not be followed. This case is not persuasive as it interpreted the word ‘to commence’ to mean the same as ‘to continue’ notwithstanding that these two concepts are treated as separate and distinct concepts.

Lastly the Court would like to comment on the order given by the court *a quo*. The court *a quo*, after finding that the company has no *locus standi* to continue with the proceedings without the leave of the court, went on to strike the matter off the roll. The order creates problems. Firstly, the Court made the order after hearing arguments and finding in favour of one party. Striking off can only be done where there are no valid proceedings. The court *a quo* erred in making an order striking off the matter where there were valid proceedings before it. The fact that the court heard arguments from both parties and found in favour of one party means that the party in whose favour a finding on the issues was made was entitled to an order protective of its rights. The order by the court *a quo* has no legal effect and should be set aside.

For the above reasons, the appeal was allowed with costs and the following order given.

The appeal succeeds with costs. The judgment of the court *a quo* is set aside and substituted with following;

“The point *in limine* is dismissed with costs.”

GOWORA JA I agree.

MAVANGIRA JA I agree

Mawere and Sibanda, appellant’s legal practitioners

Honey and Blanckenberg, respondents’ legal practitioners