BINDURA UNIVERSITY OF SCIENCE EDUCATION
versus
TETRAD INVESTMENT BANK LIMITED (Under Provisional Judicial Management)
and
THE SHERIFF OF ZIMBABWE (N.O)

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 November 2016 & 24 May 2017

Opposed Application

I.Ndudzo for the applicant
T. Magwaliba for the respondent

ZHOU J: The applicant is a university duly constituted in terms of s 3 of the Bindura University of Science Education Act [*Chapter 25:22*]. Its objects, as set out in s 4 (1) of that Act, are:

> "the advancement of knowledge, the diffusion and extension of arts, science education and learning, the preservation, dissemination and enhancement of knowledge that is relevant for the development of the people of Zimbabwe through teaching and research and, so far as is consistent with those objects, the nurturing of the intellectual, aesthetic, social and moral growth of the students at the university."

The first respondent is a company duly incorporated in accordance with the laws of Zimbabwe, and carries on the business of banking.

On 2 April 2014 the applicant, as the plaintiff, was granted a judgment against the first respondent, which was the defendant, by this court in Case No. HC 2106/14. The order in that case reads as follows:

> "IT IS ORDERED THAT:
>
> 1. Defendant pays to plaintiff the sum of US$473 025.52.
> 2. Interest at the prescribed rate of interest.

3. Costs of suit.
4. Collection Commission in terms of the Law Society of Zimbabwe tariff."

The respondent sought a stay of execution of the judgment on an urgent basis. The matter was removed from the roll on the basis that it was not urgent. An appeal to the Supreme Court against the order removing the urgent application from the roll was struck off the roll. On 16 September 2014 the applicant caused a writ of execution to be issued in order to recover the judgment debt. Pursuant to the issuing of that writ of execution the Sheriff attached goods belonging to the respondent on 26 September 2014 and arranged for their removal on 1 October 2014. The applicant states that the goods attached were insufficient to pay the judgment debt. When an attempt was made to make a further attachment the applicant was then met with the issue of the scheme of arrangement sanctioned by an order of this court. By letter dated 23 October 2014 the respondent's legal practitioners notified the applicant's legal practitioners that there was in existence an order of this court given in Case No HC 1532/14 which stayed execution of all writs against the respondent. That order sanctioned a scheme of arrangement between the respondent and its creditors.

On 29 January 2015 the respondent was placed under provisional judicial management pursuant to an application under Case No. HC 219/15. In terms of the provisional order for judicial management, all actions and applications and the execution of all writs, summonses and other processes against the applicant are stayed and may not be proceeded with without leave of this court. The applicant has now instituted the instant application seeking leave to proceed with the execution of the writ of execution issued on 16 September 2014 notwithstanding the placement of the first respondent under judicial management. The application is opposed by the first respondent.

The applicant states that the debt owed by the first respondent arose from an investment deal note which was duly executed by the first respondent on 9 October 2013. In terms of that deal note the first respondent acknowledged its obligation to pay a total sum of US$555 958.33, but only paid a sum of US$82 942.91 leaving an outstanding amount of US$473 025.52 which is the judgment debt. The applicant states that there is a banker/costumer relationship between it and the first respondent which justifies the relief being sought given that the first respondent is still operating the banking business, and the money being demanded constitutes an investment by

the applicant. The applicant submitted that it is in a unique situation when compared with the other creditors of the first respondent by reason of the fact it has a judgment in its favour, and, further, that its operations have been adversely affected by the fact that it cannot access its money. The applicant also states that the first respondent frustrated execution of the judgment before a scheme of arrangement was sanctioned and before its placement under judicial management by applying for stay of execution and noting an appeal to the Supreme Court against the order of this court which removed the matter from the roll of urgent matters on the basis that it was not urgent. The order sanctioning the scheme of arrangement and the order for provisional judicial management were obtained in the High Court at Bulawayo.

The first respondent in its opposing affidavit argues that it is entitled to the protection granted by the order from execution on the basis of the provisions of s 301(1) of the Companies Act [*Chapter 24:03*]. The first respondent further states that the applicant is not excused from the consequences of that section merely because it has a judgment in its favour or that the first respondent is a bank. There are many other creditors who have obtained orders against the first respondent, according to the opposing affidavit, such that allowing the applicant to proceed with the execution would amount to preferring the applicant over the other creditors.

At the commencement of the hearing the legal practitioners indicated that the applicants and the first respondent were abandoning the points *in limine* taken in their papers, and would debate the merits of the matter.

The power of the court to grant an order of judicial management is a creature of statute, and the circumstances in which that power is exercisable are provided for in the Companies Act [*Chapter 24:01*]. See s 299 and s 300 of the Companies Act; Tett & Chadwick, *Zimbabwe Company Law* 2nd ed., p. 168. The effect of a judicial management order is to take away the management of the company from its directors and place the company under the management, first of a provisional, and then of a final judicial manager if the provisional order is confirmed. See Tett & Chadwick, *Zimbabwe Company Law* 2nd ed., p. 168; Pretorius *et al*, *Hahlo's South African Company Law Through the Cases* 6th ed., p. 601.

The Companies Act provides for the contents of a provisional judicial management order as follows in s 301 (1):

> "A provisional judicial management order shall contain –
>
> (a) The date of the return day, which shall not be less than sixty days from the date of the grant of the provisional judicial management order;
> (b) . . .
> (c) . . .
>
> And may contain directions that while the company is under judicial management all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court."

In the present case the return date was 2 April 2015. There is no information as to what happened on the return date. However, nothing turns on that fact for the purposes of the instant application.

The order to stay all legal processes, including execution of writs, without the leave of the court during the time that the company is under judicial management is one that is within the discretion of the court, as illustrated by the use of the word "may" in the above section. Put in other words, the court is not obliged to grant the directions that while the company is under judicial management all legal processes against it be stayed and not proceeded with without the leave of the court. See *ZFC Ltd* v *KM Financial Solutions (Pvt) Ltd* HH 47-15; *Samuel Osborn (SA) Ltd* v *United Stone Crushing Co (Pty) Ltd* 1938 WLD 229; *Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231E at 237. The Act does not provide for the circumstances in which the court may permit legal processes to be proceeded with or executed against the company notwithstanding the existence of the judicial management order. However, the order being an order of this court is one in respect of which the court has inherent powers to control the execution thereof whenever real and substantial justice so demands. See *Mupini* v *Makoni* 1993 (1) ZLR 80 (S); *Jere* v *Chitsunge* 2003 (1) ZLR 116 (H).

The discretion reposed in the court in respect of execution of a writ against a company which is under judicial management must, like in every case where the court has a discretion, be exercised judicially upon a consideration of the relevant factors and circumstances. Where the discretion is conferred by statute it must be exercised in the light of the objects of the statute concerned. As was held in *Millman NO* v *Swartland Huis Meubeleerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C) at 744B (per BAKER AJ): "The objectives of a judicial management order are to postpone a liquidation of a company which is in difficulties and

to provide a moratorium for that company for a period long enough . . . to enable that company to meet its obligations and to become a successful concern." In the case of *Pellow NO & Ors* v *Zondagh & Ors* (41/02) [2002] ZANWHC 24, the court said:

> "It is clear . . . that the court has a discretion to grant leave. Such discretion must be exercised by taking into account, *inter alia*, the purpose of judicial management . . . A material consideration is the effect on the judicial management of the granting of leave . . . "

The court would not readily accede to a request for leave to execute against a company under judicial management where such execution would destroy the company and prejudice all the other creditors. See *Western Bank Ltd* v *Laurie Fossati Construction (Pty) Ltd* 1974 (4) SA 607€ at 611. The court is mindful of the fact that the moratorium against execution was granted in the light of the evidence which had been placed before it, and that the effect of granting the relief sought in the present case would be to give the applicant an advantage over the other creditors. But the court must equally be sensitive to the reality that the interests of the applicant are also relevant and must be protected, especially as a client which invested money with the respondent which is a financial institution. As a bank, the first respondent must be aware that those who invest money with it expect to get their money back when it becomes due. The applicant is a public institution, a state university. The students who pay their fees expect to get value for their investment, which, as stated by the applicant, is being severely compromised by the fact that its funds are locked in the first respondent. The applicant is expected to attain its statutory objects which have been referred to above. The respondent has not shown that if execution takes place it will go into liquidation or will be prevented from recovering. It is not enough to make unsubstantiated allegations which are not backed by figures in order to justify denying a party which is owed its money the right to recover the money owed. It must be remembered that the applicant is not asking for a loan but is seeking to recover what is due to it. For the first respondent to merely allege that it is protected by the order is insufficient as that order clearly provides that with the leave of the court execution may proceed.

The first respondent has not taken the court into its confidence by providing evidence of its exposure to more severe consequences if the relief being sought herein is granted. It has been under judicial management for almost two and a half years now. That is a long period. The purpose of judicial management, as noted above, is to enable companies suffering a temporary

setback due to mismanagement or other special circumstances, to once more become successful concerns. *Silverman* v *Doorndoek Mines Ltd* 1935 TPD 349; Cilliers *et al*, *Corporate Law* 3rd ed., p. 478. Put in other words, the object of that "special and extraordinary procedure" of judicial management is to obviate a company's being liquidated where there is a reasonable probability that by proper management or by proper conservation of its assets it may be able to overcome its challenges and become a successful concern. See *Le Roux Hotel Management (Pty) Ltd & Anor* v *E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (Under Curatorship) Intervening)* 2001 (2) SA 727 (C) at 738; Visser *et al*, *Gibson South African Mercantile & Company Law* 8th ed., pp. 411-412.

No evidence has been placed before this court to suggest that the purpose of judicial management would be defeated by allowing the applicant to execute its writ against the first respondent. The first respondent cannot seriously suggest that two and half years after it was granted the moratorium it is not in a position to offer a cent. It cannot claim that the setback which justified the granting of a judicial management order was temporary in those circumstances. Judicial management must not be used as an excuse to frustrate the just claims of those who have deposited their money with the first respondent. The first respondent is a banking institution whose business it is to give people, especially those who have invested, money. Given the above facts, it would not be a judicial exercise of discretion to expose a university to liquidation in order to protect the interests of the first respondent.

In the circumstances of this case, and in view of the factors noted above, it seems to me that this is an appropriate case for the court to suspend the moratorium in relation to the applicant, and permit it to execute its writ against the first respondent.

In the result, IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave to execute the writ issued pursuant to the judgment of this court in Case No. HC 2106/14 against the first respondent.

2. The first respondent shall pay the costs of this application.

Mutamangira & Associates, applicant's legal practitioners
Mawere Sibanda, first respondent's legal practitioners