LUI CHENG HSIAO
and
GOLD DRIVEN TOBACCO (PRIVATE) LIMITED
and
GOLD DRIVEN INVESTMENTS (PRIVATE) LIMITED
and
GOLD BRICK ENTERPRISES (PRIVATE) LIMITED
and
GLOBAL DIAMOND ENTERPRISES (PRIVATE) LIMITED
versus
THERESA GRIMMEL (The Provisional Judicial Manager)
and
LIN JING
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 and 27 March 2014

Urgent chamber application

J. Samukange, for the applicants
J. Chikomo, for the first respondent
F.G. Gijima, for the second respondent

ZHOU J: This is an urgent chamber application instituted in terms of Order 49 Rule 449(1) (a) for the rescission of an order granted by this court in Case No. HC 1828/14. The order which was granted on 12 March 2014 placed the second to the fifth applicants under provisional judicial management in terms of the provisions of the Companies Act [*Cap 24:03*]. The first respondent was appointed the Provisional Judicial Manager.

The instant urgent chamber application is founded upon the ground that the order in HC1828/14 was erroneously granted. The first and second respondents filed opposing papers. However, at the commencement of the hearing the first respondent withdrew her opposition and indicated that she would abide by the judgment of this court. The second respondent persisted with his opposition.

In his founding affidavit the first applicant states that he is the Managing Director of the second to fifth applicants. He states, too, that he and his wife hold fifty percent of the

shares in the four companies. He states that he was not given notice of the application for the appointment of a provisional judicial manager when it was instituted. According to the first applicant the second to fifth applicants are operating profitably. He submits on his behalf as well as on behalf of the other applicants that when the Court granted the order in HC 1828/14 it was misled as the deponent to the founding affidavit therein did not and does not have the authority to represent the second to the fifth applicants which are cited as the applicants in that matter.

The second respondent raised objections *in limine* to the hearing of the matter. The first ground of objection is that the second to fifth applicants are not properly before the Court as they were placed under provisional judicial management and can only act through the provisional judicial manager. The conclusion on this aspect will depend on my finding regarding the validity of the proceedings for judicial management. Suffice to state that the instant application would still be valid as the first objection does not affect the first applicant's *locus standi* to institute the proceedings.

The second ground of objection is that the matter is not urgent. In this respect the second respondent contends that the certificate of urgency does not state the basis of urgency. That is not correct. The certificate of urgency does allege irreparable harm which the applicants stand to suffer if the matter is not dealt with urgently, and sets out the facts upon which that assertion is premised. The certificate discloses that the first respondent was already changing locks at the premises of the second to fifth applicants, thereby taking over control of the companies. The application was filed promptly on the same date that the applicants became aware of the existence of the order for provisional judicial management.

The assertion that the application was not in terms of r 449 (1) (a) was properly abandoned by Mr *Gijima* at the hearing. The assertion that the order being sought was a final order was premised on the assumption that the Court cannot grant a final order in an urgent chamber application. Mr *Gijima* did not refer me to any authority in support of that submission.

The second respondent also took the point that the applicants should have proceeded in terms of s 301(2) of the Companies Act [*Cap 24:03*] instead of proceeding in terms of r 449. Section 301(2) of the Companies Act does not preclude an application in terms of r 449 where it is alleged that the judgment was erroneously granted. That objection is therefore not valid.

The second respondent questions the authority of the first applicant to represent the second to fifth applicants. He is the Managing Director, and is the one who has been representing those companies in Zimbabwe. The respondent does not suggest that there is any other person or director who contests the authority of the first applicant to represent the companies. That objection must, therefore, fail.

As regards the merits of the application, r 449 (1) provides as follows:

> "The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order –
>
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby".

In the case of *Grantully (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361(S) at 364B the Court pointed out that r 449 "is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has itself no authority to correct, alter or supplement it. The matter has passed *in rem judicatam*". The Court reiterated the principle that a court is not confined to the record of proceedings in deciding whether a judgment was erroneously granted, but could even rely on facts which were not placed before the court when it granted the judgment to be corrected, rescinded or varied. The authorities show that Rule 449 goes beyond the ambit of mere formal or technical defects in a judgment or order. *Grantully (Pvt) Ltd & Anor* v *UDC Ltd (supra)* at 365B; see also *Tiriboyi* v *Jani & Anor* 2004 (1) ZLR 470(H) at 472E.

The first ground relied upon by the applicants is that the second to fifth applicants never authorised proceedings to be instituted for their placement under judicial management. In his founding affidavit which was filed in support of the application in Case No. HC 1828/14 the second respondent states the following:

> "I am duly authorised to depose to this affidavit on behalf of the Applicant Companies. I have attached as **Annexure "A"** a copy of the Resolution of the Applicant Companies entitling me to depose to this affidavit and do all acts necessary to ensure the appointment of a Judicial Manager for the Applicant Companies."

However, annexure "A" is not a resolution of the Board of Directors of the companies referred to. It is a Special Power of Attorney executed by Wong ShuWai and Tsoi Yu Yu in favour of Lin Jing, the second respondent in the instant case. Wong ShuWai and Tsoi Yu Yu do not even state in that power of attorney the capacity in which they are appointing the second respondent to be their agent in terms of the power of attorney. However, even if they

had stated their capacity that would not have constituted a special power of attorney into a resolution of the Board of Directors of the second to fifth applicants. Put in other words, the second to fifth applicants clearly did not authorise proceedings for their placement under judicial management. The companies could not act to institute the proceedings other than through their directors. Without much ado, the order of this court is liable to be rescinded on the basis of that patent error. I have no doubt that if the above fact had come to the attention of the Court the order would not have been granted.

The conclusion I have reached above obviates the need for an inquiry into the question of whether the second to fifth applicant can institute the instant application as applicants given that they have been placed under judicial management by the order given in HC 1828/14. The first applicant is an interested party who is competent to institute the application. He has placed facts before the Court which prove that the second to fifth applicants never instituted an application for them to be placed under provisional judicial management. On the basis of that evidence it is clear to me that the judgment was granted erroneously in the absence of the applicants. The applicants never participated in the proceedings, as the second respondent had no authority to represent them.

A matter that has exercised my mind is whether I should grant a final order as prayed in the application. I have not been referred to any authority that states that such an order would be incompetent in the circumstances. The Rule clearly envisages that such an application may be dealt with in chambers. It makes no provision for the granting of a provisional order, as it clearly empowers the court or a judge to correct, rescind or vary any such order which was erroneously granted. Thus the relief envisioned is final. I must point out, too that this is a matter in which the second respondent filed an opposing affidavit. Both parties filed detailed heads of argument. For that reason, no real purpose would be served by granting a provisional order as the matter was argued like an ordinary opposed application.

As regards costs, it seems to me that the second respondent who instituted the application in HC 1828/14 and vigorously opposed the instant application must be ordered to pay the costs. As pointed out above, the first respondent indicated at the commencement of the hearing that she was withdrawing her opposition to the application. The applicants on their part indicated that they would not be seeking costs against her in view of her attitude to the application.

In the result, it is ordered as follows:

1. The order granted in Case No. HC 1828/14 placing the second to fifth applicants under provisional judicial management is hereby rescinded.
2. The second respondent shall pay the costs.

Venturas & Samukange, applicants' legal practitioners
Thompson Stevenson & Associates, first respondent's legal practitioners
F.G. Gijima & Associates, second respondent's legal practitioners