DISTRIBUTABLE (48)

(1) JOSEPH SIBANDA (2) WEDGEWALL INVESTMENTS (PRIVATE) LIMITED

vs

(1) MAKONDE INDUSTRIES (PRIVATE) LIMITED (in liquidation) (2) GLEN MOOR TRADING (PRIVATE) LIMITED (3) NATIONAL SOCIAL SECURITY AUTHORITY OF ZIMBABWE (4) ZIMBABWE REVENUE AUTHORITY OF ZIMBABWE (5) MARTIN DRIVE (PRIVATE) LIMITED (6) MASTER OF THE HIGH COURT OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & BHUNU JA
HARARE, OCTOBER 15, 2015, & AUGUST 17, 2017

T. Mpofu, for the appellants

D. Tivadar, for the 1st respondent

E. T. Matinenga, for the 2nd respondent

D. Ochieng, for the 5th respondent

No appearance for the 3rd, 4th & 6th respondents.

GOWORA JA: This is an appeal against a decision of the High Court sitting at Harare in which that court dismissed an application for the setting aside of a final order for the liquidation of the first respondent granted by that court on 8 May 2013.

The second appellant is a private company with limited liability duly registered as such under the laws of Zimbabwe. It is common cause that the first appellant is the major shareholder of the same. He is also a director of the company. He deposed to the founding affidavit on behalf of both appellants. He also described himself as the alter ego of the second appellant.

He averred that he was the first respondent's largest creditor, which entity he alleged owed him USD 486 818.48. He averred further that the first respondent also owed the second appellant the sum of USD 241 616.61.

Until its liquidation, the first respondent was engaged in the manufacture of specified food items under a contract with the World Food Program. It owned an extruder plant for the process.

It is common cause that in order to enable it to perform its obligations under the contract, the first respondent obtained a loan from the second respondent in the sum of USD 200 000. The date and the instrument in terms of which the loan was advanced is a matter of dispute between the parties. The first respondent made payments towards the settlement of the debt but failed to extinguish the debt in full. The parties subsequently entered into negotiations in an attempt to restructure the debt but these failed. Those negotiations are not germane to the resolution of the dispute.

In the meantime, the first respondent's landlord, the fifth respondent herein, sought and obtained judgment against the former in respect of arrear rentals and, as a consequence, an order for its ejection from the premises where the extruder plant was situate. The fifth respondent,

in execution of the order for arrear rentals, caused the attachment of the first respondent's extrusion plant. It was at that juncture that the second respondent sought to protect its interest based on the loan agreement.

On 20 March 2013, the second respondent obtained an order for the provisional liquidation of the first respondent. First respondent did not oppose the application. On 8 May 2013 the provisional order for liquidation was confirmed. Again it was unopposed.

On 20 December 2013 the appellants filed an application in the High Court in terms of which they sought an order pursuant to the provisions of s 227 of the Companies Act [*Chapter 24:03*], "the Act", for the setting aside of the final order for the liquidation of the first respondent. The basis upon which the order was sought was premised on an allegation that the second respondent was not, at law, entitled to seek the liquidation of the first respondent. They alleged that the second respondent was a shareholder in the first respondent. They alleged further, that as a shareholder, the second respondent lacked the requisite *locus standi* as only a creditor is entitled under the law to apply for such relief. Consequently, the appellants contended that the order for the liquidation of the first respondent was invalid by virtue of the lack of standing by the second respondent to seek it.

The court *a quo* dismissed the application with a punitive order of costs. The court concluded that the application was *mala fide* thus warranting an order of costs to show the displeasure of the court. This appeal is against the dismissal of the application as well as the level of costs awarded against the appellants.

The first ground of appeal raised by the appellants was that the court *a quo* erred by concluding, *mero motu,* that the application had been brought in breach of r 63 of the High Court Rules, and that, the court erred further in finding that the rule applied in the determination of the application before the court.

The court said:

> "The ordinary rules that govern applications for rescission of judgment apply. Order 9 Rule 63 of the Rules of the High Court 1971 provides that such an application must be made within one month of acquisition of knowledge of the judgment. This application was filed in December 2013. The judgment or order that is sought to be set aside, the final liquidation order is dated May 2013. No explanation was given for the delay in bringing this application in terms of the rules of this court and no application for condonation was placed before the court. It is my view that, s 295 of the Companies Act does not assist the applicants because it expressly relates to dissolution of a company, not the granting of a final liquidation order, which is only the first step towards dissolution. It follows that the two-year time period allowed in terms of s 295 does not apply to the applicants, it being common cause that the first respondent has not yet been dissolved."

The appellants contended that the court *a quo* clearly misunderstood the matter that it had to determine and that as a result it did not have recourse to the written submissions filed by the parties. It was contended further that r 63 did not apply and that due to the error by the court in considering the application in the light of the provisions of the said rule the court could not have come to the correct conclusion on the matter.

The record reveals that the first respondent filed an opposing affidavit deposed to by the liquidator. She did not oppose the relief sought and chose to abide by the decision of the court. However, she sought an order of costs against the unsuccessful party.

The second respondent mounted a spirited opposition to the relief being sought. The second respondent did not, however, advert to the provisions of r 63 of the High Court Rules. It seemed that the second respondent accepted that the application had been properly brought in terms of s 227 of the Act. The fifth respondent also chose to challenge the merits of the application. It did not raise any procedural issues.

On behalf of the second respondent, Mr *Matinenga* argued that the court *a quo* was correct in its approach as it would have been "acutely aware of the need to bring the litigation between the parties to finality."

Without a doubt the procedure adopted by the court *a quo* of raising a technical issue, determining it and pronouncing judgment on it without hearing submissions from the parties was highly irregular.

In *Proton Bakery (Pvt) Ltd v Takaendesa* 2005(1) ZLR 60, at 62E-F, GWAUNZA JA, said:

> "The appellant argues, in the light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite.
> I am for the reasons outlined below, persuaded by this argument"
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> And later at 63C-D:
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> "Fourthly and most importantly, the court *a quo* had ample opportunity in the five days during which *viva voce* evidence was led on the merits of the case, to solicit evidence on the specific issue of the respondent's suspension, if as now appears, it considered such evidence decisive. The court, however, did not solicit this evidence. Instead, it went on *mero motu* and after the event, to pick on a procedural irregularity neither raised nor argued before it, and base its determination solely on that technicality. This it did to the exclusion of the not insubstantial evidence placed before it on the merits of the case."

A perusal of the submissions presented by the respective parties before the court *a quo* establishes that the court was never addressed on the issue of whether or not the application was properly before the court in terms of s 227 of the Act or whether or not it would run foul of r 63 of the High Court Rules. And yet despite this, the court was able to find that s 227 was not the appropriate section for the court to exercise its discretion as the appellants had not brought the application in terms of the provisions of the High Court Rules.

In my view, the court was in error when it concluded that an application such as the one before it as in this case had to be brought under the aegis of r 63, and that further to that, it had to be filed within a month from the date on which the applicant had knowledge of the order or judgment in question.

The court *a quo* was alive to the fact that the application before it was premised on s 227 of the Act. Notwithstanding that premise the court went on to find that the section was inapplicable. It is clear that the decision by court *a quo* was informed by the fact that the application had been granted unopposed. As a consequence, the court was of the view that since this was matter in which an order had been obtained in default of opposition by the parties affected by the order, then the rules of the High Court had to be considered in determining whether or not to grant relief. Rule 63 of the High Court Rules 1971 reads:

63. Court may set aside judgment given in default
(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.

A simple reading of the rule brings to the fore two issues. The first is that a party against whom a judgment had been obtained in default, whether under these rules or any other law, is entitled to approach the court to have such a judgment rescinded or set aside. The second, and most important requirement under the rule, is that a litigant wishing to avail himself of this indulgence from the court must file a court application for relief not more than a month after he has knowledge of the default judgment.

The default related to in terms of r 63 speaks to a situation where a party has been served with court process and fails to either respond to it or attend a scheduled hearing in relation thereto. The respondent cited in the application for liquidation is the first respondent. This was the party upon whom the application was served, against which party specified relief was sought and, as a consequence, the party that could technically be said to have been in default. From a perusal of r 63 it is obvious that the first respondent, as the party against whom a judgment has been entered in default is the one permitted to make an application for the rescission of that judgment within a month of learning of the same.

As against that, the appellants did not have a judgment entered against them in default. Neither appellant was a party against whom a judgment was entered in default in relation to the orders for the liquidation of the first respondent. No relief was ever sought against either of them by the second respondent. Despite having an interest in the proceedings relating to the liquidation of the first respondent, they were never cited at all. The appellants therefore were not the parties that the rule is aimed at.

In addition, the provisional order issued by the court called upon interested parties to respond to the order by a specified date if they so wished. The court *a quo* did not specify however that a failure to respond to the same would be a default as envisaged in the rule and as a consequence warranting an application in terms of r 63.

The appellants contend that the applicable law in this case is s 227 the Act, which reads as follows:

227 Court may stay or set aside winding up

The court may at any time after the making of an order for winding up, on the application of the 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.

In direct contrast to r 63, s 227 does not provide for a time frame within which such application may be made. It provides that the "court may at any time after the making of an order for the winding up" stay or set aside such order. (My underlining) The contradiction in the provisions of s 227 of the Act and r 63 is obvious. Whilst the latter places a limitation on the time frame within which an application for rescission of a default judgment may be brought, s 227 grants the court latitude in so far as when such an order may be granted, regard being had always to whether or not the period in which relief is sought can be considered as being reasonable. Therefore, in placing a limitation on the time that the appellants ought to have made their application to have the proceedings set aside the court was guilty of serious misdirection.

Section 227 avails an applicant a unique remedy for the setting aside of a winding up order and is not related to an application for rescission of a default judgment. The provision does

not confine itself to orders granted in default of any party affected by it. In concluding that the application had to comply with r 63 of the rules of the High Court, the court *a quo* was seeking to limit the rights of parties affected by the winding up order without regard to s 227.

The legal basis of the application itself was not in issue between the parties to the dispute. The parties confined themselves to the question whether or not the appellants had met the requirements attendant upon an application of the nature confronting the court *a quo*. The misdirection is clear.

When the affairs of a company have been completely wound up, the Master of the High Court is obliged to make an application to the court for an order that the company be dissolved. The court *a quo* invoked the provisions of s 295 in finding that the application was not merited on the premise that the first respondent had not yet been wound up. The provision reads:

295 Power of court to declare dissolution of company void
When a company has been dissolved the court may, at any time within two years of the date of the dissolution, on an application by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

In my view the court *a quo* applied the wrong law in deciding whether or the application should have been brought within a specified time. The company had not been wound up and clearly s 295 did not apply. The court should simply have asked itself if the application met the requirements in the Act as outlined in s 227.

However, notwithstanding the errors alluded to above, the court *a quo* correctly captured the issue before it, viz; whether or not the second respondent was creditor or a shareholder of the first respondent. The resolution of this issue would determine the standing of the second respondent in seeking an order for the liquidation of the first respondent. The second respondent contended that it had standing but that in any event, there was a material dispute of fact which was incapable of resolution on the papers and that the appellants ought to have anticipated this dispute of fact which could not be resolved on the papers. The second respondent prayed that on that basis alone the application should be dismissed with costs.

The position of the appellants was that the first and second respondents had entered into an agreement on 12 September 2009 wherein the latter lent to the former the sum of USD 200 000. In terms of the agreement repayment had to be effected within 45 days failing which shares equal to 25 per cent of the equity in the first respondent must be transferred to the second respondent.

It is not in dispute that one Casper Mombeshora did deliver to the second respondent share certificates in transferable form representing such shareholding in the first respondent. The second respondent admits receiving such certificates, has not returned them, but avers that the delivery of the shares without a concomitant notation in the company register and share certificates in its name does not make the second respondent a shareholder in the first respondent. The position taken is that the second respondent remains but a creditor. It reiterates that as such it is entitled to seek the order it obtained for the liquidation of the first respondent.

In heads of argument filed before the court *a quo*, the second respondent conceded that there was a material dispute of fact on the issue of the shares and the share certificates. Despite the concession by the second respondent of a material dispute of fact on the papers, the court *a quo* went on to find that there was in fact no such dispute. The court said:

> "The court did not find this submission persuasive, being of the view that the dispute of fact referred to was not so material or complex as to be incapable of resolution on the papers filed of record. There was sufficient evidence in the affidavits filed of record, and in the terms of the three agreements alluded to by the parties, to assist the court to make a determination of the question of which agreements governed the relationship between the parties. It is not every apparent dispute of fact which is incapable of ascertainment."

The court was correct in its approach on how to resolve a dispute of fact. Before the court were the following documents:-

i) Agreement dated 12 September 2009 for a loan sum of USD 200 000.00;

ii) Agreement dated 14 September 2009 for a loan amount of USD 100 000.00;

iii) Agreement dated 5 October 2009 for a loan amount of USD 100 000.00;

iv) Notarial General Covering Bond dated 11 December 2009 executed by the first respondent in favour of the second respondent for the sum of USD 200 000.00.

There is merit in the argument by the appellants that had the court a quo had proper regard to the documents before it, it would have become apparent that there was a material dispute of fact which called for resolution. In the absence of a resolution of this dispute it was not clear on the papers whether second respondent was a creditor or a shareholder. Instead it embarked on what meaning was to be ascribed to a creditor at insolvency.

The court *a quo* further went on to consider that the acceptance by the Master of the second respondent's claim was sufficient for it to find that indeed the second respondent was a creditor instead of a shareholder. It also accepted that the two later agreements were the basis upon which the status of the second respondent was premised.

Against this finding is the fact that the first agreement was never cancelled by either party to the same. I say this for the following reasons. The final clause in the agreement provided as follows:

> "In the event that Makonde Industries default on the repayment of $230 000 within 45 days, Glen Moor will give written notice that they have 15 days to rectify the default failing which Makonde Industries selected shareholders agree to transfer a 25 per cent stake in Makonde Industries to Glen Moor Trading."

Despite denials from the second respondent, the record shows that this agreement was consummated by the parties. Proof of such consummation is be found in the concession by the second respondent that Mombeshora handed over share certificates to the second respondent. The second reason is that on 11 December 2009 the first respondent registered a Notarial General Covering Bond in favour of the second respondent. The *causa* for the mortgage bond was the agreement of 12 September 2009. The mortgage bond was registered by the second respondent's legal practitioner of record, Mr Crossland.

Given that the mortgage bond was registered on 11 December 2009 which date was after the execution of the agreements of 14 September 2009 and 5 October 2009, it seems to me that one is left wondering as to which of the various agreements concluded by the parties was the operative agreement. In view of the conflicting conditions between the first agreement and the last

two, there is confusion as to status of the second respondent in relation to the first respondent, especially when regard is had to the contention by the appellants that the second respondent was a shareholder of the latter as opposed to contention by the second respondent that it was a creditor.

Going by the facts outlined above, it is clear that the application to have the order winding up the company set aside had merit. The status of the second respondent as an applicant for that order could at best be described as unclear. It required closer scrutiny.

In my view, the material disputes of fact are incapable of resolution on the papers. It did not seem as if the appellants ever became aware of the two agreements that the second respondent alleges were the agreements in respect of which the parties conducted their relationship vis-a-vis the loan. As such it cannot be said that the appellants should have anticipated the existence of material disputes of fact.

Accordingly, due to the disputes of fact, the resolution of which would clarify whether or not the second respondent had standing to make the application for the liquidation of the first respondent, it is only proper that the matter be remitted for trial on that aspect. It becomes unnecessary to consider the other grounds of appeal.

In the result it is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* be and is hereby set aside.

3. The matter is remitted for the court *a quo* to hear oral evidence on the question of whether or not the second respondent is a shareholder or creditor of the first respondent.
4. Thereafter the court is to determine the matter in accordance with the provisions of s 227 of the Companies Act [*Chapter 24:03*].

ZIYAMBI JA: I agree

MAVANGIRA JA: I agree

Gill, Godlonton & Gerrans, appellants' legal practitioners

Coghlan, Welsh & Guest, first respondent's legal practitioners

Atherstone & Cook, second respondent's legal practitioners

Kevin John & Arnott, fifth respondent's legal practitioners