PRIME SOLE
versus
MUNIR KAZI

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 31 May and 13 September 2006

Opposed Court Application

Advocate H Zhou, for the applicant
Advocate K Mazonde, for the respondent

GOWORA J: The applicant has approached this court by way of an application for an order placing the estate of the respondent under provisional liquidation. As the respondent is an individual, it is understood and accepted by both parties that what is sought is an order placing the estate of the respondent under provisional sequestration and appointing a trustee to run and manage the financial and business affairs of the respondent.

The background to the dispute is as follows. On 12 July 2005 a company called Maniam Investments issued two invoices to the applicant. The first, Annexure 'A' to the applicant's papers was in relation to 2500 units of Butadiene Styrene Rubber Granular at a total price of Z$2 345 329 500.00. The second, Annexure 'B' was in respect of 2500 units of PVC Nitrite Granular at a total price of Z$2 600 618 025.00. Both invoices bore the legend '<u>Please note that this invoice is valid for 48 hours from date of issue</u>'. (my underlining)

On the same day, the applicant deposited an amount of Z$450 000 000.00 into the account of Guistein Investments (Private) Limited. The following day an equal amount was again deposited into the account of Guistein Investments by the applicant. On 15 July 2005 two further payments of Z$450 000 000 .00 each were deposited into the account of Guistein Investments. Subsequent deposits into the account of Guistein were as follows; Z$250 000 000.00 on 21 July 2005, Z$200 000 000.00 on 23 July 2005, Z$200 000 000.00 on 5 August 2005, Z$489 000 000.00 on 10 August 2005, and Z$99 731 198.00 on 17 August 2005. Thereafter a number of deposits were made by the applicant into the account of

Sutcliffe. Although the applicant states that it is a company there is no place on the papers where it is described in a manner that shows this status. For all I know Sutcliffe could be an individual. The four deposits made into the account of Sutcliffe were as follows; Z$450 000 000.00 on 12 July 2005, Z$450 000 000.00 on 13 July 2005, Z$450 000 000.00 on 15 July 2005 and Z$450 000 000.00 on 18 July 2005. The applicant has attached to its papers proof of additional payments by it to yet another entity called Gargnet Enterprises in the sum of Z$450 000 000.00 on 12 July 2005. The applicant, however, has not shown proof of any payment to the respondent personally. According to the papers the total amount paid to Guistein is Z$3 039 690 877.00. Payment to Sutcliffe totaled Z$1 800 000 000.00 whilst the amount paid to Gargnet was Z$450 000 000.00.

According to the applicant, and this is not denied by the applicant, an amount of ZAR55 830.00 was paid to its suppliers in South Africa. Payment was effected on 8 September and 9 September 2005 respectively. Apart from stating that payment was effected by the respondent, the applicant has adduced no further evidence as to the mode of payment, the person who eventually paid on behalf of the respondent and where payment emanated from. The applicant contends that going by the prevailing exchange rate at the time of payment, the amount paid was the equivalent of US$8 589.00. This payment, as far as the applicant was concerned, then left the respondent with the obligation to pay US$100 361.00. The applicant avers that the respondent has made several offers to pay either in the currency of United States dollars or in Zimbabwe dollars but that none of the offers to settle have come to fruition. The applicant further avers that the respondent has offered to refund the applicant but that again nothing has come out of this offer. It is common cause that on 23 November 2005 the applicant's legal practitioners sent a letter of demand to the respondent. The letter, sent by facsimile, indicated that the respondent had made an arrangement with the applicant to pay an amount of ZAR 102 000.00 and that respondent had only paid ZAR 55 800.00. The respondent was called upon to make payment '<u>of the aforementioned sums by no later than 24th</u>

November 2005 failing which an application for the sequestration of his estate would be launched' (my underlining). On 9 December 2005, the applicant's legal practitioners received three undated cheques, each with a face value of Z$450 000.000.00 drawn by Guistein Investments. The cheques were not met on presentation as they were apparently drawn against a closed account. All these circumstances have, cumulatively, led to the applicant seeking from this court for an order for the sequestration of the estate of the respondent.

I now examine the case for the applicant. It is the submission of the applicant that the respondent has committed an act of insolvency as provided for in terms of section 11(f) of the Insolvency Act [*Chapter 6:04*]. Although there is no document bearing the name of the respondent, it is the applicant's case that the respondent with craft raised invoices in the names of Maniam Investments and arranged for payment in the names of the corporate entities, his nominees. According to the applicant, the respondent is indebted to the applicant in the stated amount and has refused or suspended payment on the amount due. Catherine Smith in her book THE LAW OF INSOLVENCY, 3RD Edition at page 32 states:

> *"If a debtor owes money to a creditor which he fails or refuses to pay, the creditor may enforce his rights by having recourse to the courts and eventually, after the required procedural steps have been taken, causing the attachment and selling in execution of the debtor's assets in order to obtain satisfaction of his, the creditor's claim. Compulsory sequestration of a debtor's estate embodies the ultimate form of execution and results in a concursus creditorum. Instead of piecemeal sales in execution of the debtor's assets at the instance of several execution creditors, all of the debtor's assets vest, on his insolvency, in the master and subsequently the trustee, for realization and distribution amongst the general body of his creditors. The same results flow from the voluntary surrender by a debtor of his own estate."*

The applicant therefore contends that in terms of section 13(b) of the Act there is reason to believe that it would be to the advantage of the creditors of the respondent for his estate to be sequestrated. Section 13 of the Act provides:

> 'The High Court shall not grant an order of provisional sequestration unless it is of the opinion that, prima facie-

(a) the debtor has committed an act of insolvency or is insolvent; and

(b) there is reason to believe that it will be to the advantage of creditors of the debtors if his estate is sequestrated; and

(c) the petitioner has a claim against the debtor to the extent referred to in
subsection (1) of section twelve.

In order to establish the requirement of insolvency on the part of the respondent, the applicant seeks to rely on the provisions of section 11(f). The contention is that the respondent needed money and fraudulently led the applicant to pay money to his nominees, which are companies. The respondent is the secretary of one of the companies as well as a director with a relative of his. The three cheques drawn by Guistein Investments were allegedly signed by the respondent. Although the heads of argument filed by the applicant are silent on the issue, in its founding affidavit, the applicant makes the averment that the respondent has by conduct advised his creditors that he has suspended payment of his debts and has further compromised with his creditors. The applicant is of the view that the respondent has the assets and means to settle his debts but that he has concealed such assets and means as a way of avoiding paying the debts. Paragraph (f) provides:

> 'A debtor shall be deemed to have committed an act of insolvency if-
>
> (f) he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts; or
> …..'.

Neither of the legal practitioners has referred me to a Zimbabwean authority on the meaning to be ascribed to this paragraph of the Act. Counsel for the respondent has referred me to the South African case of *Barlow's Estate (Eastern Province) Ltd v Bouwer*[1] which is a judgment by REYNOLDS J. The learned judge was considering an application for a final order of sequestration under the insolvency Act in South Africa. At issue was the meaning to be ascribed to section 8(g) of that country's

[1] 1950 (4) SA 385

Insolvency Act which in ambit at the time was somewhat narrower than our own, in that it only provided for notice by the debtor. The section in the South African Act provided –

'a debtor commits an act of insolvency . . . .

(g) if he gives notice in writing to any one of his creditors that he is unable to pay
his debts'.

At p 393E-G, the learned JUDGE stated:

'It is perfectly true that under S 12 (1) the creditor has not to prove respondent has committed an act of insolvency, but where a creditor relies on notice as being a declaration of an inability to pay, and notice shows that respondent is able to the knowledge of the creditor to pay, and can be forced to pay all creditors in full by due process of law apart from insolvency proceedings, the mere notification of what is in true substance an unwillingness to pay is not an act of insolvency………..'

The cheques which the applicant seeks reliance on were drawn by Guistein Investments Private Limited which to all accounts is the holder of the current account against which the said cheques were drawn. The applicant has also attached an application for an electron transfer in the sum of Z$450 000 000 by Guistein Investments against its account with Stanbic Bank in favour of the applicant. It appears that the electronic transfer was completed as it bears the stamp of the bank. The applicant has indicated that no payment was effected into its account. In order to determine the application before me it not necessary for me to resolve whether or not the electronic transfer was given effect to .In the documents I have just referred to the name of the debtor is Guistein. I have not been referred to any document that bears the name of the respondent. According to the Act a debtor is defined as follows:

" 'debtor', in connection with the sequestration or assignment of the estate of a debtor, means a person or partnership or the estate of a person or partnership, including a partnership which has been terminated but has not been wound up, which is a debtor in the usual sense of the word but does not include a body corporate or a company or other association of persons which may be placed in liquidation or which may be wound up in terms of the law relating to companies or any other law".

The applicant in the circumstances of this case was under a most onerous burden to establish that the respondent was a debtor as defined by the Act. The onus to establish that the sequestration of a debtor's estate is to the advantage of the debtor's creditors is on the creditor. See *Scottish Rhodesia Finance Limited v Ridgeway*.[2] All payments in this matter made by the applicant were made to the three companies variously. The applicant describes the companies into whose accounts it paid monies as the nominees of the respondent and yet has adduced no evidence to that effect. The respondent is alleged to be the principal officer of one of these companies, but that does not make the company in question a nominee of the respondent. It is trite that a company is separate from its members and the applicant has not even alleged that the respondent owns shares or is the controlling shareholder in any of the company. The applicant has not made any effort to open up the relationship between the respondent and the companies it calls the nominees of the respondent. Without lifting the corporate veils of the said companies they remain distinct and separate from the respondent.

Thereafter the applicant had to show on a balance of probabilities that that the respondent had committed an act of insolvency. The applicant has not instituted process for the recovery of any amounts of money either from the respondent or his so-called nominees. The respondent has not given notice that he has suspended the payment of his debts. The conduct complained of is that cheques were issued against a closed account, which account is not that of the respondent. The applicant did not prove that the respondent owed any money to it, neither did it show that the respondent had committed an act of insolvency. I cannot even go further to decide whether or not there is an unwillingness to pay by the respondent. The respondent's conduct can only be examined in the circumstances where it can be termed a debtor in terms of the Act. The facts before me do not justify the respondent being referred to as a debtor in any manner.

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[2] 1978 RLR 452.

The application has no merit and it is therefore dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners.
Chibune & Associates, respondent's legal practitioners.