JONAH GUMO
versus
THE MASTER OF THE HIGH COURT N.O
and
ZEXCOM FOUNDATION INVESTMENT FUND LIMITED
(Under Provisional liquidation)

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 12 September, 9 December 2016

Opposed Application

F. Mahere, for the applicant
H. Moyo, for the 2nd respondent

CHIGUMBA J: The applicant seeks an order that ZEXCOM Foundation Investment Fund Limited (the Company) be removed from provisional liquidation. He wants the court to authorize the shareholders of the Company to elect directors of the Company within two months of its removal from provisional liquidation. Pending the appointment of directors, the running of the Company's affairs is to be entrusted to its contributors. The issue that arises for determination is whether in the circumstances of this case, the applicant is entitled to the relief that he seeks, bearing in mind that the Company is under provisional liquidation. Part of the national objectives which are enshrined in our Constitution include, in s 3 (1) (i), the founding value and principle that recognizes and respects the liberation struggle. Section 3 (2) (i) (iv) stipulates that the principles of good governance, which bind the State and all institutions and agencies of government at every level, include, recognition of the rights of veterans of the liberation struggle. There is a duty imposed on the State and agencies of government in my view, emanating from these Constitutional provisions, to assist veterans of the liberation struggle even where they wish to enforce each other's rights and obligations against each other. The spirit of

good governance, appears to have deserted the Company, whose principal object was to improve the economic and material wellbeing of all of its members and their dependents.

In the founding affidavit the applicant averred that; - the second respondent was duly registered in terms of the laws of this country on 27 October 1998. Its principal objects, which appear in its memorandum of association are "to raise funds from war veterans registered in terms of the War Veterans Act for purposes of investment in the various sectors of the economy in Zimbabwe, to enhance the future earnings of the War Veterans, to improve the economic and material well-being of its members and their dependents, to provide the opportunity for its members to enjoy maximum returns for their mutual benefit at minimal risk". Thousands of war veterans were allotted shares in the respondent company in order to further these objectives. There are between 3000-5000 shareholders in the respondent company. The applicant is one such shareholder. On 9 December 2009, the respondent company was placed under provisional liquidation, under case number HC171-09, on application by three shareholders, *Andrew Ndlovu, Robert Mlalazi, John T. Ngwenya* and the late *Victor Muzenda,* who was appointed provisional liquidator. Both *Mlalazi and Ngwenya* are now deceased. The basis of the application for provisional liquidation was mismanagement by the directors, debt, failure to make profit. *Muzenda* was subsequently removed as provisional liquidator by *ZEXCOM Private Limited,* a company which is different from the respondent company, under HB10-14. When *Muzenda* died, the Master of the High Court took over the affairs of the respondent company.

Under HB10-14, *Barbra Lunga* was appointed provisional liquidator of *ZEXCOM Private Limited.* She assumed office on 21 July 2014. She has not been issued with a certificate of appointment as provisional liquidator for *ZEXCOM Foundation Investment Fund Limited, but for ZEXCOM Private Limited.* There is no need for the respondent company to remain in provisional liquidation. The basis on which it was placed in provisional liquidation has fallen away. There are no longer any unpaid debts, or claims filed with and approved by the master. There are no unsatisfied judgments. There are sufficient resources and revenue to settle any outstanding creditor's claims. The company owns property which it leases out to tenants, and realizes USD$20 000-00 each month from its Harare property, and USD$5000-00 from its Bulawayo property, as well as USD$3000-00 from its Murehwa property. The company has been allocated farms for agricultural and rural development and it has plans to commence commercial farming

activities. The majority of shareholders are agreed that the company be removed from provisional liquidation. Most of the shareholders depend solely on revenue generated from the respondent company for their livelihood. To allow the respondent company to remain in provisional liquidation will be to subvert the will of the shareholders.

In response to the application, the Deputy Master of the High Court based at Bulawayo filed the following report of record on 13 January 2016; - the respondent company has been under management for a long time starting with judicial management then provisional liquidation. There was sufficient funds in the company accounts to settle all debts at the time of judicial management. The judicial manger went on a selling spree and liquidated most of the assets. The company is capable of performing well if removed from liquidation. A notice of opposition was filed on 24 February 2016. The opposing affidavit was deposed to by *Barbra Lunga*, who averred that;-she was appointed provisional liquidator of the respondent company in terms of a judgment of the High Court at Bulawayo HB10-14 which was handed down on 23 January 2016. She became aware of this application on 15 February 2016. Service of the application was effected at 82 Rezende Street Harare, Equity House, a multistoried building with many reception areas. This was not the proper office of the respondent. The application ought to have been served on the provisional liquidator at Fidelity Life Center Building, in Bulawayo. Equity House in Harare was forcibly occupied by the applicant and an order for his eviction was granted under HB896-15.

The liquidator has been unable to regain control and access to this building or office of the respondent because of the illegal actions of the applicant. The relief sought cannot be granted without any input from the provisional liquidator. There was no valid service of this application on the liquidator of the respondent. The applicant served the application on himself. Under HC 6388-14 the applicant and two others applied for my removal as liquidator and used the correct address in Bulawayo. The applicant has lost numerous court cases, a fact which he deliberately chose not to disclose to the court, in relation to the affairs of the respondent. If the relief sought is granted it will unravel previous orders of this court whose effect has been to protect the respondent's assets. Under HC 896-15, on 28 September 2015, the High Court ordered the applicant and all those claiming occupation through him to vacate Equity House and to give a full account of all rentals collected. The applicant and a group of unruly war veterans caused

chaos on the day that this ruling was made, resulting in Counsel having to be rescued by the riot police after taking refuge inside the court building. The court order was served on the applicant's legal practitioners on 3 November 2015. At the time of the preparation and filing of this application the applicant was aware of the court order.

Another judgment HH 743-15 handed down on 18 September 2015, adverse comments were made about the conduct of the applicant and his legal practitioners. The deputy master was heavily censured for his conduct in that matter. The issues raised in this application are now *res judicata.* On 13 and 26 January 2016 writs of imprisonment were issued as a result of applicant's willful refusal to obey outstanding court orders. The applicant has dirty hands and seeks to obtain this order by misleading the court that it was properly served in terms of the rules. The deputy Master of the High Court at Bulawayo was censured for aiding and abetting applicant and his colleagues from looting the funds of the respondent in case number 2188-14 which was handed down on 14 October 2014. He paid out rentals belonging to the respondent to applicant, contrary to court orders directing him to account to the provisional liquidator for these monies. This is a criminal abuse of court process. It would be disastrous to put the affairs of the respondent back in the hands of the office of the Master whose previous conduct in the running of the affairs of the respondent has already been censured in the strongest possible terms by this court. Applicant is looking for a free license to abuse and loot the respondent's assets which include rentals in the sum of USD$25 000-00 each month. The respondent's 5000 shareholders have never benefitted from it in terms of its objects. The applicant has failed to account for funds in excess of USD$30 000-00 to date. He should not be allowed to continue to line his pockets.

It is not correct that the respondent no longer has creditors who need to be paid. Employment costs, legal costs, premiums for bond of security, council rates, water supplies, all running to the tune of one million dollars. The respondent is a proper candidate for liquidation because of the serious infighting, gross mismanagement and other insolvency issues. Only the applicant and his renegade group are enjoying the fruits of the investment made by 5000 war veterans. The powers of the provisional liquidator have been usurped by the applicant and his rogue group, with the assistance of Mr. Antonio the Deputy Master of the High Court at Bulawayo. The resolution of 20 October 2015 is a fabricated document, and it is unlawful because the provisional liquidator was not given any notice of a shareholder's meeting. The

founding affidavit was signed a day before this resolution so it is not properly before the court. Punitive costs should be awarded against both the applicant and his legal practitioners of record.

Applicants filed an answering affidavit on 18 March 2016 in which they averred that;- *Barbra Lunga* is not a duly appointed provisional liquidator of the second respondent. She has not furnished the security required by the Master in terms of the Companies Act. She cannot perform the functions of a provisional liquidator. She was removed as a provisional liquidator by a default judgment in case number HC 6338-14 which is extant, that is why she was not cited as a party to these proceedings, and why service of the application was effected on the registered office of the second respondent. The applicant's occupation of Equity house stems from his being a shareholder in the second respondent. The question of the removal of the second respondent from provisional liquidation has never been adjudicated upon before, and was not before the court in HH 743-15. That question is therefore not *res judicata.* The writs issued in case number HC 896-15 are subject to an application for rescission which is pending. The applicant is supported by other shareholders of the company who resolved to remove the second respondent from provisional liquidation.

On 25 April 2016, the applicant filed heads of argument in which it made the following submissions; - there is no longer any need for the second respondent to remain in provisional liquidation because this is no longer serving the interests of the shareholders. The applicant was not obliged to cite *Barbra Lunga* as a party to the proceedings. She has not complied with the provisions of s 274 (1) of the *Companies Act [Chapter 24; 03]*, which provides that;-

> "In every winding up of a company each liquidator, including a co-liquidator or a provisional liquidator, shall furnish security to the satisfaction of the Master for the due performance of his duties as such. Until he has furnished the Master with such security he shall not be capable of acting as liquidator, co-liquidator or provisional liquidator, as the case may be; and if security is not furnished within a time to be fixed by the Master he shall be deemed to have resigned his office".

It was submitted that the case of *Tagarira Brothers private limited* v *Lunga N.O. & Anor*[1] is authority for this proposition and that it was stated as follows in that case:

> "Provision of security is a pre-requisite to such appointment as rightly observed by the learnered authors JC Nkala & TJ Nyapadi in *Company Law in Zimbabwe* (1995 ed) @ p 436-

[1] HB 126-2003

> 'Each liquidator, co-liquidator or provisional liquidator must furnish security to the satisfaction of the Master for the due performance of his duties as such before he shall be capable of exercising his duties. If he fails to do so within a fixed time he shall be deemed to have resigned from his office'.

> It is trite that a provisional liquidator is appointed as a financial overseer, controller and liquidator. The power of appointment vests with the Master and the court has no inherent power to appoint a provisional liquidator. The Master has an unfettered and sole administrative discretion as to the appointment of a provisional liquidator and it is within his or her statutory powers to give instructions on such appointments".

The applicant persistent in his submission that he was therefore not obliged to serve a copy of the application on *Barbra Lunga,* and that, moreover, she had been removed as a provisional liquidator by a default judgment in HC 8447-15, which was valid until set aside. See *Munyikwa* v *Jiri* [2], *Culverwell* v *Beira* [3]. The court was urged to resort to rule 87 (1) of its rules if it was of the view that *Lunga* ought to have been served with a copy of the application. The court was urged to have regard to rr 87 (2) and join her to the proceedings it so wished. It was submitted that a fully paid up shareholder is a contributory in terms of s 202 of the Companies Act. Section 227 of the Companies Act provides that:

> "The court may at any time after the making of an order for winding up on the application of a liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings on such terms and conditions as the court deems fit".

There should be sufficient reasons/grounds for a company to be wound up as opposed to it being placed under judicial management. See *Tamira Overseas S.A.* v *Aquirium Trading Private Limited*[4], *Lief N.O.* v *Western Credit Africa Private Limited* [5].

The company was placed under provisional liquidation on the basis that it was just and equitable to do so in terms of s 206 (g) of the Companies Act under case number HC 1717-09. The reasons used to place the company into liquidation no longer exist. It was submitted that

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[2] HH338-15 @p7

[3] 1992 (4) Sa 490 (W) @ 494 A-C 'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong. A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside. See Hadkinson v Hadkinson 1952 2 All ER 567 CA, Bylieveldt v Redpath 1982 (1) SA 702

[4] HB31-15

[5] 1966 (3) SA 344-348

when a company is placed in liquidation the board of directors is rendered non-functional. See *South African Mercantile & company law by JTR Gibson* 4th ed p435:

> 'On the granting of a winding up order a director ceases to be a director, officially, functionally and nominally. *Attorney General* v *Blumears* 1961 (4) SA 313 (T) *Tett* v *Chadwick Zimbabwe Company Law* 2nd ed, p143-144.

It follows that when a company is removed from liquidation, new directors should be appointed. The applicant denied that the company was unable to pay its debts as envisaged by s205 of the Companies Act. At the hearing of the matter, Ms *H. Moyo* appeared on behalf of the provisional liquidator *Barbra Lunga.* She raised certain points *in limine,* the first of which was that the applicant was in contempt of court for failure to comply with an order of this court issued on 14 October 2014. The applicant was ordered to account for all the funds belonging to the second respondent which he appropriated and to surrender these funds. He has also been ordered to vacate Equity House and has deliberately and intentionally flouted these orders. It was submitted that the applicant is in open defiance of this court's own orders and had approached the court with impunity. Counsel for the applicant Ms *F. Mahere* sought to argue that the evidence being relied upon by the respondent was not properly before the court as it was being led from the bar and had not been placed before the court by way of the notice of opposition or heads of argument.

However, the record will show that at p51, and as part of annexures to the opposing affidavit, a judgment of this court HH 743-15 appears. The operative part of this judgment is at p 61. It reads as follows:

> "Pending the determination of this application on the return day, the 1st, 2nd, 3rd, 4th and 5th respondents herein are hereby interdicted and prohibited from giving effect to, or in any way putting into effect, or implementing any of the terms of the default judgment under HC 6388-14 or from dealing with the affairs of Zexcom Foundation Investments Funds Limited in any manner whatsoever which may be inconsistent with any of the existing orders or judgments of this court previously granted in favor of the applicant in all matters relating to the company".

It is common cause that this order is extant and therefore binding on the applicant, who was a party to those proceedings. The court in that matter chronicled a sordid tale of greed spanning a considerable period of time, perpetrated by liberation war heroes against each other and each other's interests. A summary of numerous court cases in this court and in Bulawayo makes interesting reading. At rp 57, p7 of the judgment, para 4, the court stated that;-

> "I deprecate the conduct of the respondents and their legal prcatitioners which is exhibited in the records before me. It is an extreme form of abuse of court process. One of their pitched arguments was based on a manifestly silly mistake in the citation of Zexcom on Barbra Lunga's appointment as provisional liquidator…in a judgment on 17 July 2014 granting Kahwa leave to execute despite Muzenda's appeal to the Supreme Court….sitting at Bulawayo…expressly ruled that the misspelling of Zexcom in Barbra Lunga's appointment was of no consequence…not only that, but on 21 January 2015,… also sitting at Bulawayo, granted an order specifically correcting the error".

Despite this chronicle, the same arguments have been regurgitated before me in this application. Despite the interim relief granted in HH 743-15, the interdict, and the prohibition, the applicant is before me, bold as brass, making submissions about the need or failure to serve the application on the provisional liquidator, in a manner which seeks to give effect the terms of the default judgment under HC 6388-14. The applicant seeks to deal with the affairs of the second respondent in a manner which is inconsistent with existing orders and judgments of this court previously granted in favor of *Barbra Lunga*. The applicant seeks to act in a manner inconsistent with a judgment of this court in HH 743-15. It is common cause that the applicant has not complied with the judgment in HC 896-15 handed down in Bulawayo in which he was ordered to vacate Equity House. It is common cause that a writ for personal attachment and committal to prison was issued against the applicant on 28 January 2016 for failing to vacate Equity House as ordered. It is common cause that on 14 October 2014, the High Court at Bulawayo ordered the applicant and others to cease to deal in the affairs of the second respondent, to interfere with the provisional liquidator, and to account for rentals collected, and that the applicant has not complied with this order.

Fortunately, the applicant has given us the guiding principles which we ought to apply in cases of this nature, in the heads of argument which were filed on his behalf:

> 'An order of a court of law <u>stands until set aside</u> by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong. <u>A person may even be barred</u> from approaching the court until he or she has obeyed an order of court that has not been properly set aside. See *Hadkinson* v *Hadkinson* 1952 2 All ER 567 CA, *Bylieveldt* v *Redpath* 1982 (1) SA 702 (My underlining for emphasis)

The question of whether or not the applicant is in contempt of court is not properly before us. What is before us is a preliminary point raised, on behalf of the provisional liquidator, that the applicant ought to be barred, or denied audience, until he and his co-conspirators comply

with all extant and outstanding court orders. We find merit in this preliminary point, and uphold it. The court itself was at liberty to *Mero Motu,* bar the applicant from being heard until he obeys all of its previous orders, so the point that the evidence to support this assertion was not placed before the court in heads of argument is porous at best, devoid of merit, and self -serving. Self-serving on the part of the applicant because he knew very well the correct address of service where service of this application ought to have been made on the provisional liquidator but chose not to, in a calculated nefarious attempt to snatch at yet another judgment and cause further proliferation of the never-ending saga that has afflicted and debilitated the noble intentions of the contributors who made the second respondent what it is today.

The sordid chronicle of the numerous cases in this matter, which have not brought light at the end of the tunnel cries out for intervention by the relevant government ministry which oversees the affairs of war veterans in this country. There is need to introduce the principles of the Constitution to the running of the affairs of the second respondent. We find that it is in the interests of justice that the applicant be barred from being heard in this matter, and barred from filing any other matters pertaining to the second respondent, unless and until he has complied with the outstanding court orders of this court which are extant. Once that has been done, applicant is directed to seek the leave of this court or of the court at Bulawayo, to institute any proceedings in relation to any of the affairs of the second respondent. In seeking leave, applicant will be required to show that all outstanding orders have been duly complied with. It is directed that a copy of this application be served on the Registrar of the High Court at Bulawayo and Harare, and on the Law Society of Zimbabwe which should take note of the censure of the legal practitioners of the applicant, and of the Deputy Master at Bulawayo, under HH 743-15. In the result, it be and is hereby ordered that:

1. Applicant be and is hereby barred from being heard on the merits of this application for failure to obey the orders in case numbers HH 743-15, HC 2185-14 and HC 896-15.

2. Applicant's right of audience in any matter which pertains to the 2nd respondent, and its affairs, which has been curtailed, the bar, may be uplifted, on application, and on proof that these abovementioned extant court orders have been complied with.

3. The applicant is ordered to pay costs on a legal-practitioner client scale.

Messrs Gill Godlonton & Gerrans, applicant's legal practitioners
Messrs Joel Pincus, Konson & Wolhuter, 2nd respondent's legal practitioners