PROMETHEUS (PRIVATE) LIMITED
versus
FAIRDROP TRADING (PVT) LIMITED t/a
ROCK FOUNDATION MEDICAL CENTRE
(Under Judicial Management)

HIGH COURT OF ZIMBABWE
BACHI -MZAWAZI J
HARARE, 26 July and 7 September 2022

Opposed Application

O Kandongwe, for the applicant
S Murondoti with *S Muchigere*, for the respondent

BACHI MZAWAZI J: This is an opposed application for the upholding of a special plea, raised as a plea in abatement to the plaintiff's summons and declaration filed on 18 June 2020 in the case bearing the same case number.

The summarized facts are that, the plaintiff, issued summons commencing action for the recovery of the sum US850, 000.00 or its equivalent in Zimbabwean dollars at the prevailing inter-bank rate, which he had paid as security deposit in terms of a lease agreement entered with the defendant. Both parties are duly incorporated companies. It is common cause that the defendant is a Company under judicial Management. A fact known at the time of the conclusion of the lease agreement with the plaintiff. It is not in dispute that the said amount has been paid as security deposit and that the terms of the lease agreement leading to its termination where complied with. It is also a common fact that the judicial management was granted by this court in terms of the then existing governing laws and a court order to that effect is still in place. The sequence of events is that, after the issuance of the summons commencing action and declaration and the subsequent entry of an appearance to defend by the defendant, the defendant filed a plea in bar.

It is the defendant's assertion that, in terms of r 42(8) of statutory instrument 202/21, they proceeded to simultaneously file heads of argument in support of and accompanying their plea. Rule 42(8) of the 2021, High Court r reads;

> "A party filing an exception, special plea or an application to strike out shall, at the time of filing it, file heads of argument in support of the exception, special plea or application to strike out."

The pertinent part of their special plea is framed as follows:

DEFENDANT PLEADS IN BAR THAT:

> "The plaintiff did not seek leave before proceeding against the Defendant as required by the express terms of an extant order of this court under case HC 10095/14. On that basis therefore. Plaintiff's claim should fail"

In light of the above, the defendant argues that, it is a term of the above mentioned, existing court order, that no legal actions, whatsoever should proceed against the defendant without leave having been firstly sought and obtained from the court. Therefore, they state that in the absence of a court order granting such leave to sue defendant, the plaintiff's claim is amiss. In other words, they submit that the extant order bars the plaintiff from bringing this lawsuit against them in the absence of the leave of the court.

They further argue that, the mortarium not to sue a company in distress was an offshoot of judicial management in terms of the then Companies Act *[Chapter 24:03]*. Hence, the order was given in terms of a statute which was at the time, in force and cannot be disregarded. In that regard, they motivate that, they are aware that the old Companies Act was abrogated by its successor, Companies and Other Business Entities Act *[Chapter24:31]*, alongside the Insolvency Act *[Chapter 6:07]* but both have no express provisions that retrogressively ousts or interfere with existing lawful orders. In support of their averments they relied on the cases of *Glens removal and Storage Zimbabwe* (*Private)Limited* v *Patricia Mandala* CCZ 6/17, *Schierhaut* v *Minister of Justice,* 1926 AD 99 at 69 amongst others. In that respect, they conclude by stating that a thing done in breach of a court order is *void ab initio* and of no force and effect. On that basis they pray for the dismissal of the plaintiff's claim with costs.

In rebuttal to the defendant's plea in bar, the plaintiff procedurally filed its response and heads of argument. Their replication was couched as follows;

1. In terms of s 126 (1)(e) of the Insolvency Act, [*Chapter 06:07],* proceedings concerning any property or right over a company under judicial management or under corporate rescue exercises the powers of a trustee can be instituted without the leave of the Court. The present proceedings are meant to recover security deposit fee which funds fall under the ambit of trust funds and were being held by the defendant in trust.

2. It follows therefore from the above that the leave to sue the defendant is not required. The special plea carries no merit. It must be dismissed with costs.

In the furtherance of their position, the plaintiff maintains that, since judicial management was the birth child of and discarded with the old law, it is now the new legal regime of corporate rescue ushered in by the Insolvency Act *[Chapter 6.07*], that has replaced it and carries the day. Therefore, since the old procedure of judicial management has been substituted by corporate rescue, the new law thus provides for an exception as expressed above in s 126(1) (e) of the Insolvency Act. That being so, they argue, there is no need for the plaintiff's claim to be preceded by seeking leave to sue from the court. It is their submission that, it is irrefutable that good tenancy deposit paid to the defendant is refundable, does not belong to them and it is money held in trust. As such, the court order directing them to seek leave being a product of the old law, is waived by the said exception proviso in the Insolvency Act which abrogated it. Put differently, they proffer that, in terms of s 126(1)(e) of the Insolvency Act, *[Chapter 6:07]*, proceedings for the recovery of the security deposit, which undeniably is trust funds, can be made without having to seek leave from the court.

On analysis, the central issue from the foregoing facts and submissions is, whether or not an abrogating law can repeal an existing court order granted in terms of its predecessor? Whether or not the special plea succeeds, is hinged on the main issue.

In order to do so, two critical areas of the law have to be unpacked. That is, the legal position on court orders *per se* and in particular standing orders and the law on retrospectivity of legislation.

A court order by a competent court must be obeyed. It is the law and is legally binding until such time it is lawfully challenged by review or an appeal. This is the established legal position now entrenched is s 164(3) of the Constitution as a key tenet of judiciary independence.

Section 164(3) of the Constitution, Amendment Act no. 20 of 2013, denotes,

> "An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies and must be obeyed."

It is based on one of the founding democratic principles of our constitution, the rule of law. That is, adherence to and respect of the law by all irrespective of status, color or creed. In essence, this is what was referred to as, the doctrine of obedience of the law until its lawful invalidation, by BHUNU JA, in the supreme court decision in *Econet wireless (Pvt) Ltd* v *Minister of the Public Service, Labour and Social Welfare & Ors, SC31/*16, at page 6, citing

the dictum by Lord Radcliffe, in *Smith* v *East Elloe Rural District Council* [1956] AC 736 at 769, wherein it was proclaimed,

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears that no brand of illegality on its forehead. Unless the necessary procedures are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders," If it were not so, and every litigant challenging the validity of the law was excused from obeying the law pending determination of its validity there would be absolute chaos and confusion rendering the application of the rule of the law virtually impossible. This is because anyone could challenge the validity of any law just to throw spanners into the works to defeat or evade compliance with the law."

The same had been pronounced in the English case of *Hodkinson* v *Hodkinson [1952] (2) ALL ER 567 CCD at 569C,* as follows*;*

> "It is the plain unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it even extends to cases where the affected believes it to be irregular or even void."

See also, *Munyikwa* v *Mapenzauswa and Anor,* SC91/05, buttressing that court orders are made so that they can be complied with.

In casu there is a court order granted in terms of and during the life span of a now repealed Act of Parliament. The order by MAKONI J, (as she then was), dated 11 March 2015, in case HC 10095/14 in part, reads;

> "(d) All actions and applications and the execution of all writs, summons and other process against the Company shall be stayed and not proceeded with without the leave of the court."

It is common cause that this was a term of an order granted in terms of s305 of the then, Companies Act *[Chapter 24:03*], confirming an application by the defendants *cum* applicants herein, for a provisional judicial management order which had been granted on 3 December 2014 and extended on January, 2015. As earlier stated, the order is still operational as it has not been challenged. The position of the law as detailed above is very clear. What has been repealed is the concept of judicial management. It no longer exists. In its place is corporate rescue and the exceptions therein apply hence forth, but can they apply to a court order that had been issued by this court in terms of the now defunct provisions? That is the question. Can the exception in the new law apply *mutatis mutandis* to an order of the court?

In essence what they are stating is that, s 126(1)(e) applies in retrospect to actions done before the principal act was promulgated.

It cannot be overemphasized that the Companies Act *[Chapter, 24:03*] and the Private business Corporations Act *[Chapter, 24:11]*, where both repealed by the Companies and Other Business Entities Act [*Chapter 24:31*]. It is also trite, as noted before, that judicial management, a creature of the old Order, Act, *[Chapter 24: 03*], with its discovered shortcomings was ousted by the repeal of the old law and replaced with corporate rescue in terms of [*Chapters 24:11*] in consonance, with the new provisions in chapter twenty three of the new Insolvency Act *[Chapter 6:07]*, which also repealed the old Insolvency Act, *[Chapter 6.04]*.

Notably, the spirit behind both concepts of judicial management and Corporate social rescue is to rescue or bail out companies in financial dire *straits.* As it were, the current position is that the Insolvency Act *[Chapter 6:07]*, the repealing enactment, through the general notice 423/12018, promulgated, on and from 28 June 2018, became the law and all struggling corporates in financial distress fall under the new statutory provisions. See, *Metallion Gold Zimbabwe* (*Private) Limited and Others* v *Shariwa* SC107/21.

Interestingly, as already alluded to both the new Insolvency and Companies Act are silent on retrospectivity applications of their provisions. That gives rise to the question of what is the effect of the abrogating law on actions that would have been done whilst the repealed legislation was in force? Inevitably, the question is best answered after exploring the second one, on what does the law say on the retrospectivity of legislation given the respondents' standpoint?

Of note, there is a presumption against retrospectivity of legislation as soundly advanced by the applicants herein. It is a rule of Roman Dutch and English law that a law is presumed not to be retrospective unless such is clearly the intention of the legislature. In the case of *Faria* v *Claridge, 1988.* (2) ZLR 202 (HC), it was expressed that,

> "In the absence of an express provisions to the contrary, the law giver is presumed to legislate only for the future. Therefore, a statute which repeals another is not considered to interfere with vested rights unless it does so in clear terms."

In the South African case, *Curtis* v *Johannesburg Municipality* 1906 T.S 308 at 311 said: INNES J, (as he then was), noted,

> "The general rule is that, in the absence of express provisions to be contrary, statutes should be considered as affecting future matters only, and more especially that try should if possible be so interpreted as not to take away rights vested at the time of their promulgation."

GUBBAY J, in *Nkomo and Another* v *Attorney General & Ors,* 1993 (2) ZLR 422 (S), at 427, exclaimed that,

> "Care must always be taken to ensure that retrospectively is confined to the exact extent which the section of the Act provides."

See, *Agere* v *Nyambuya* 1985 (2) ZLR (S) 338 -G, and *Zimbabwe Phosphate Industries Limited* v *Elias Mafara & Ors SC 44/05.*

The position outlined in the above case authorities finds expression in the Interpretation Act *[Chapter 1.01*]. Section 17 of the same reads;

S 17-Effect of repeal of enactment

(1) Where an enactment repeals another enactment, the repeal shall not-
(a) revive anything not in force or existing at the time at which the repeal takes effect; or
(b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

Applying the primary rule of interpretation and according s 17(b), in my considered view, it leaves little doubt that, the order granted by this court in case HC 10095/14 is encompassed. It is an order granted under the repealed law and in terms of section b cannot be affected. In *Chigovera* v *Minister of Energy and Power Development* and Another SC115/21, KUDYA JA, held that, s 17(1)(c) of [*Chapter 1.01*] preserves the effects of the repealed enactment. These include any accrued obligation and liability.

I am swayed by the applicant's argument that s 126(1)(e) does not apply in retrospect to offset a court order granted under the law which was then in force., I am further swayed by their submissions that, s 126(1)(e) does not apply in retrospect to offset a court order granted under the law which was then in force. In applying the maxim, e*xpressio unis* as amplified in, *Tapedza & Others* v *ZERA & Ors,* SC30/20. As such, if the legislature, had intended the section to apply in that manner it would have expressly stated so.

Section 126(1) (e) Insolvency Act *[Chapter 6:07*], provides that,

> "During corporate rescue proceedings no legal proceedings, including enforcement actions against the company, or in relation to any property belonging to the company, or lawfully in possession may be commenced or proceeded with any forum, except …proceedings concerning any property or right over which the company exercise the power of a trustee."

The section states that," during corporate rescue proceedings". I would like to conclude that these are proceedings commenced in terms of that section and the new laws. Hence, it

eliminates proceedings under a judicial management as borne out of the law sanctioning judicial management. For there is no longer anything known as such.

JUSTICE MAVHANGIRA, in the case of *MCA Venture Capital (Private) Limited* v *Secretary for Mines and Mining Development and Others*, SC43/21, has settled the position that section 126 of the Insolvency Act does not apply in retrospect. She had the occasion to conclude that in the case of *ZFC limited* v *KM Financial Solutions Pvt Limited HH 47/15*, the same provision was interpreted to be applicable only in actions and proceedings that were in existence at the time that the provisional order was granted. On the other hand, in *G.N. Mlotshwa & Company* v *David Whitehead Textiles Ltd* and O*thers, HH 78/2017*, as relied on by the respondents, the provisions were held to be all embracing for the proceedings that had commenced and that had not. . It was also observed that since the above two authorities are at variance in *Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd & Another* SC 3-20 the Supreme Court took the position similar to that espoused in ZFC *Limited* case above.

In view of the decision in *MCA Venture Capital (Private) Limited,* above, I find that, it is not necessary to venture any further. That is the legal position. Section 126 does not apply in retrospect, so does its proviso 126(1)(e). Although it is evident that the funds held as security deposit do fall under the category of trust funds or money held in trust, it is an exception beneficial to cases falling under the corporate rescue regime. That being the case the plaintiff is bound by the provisions of the old enactment which had been translated and concretized into a court order. They have to seek leave of the court before bringing any action against the defendants.

It will be absurd to allow the new law to unravel or undo an extant court order in the absence of a specific legislative provision to that effect. The respondents suffer no prejudice by complying with the law and then bring their action.

Disposition

The special plea is upheld. There will be no order as to costs.

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