MICHELLE OSVALDO FILANNINO
versus
THERESA GRIMMEL N.O
and
NEWTON JARAVANI
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 June and 29 September 2021

Opposed Application

R R Nyapadi, for the applicant
Adv. T Mpofu, for the respondent

MANGOTA J: Michelle Osvaldo Filannino ("Michelle") who holds 70% share in Harare Produce Sales (Pvt) Ltd ("HPS or "the Company") and Theresa Grimmel ("Theresa"), the judicial manager of the company, have been at each other's throats for over three consecutive years. The dispute which exists between them started in 2018 to date.

He applies for removal of Theresa from the position of judicial manager of the company. She opposes his application and she applies for liquidation of the company. He opposes her application and he applies for placement of a caveat on the tittle deed of the property which must be transferred into the name of HPS and she opposes the same.

Michelle's application for removal of Theresa is filed under HC 7830/19. Theresa's| application for the winding up of HPS is filed under HC 6064/19. His application for a caveat is filed under HC 5877/19.

For reasons which will appear in this judgment, HC 7830/19 and HC 5877/19 succeed. HC 6064/19 fails.

A judicial manager is to a sick company what a doctor is to a patient. The duties and roles of the two are not dis-similar. They are similar. Both of them employ all their expert knowledge to ensure that the sick company or the patient is allowed to come back to life. It is, therefore, unethical for the doctor who sees an opportunity of recovery on his patient who is on a life-supporting machine to pull off the plug and allow him to die in circumstances where, with the application of necessary medication, the patient's chances of coming back to

life are not only possible but are also probable. It is, by parity of reasoning, unethical for a judicial manager who is aware that, by a correct application of the minimum resources which a company has or should have at its disposal the company may return to the status *a quo ante* its ailment, to apply for its winding up.

By accepting to be appointed into the office, the judicial manager holds himself out to members and creditors of the company that he possesses not only the qualification onto its feet.

The task of the judicial manager is well curved for him in *Tett and Chadwick's Zimbabwe Company Law*, 2nd ed., p 171. It is to nurse the company as best he can in order that he may bring it out of the difficulties which resulted in the order of court. He has all the duties and obligations of a director of the company.

Where the judicial manager entertains the view that he cannot resuscitate the company after he has done his homework on the probabilities or otherwise of the company's life, he should hold meetings with its members as well as creditors and share his findings with, and recommendations, to them and define the correct path for them to follow. If either group persists with continuation of judicial management in circumstances where his expert advice is that the company's life-line is at an end, his option is to resign and pave way for his successor who may, or may not, achieve the members' or the creditors' desired-end-in view. Both members and creditors depend on his good advice which should not be tainted with any apparent conflict of interest. It should, in other words, be *bona-fide* and be tendered with all the facts which are at the disposal of the judicial manager.

Millan N.O.v Smartland Huis Memerleersders Bpk ltd, 1972(1) SA 741(C) 744B spells out the objects of judicial management in a clear and lucid manner. It reads:

> "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. (emphasis added)

The judicial manager's main task, it is evident from the quoted excerpt, is to nurse the company. The company is, by virtue of the court order upon which it rides, afforded a *moratorium* for its healing process. The court order interdicts creditors from continuing to hurt it during the duration of judicial management. These can only come in to lay their claims after the judicial manager has accomplished his work to the satisfaction of the court which imposed the judicial management order. They are allowed to file their claims after the

manager has shown that the company has become a successful concern and is now able to meet its obligations.

Theresa was, during her tenure of office, everything which a judicial manager should not be. She assumed her position on 26 February 2018. She was appointed as such under HC 12810/16. The appeal which was filed in respect of HC 12810/16 disenabled her from performing the functions of her office. The dismissal of the appeal saw Theresa becoming the substantive judicial manager of HPS. She received her certificate of appointment into the office on 21 May 2019. Reference is made in the mentioned regard to Annexures A, B and C. These respectively appear at pp 8, 9, and 10 of HC 7830/19.

From the date of her substantive appointment into the office of judicial manager of HPS, Theresa has done no judicial management work at all. She has, for instance, not called any meeting of members of the company. Nor has she convened any meeting of HPS's creditors. She has not submitted to creditors of the company any report which shows the assets and liabilities of the company and/or its debts and obligations as verified by the company's auditor(s). She has, in short, violated paras (g), (h) and (i) of s 306 of the Companies Act [*Chapter 24:03*]. She has no explanation, let alone a sound one, for acting in the manner that she did. She paid no regard to peremptory provisions of the law. She showed a complete disdain of the law.

Theresa adopted an arm-chair approach to her work. She did virtually nothing of her own in furtherance of the functions of her office. She placed reliance on the work of her predecessor whom the court removed from office because of incompetence. She was more in, than out of, court seeking this or that relief which, in the majority of cases, had nothing to do with her work as a judicial manager. She spent a great deal of her time either filing this or that application against Michelle or opposing applications which he filed in furtherance of the interests of the company.

Theresa did not act as a good and competent judicial manager. A competent manager is one who has the ability to produce good and appreciable results from minimum resources which are available to him. Her act of selling the only asset of the company in circumstances where she should have transferred title of the asset into the name of the company placed her in an unfavourable light *vis-à-vis* her work as a judicial manager. This is a *fortiori* the case when she sold the asset in violation of:

i. paragraph (4) of HC 12810/16 - and
ii. section 307(i) of the Companies Act.

Theresa's statement which is to the effect that the obligation to transfer title in the property did not lie upon her but upon HPS's legal practitioners is misplaced. She knows as much as anyone does that legal practitioners are agents of their principals and that, as such, they can only act on instructions of their principals. They do not have the capacity to act on their own and, if they do so, they would be acting *ultra vires* their mandate.

Judicial management, it is trite, relieves directors of a company of their rights and/or duties in the company. Those rights and duties are transferred to the judicial manager for the duration of the court order.in terms of which the judicial manager receives his appointment. The judicial manger, therefore, has the duty to instruct legal practitioners of the company to perform any work which furthers the interests of the company.

Theresa's predecessor should have instructed the company's legal practitioners to act in terms of para (4) of HC 12810/16. He was removed from the office of judicial manager because of his incompetence. Theresa came into his shoes effectively from 21 May 2019 todate. She should, therefore, have instructed the company's legal practitioners to act in terms of para (4) of HC 12810/16. Her failure to act as she should have done is very telling. It shows nothing other than that she had lost the interest to resuscitate the company to enable it to come out of its difficult circumstances.

Theresa's assertions on the point which is under consideration are not only intriguing. They also display a degree of some confusion on her part. She states that, it was not her obligation to act in terms of para 4 of HC 12810/16. She states, further, that Michelle or the legal practitioners of HPS bore that responsibility. She states, in the same breadth, that she signed the transfer documents and handed the same to legal practitioners of the company. One is left to wonder as to the real work which she performed on the issue which relates to her conduct *vis-à-vis* the transfer of tittle in the asset into the name of the company.

The logic of Theresa's above-mentioned statement leaves a lot to be desired. If she instructed the company's legal practitioners to transfer tittle in the asset into the name of the company as she asserts, one is left to wonder as to what prompted her to sell the very asset upon which the company's fortunes were/are premised. The existence of the asset in the company's books would, no doubt, have enhanced the company's standing financially.

Theresa states correctly that the object of judicial management is to resuscitate the company. She insists that HPS could not be revived because it had been closed for three or four years and because it had no clients/customers, nor stock, nor transport nor any working capital. She, however, ignores the existence of the asset which, if transferred into the name of

the company, could have been used as a collateral to raise the requisite capital with which she would have resuscitated HPS.

She admits that she did not have the power to sell the asset without leave of the court. She alleges that her opinion to wind up HPS was a result of information which she received from the work of the previous judicial manager. She, however, complains that his work was inaccurate in the sense that he mixed together pre- and post-judicial management debts. Why she placed reliance on work which she knew was inaccurate remains a matter for anyone's guess. The email which one Munyaradzi Masamba wrote to her on 6 May 2019, Annexure 9, contains matters which gave useful pointers to her work. It appears at p 48 of HC 7830/19. It is in the same that he requested her to:

(i) verify the creditors' list which, in his view, appeared to have been inflated in an unwholesome manner;

(ii) ascertain HPS's assets and liabilities – and/or

(iii) woe potential investors or shareholders into the company.

He remained of the view that the introduction of the asset into the looks of HPS should result in it being in a much better standing financially.

Theresa does not appear to have taken advantage of the useful pointers to which her attention was drawn by Mr Masamba. She, in fact, acted contrary to the useful information which had been placed at her disposal. She wrote to Michelle on 20 May 2019 recommending the liquidation of HPS. Reference is made in this regard to Annexures D11. This appears at p 52 of HC 7830/19.

A judicial manager who has no regard for the law cannot justify his continued existence in the office into which the law appointed him. This is a *fortifori* the case where, as *in casu*, he violates clear and peremptory provisions of the law through which he ascended into the office of manager and has no explanation, let alone a sound one, for his unwholesome conduct. Such a manager displays the opposite of the character of *Bractone*, one of the famous ancient Greek philosophers who said he feared only two things under the sun. He asserted that he feared God and the law. He said he feared God because he makes him man who is not man and he feared the law because it makes him king who is not king.

It is the law which makes him judicial manager who is not such. When he therefore goes against what makes him what he is and has no justification for his conduct, the law cannot allow him to remain in the position into which it placed him. It logically removes him from what it created him to be and replaces him with another. This, in short, is the essence of

the application of Michele. He is moving me to remove Theresa from her office. His reason is that she did not perform and she violated the law.

Theresa violated the law in a very inexplicable manner. She:-

i. acted against para (4) of HC12810/16.
ii. contravened paras (g), (h) and (i) of s 306 of the Companies Act,
iii. did not apply for cancellation of the judicial management order and the issuance of an order for the winding up of HPS - and
iv. contravened s 306(m) of the Companies Act.

The speed with which she moved to place the company into liquidation displays nothing but her intention to work not as a judicial manager but the liquidator of HPS. She relegated her duties in the field of judicial management in preference to those of a liquidator.

Theresa knows as such much as anyone does that the duties of the liquidator are not synonymous with those of a judicial manager into which office the law appointed her. The difference of the two offices was clearly articulated in *S. Cohen* vs *Johson & Johnson*, 1970(4) SA 332, 336F-G in which it was stated that:

> "The purposes of a liquidation order are entirely different from those sought to be achieved by an order for judicial management. In the one case, the very object is to wind up the affairs of the company and effect its dissolution; in the other, the object is just the opposite, namely, to avoid the liquidation where there in a chance of the company surmounting its difficulties by a proper management, namely management by a person appointed as judicial manager to conduct the affairs of the company subject to the supervision of the court." (emphasis added)

Theresa did not manage the affairs of the company at all. She failed to avoid its liquidation as she should have done. She appears to have seen no chance of the company coming back to life. She, in fact, moved for its liquidation. She cannot, therefore justify her continued existence in the office of judicial manager for HPS. This is a *fortiori* the case when her intention, as gleaned from the record, is to kill, and not to resuscitate, the company. Her appointment and continued occupation of the office of judicial manager brings more harm to the company than good. She must, therefore, vacate that office. If the going was tough for her, as she appears to insinuate in her papers, her best option was to move to be relieved of her duties and pave way for her replacement. Her appointment as measured against the work which she committed herself to perform and did not perform served no meaningful purpose. Similarly, her continued occupation of the office of judicial manager serves no purpose at all.

The application for Theresa's removal from judicial management of the company is not without merit. All the facts are on the wall for anyone to read. The application is, accordingly, granted as prayed.

Theresa's application for liquidation of the company, HC 6064/19, brings to the fore the conversation which Abraham held with God almighty. The conversation is well recounted in Genesis Chapter 18 vs 17-33. It is about God's intention to destroy the cities of Sodom and Gommorah because of the wickedness and iniquitous conduct which the people of the two cities had been convicted of, so to speak, Abraham, so it would appear, entered into what may be referred to as a plea bargaining with God. He implored God to serve the two cities if there were, initially, fifty righteous people in the one or the other or both cities. God's response to his first plea was that if that was the case, he would not destroy the cities for the sake of the fifty righteous people who were in the cities. Abraham persisted with his bargaining exercise. He went down to forty-five, thirty, twenty and ten righteous people and God's answer, in each case, was quite assuring. He stated, in the end, that he would not destroy the two cities for the sake of ten righteous people who were in the cities.

Because no ten righteous people were existent in the one or the other or both cities, the people of Sodom and Gommorah were swept away in the consuming fire. God saw no reason for him to allow the cities to be spared. There was nothing which compelled him to spare the sons and daughters of Sodom and Gommorah from the consuming fire. His wrath on the two cities had every justification.

The circumstances of the people of Sodom and Gommorah are not similar to the circumstances of the company which is under consideration. In the one case, there were no ten righteous persons who could have persuaded God Almighty to exercise his prerogative of mercy on the two cities. His act of destroying both cities had every justification. He had no reason to spare anyone when no ten righteous people were non-existent in the cities of Sodom and Gommorah. In the other case, the company is not without any asset(s). The existence of those assets would not easily persuade me, or anyone who is in my line of work, to destroy the company completely as Theresa is moving me to do.

Theresa states, in para 2 of her founding affidavit, that the registered offices of the company are at 45 Spurrier Road, Adbennie, Harare ("the property). The property, it is trite was purchased with the company's money but was fraudulently registered in the name of a company called Baledale Investments(Pvt) Ltd under title deed number 1069/07. The

property is, therefore, that of the company and not that of Baledale Investments (Pvt) Ltd. Theresa is aware of the stated fact.

The proceedings which Michelle filed under HC 12810/16 unearthed the fraud as a result of which the court directed that:

a) Title deed under 1069/07 in favour of Baledale Investments (Pvt) Ltd be cancelled in terms of s 6 of the Deed Registration Act - and
b) upon cancellation of the tittle deed number 1069/07, the property be transferred into the name of the company.

For reasons which are known to her, Theresa did not cancel title deed number 1069/07. She did not transfer title in the property into the name of the company. What she did was to conduct an informal evaluation of the property the value of which was placed at $165 000. She advances no reason for conducting an exercise of such a serious magnitude in the manner that she did. She appeared to have intended to down-play the real value of the property with a view to having the company liquidated. This can easily be gleaned from the application which is currently under consideration.

Theresa betrays her *mala fide* intention when she states, as she does, that she sold the property for $1 400 000. The selling price of the property shows the real value of the same. That value does not compare with the informal evaluation of $165 000. The real and correct value of the property cannot remain *in sync* with the contents of Theresa's hymn wherein she alleges that the company is defunct to the extent that, with proper management, it cannot be resuscitated. This is a *fortiori* the case given Michelle's statement which is to the effect that he is prepared to invest in the company provided title in the same has been transferred into the name of the company.

Michelle, it is my view, is not the only potential investor of the company. A lot more investors are likely to come on board if title in the property is allowed to find its way into the name of the company. The object of the company, the record reveals, is the sale of vegetable produce. The business has the probability of becoming a lucrative one. Judicial notice is taken of the fact that businesses which are in the line of sale of food products are not likely to fall by the way side if they are properly managed.

HPS suffered poor judicial management on two separate occasions. Theresa's predecessor worked towards its destruction. Theresa took it a step further into a bottomless pit, so to speak. She did not do any judicial management work at all. Her aim and object

appeared to have been set. It was to destroy the company further than where her predecessor left it.

Theresa appears to have been eager to protect the companies' creditors at the expense of its members. The one-size-fits-all approach which she adopted for her work has its advantages and disadvantages. She, by virtue of her office, should have catered for the interests of both members and creditors of HPS. This is a *fortiori* the case given that her coming into the office of judicial manager was at the instance of Michelle who is the majority shareholder of the company.

Paragraph 31 of Theresa's founding affidavit lists twenty-one creditors of the company. The total of their claims adds up to the sum of $428 890.72. It follows, from the stated matter, that even if these were to be given their dues as per Theresa's intention of protecting them, the company would remain with an excess of over $800 000 with which its resuscitation would have been made possible. Theresa's statement which is to the effect that the company was/is defunct does not, therefore, hold. It is not only a mis-statement. It is also misplaced.

The characteristics of the above-observed matter are not in consonant with liquidation of the company. This is a *fortiori* the case when the claims of its provisionally accepted creditors add up to only $85 369.67. This sum as measured against the real value of the property leaves a balance of $1 314 630.33. It is, accordingly, a fallacy for Theresa to suggest, as she is doing, that a company which has a residual value of over $1 000 000 after its creditors have been paid is defunct. The reality is that it is, with proper management of its residual value, capable of returning on to its feet and becoming a successful concern. The stated matter finds fortification from the known fact. The known fact is that creditors of a company which is under judicial management are not allowed to lay their claims against it whilst its management is in existence. The long and short of the statement is that a well-intentioned judicial manager cannot fail to resuscitate the company which has an asset value of $1 400 000. This s f*ortifori* when creditors who require only $85 369.67 of it are prevented from having it when the court order which relates to its management is still extant.

The company which is under consideration has suffered a number of setbacks not out of its own making but out of officers who were appointed to manage it. The first judicial manager was just but incompetent and his removal had every justification. His successor who is its current judicial manager took up management of the company with preconceived ideas from which she refused to depart. She did not do any work for the company at all other than

to move for its liquidation the application of which I am invited to consider *in casu*. Both judicial managers overlooked the existence of the company's property with which they would have been enabled to turn the fortunes of the company around and make it a successful concern to enable it to meet its obligations. The property has real, as opposed to imagined, value. Its worth is $1 400 000 and that is not a mean figure which can easily be ignored in judicial management of the company's affairs. The company, therefore, has every prospect of recovery. It has the requisite capital from which it can commence to move back to life after the period of set-back to which Theresa continues to harp upon.

It is for the abovementioned reason, if for no other, that Michelle advised Theresa through his legal practitioners not to:

a) liquidate the company and/or
b) sell the company's property

The reasons which Michelle and his legal practitioners advanced for the injunction which they imposed on Theresa are both sound and cogent. Theresa, they correctly advise, did not have the mandate to either liquidate the company or to sell its property. Her brief, they correctly argue, was to resuscitate the company. She failed to perform the duties which the Act imposed upon her. She ventured into an area which was not her concern. Her motion to wind up the company is completely outside her mandate.

Whilst Theresa's statement which is to the effect that it is not her mandate to start a new company for the benefit of its shareholders is correct, no one requested her to start a new company as she is suggesting. Her appointment was to judicially manage HPS and to give life to it. The company was, by her own statement, incorporated on 26 October 1994. It was incorporated according to the laws of Zimbabwe. Its share structure is intact. Its object of selling vegetable produce has not changed. What has changed is mismanagement of its operations, initially by its directors and later by its judicial managers. Its certificate of incorporation is intact making Theresa not to start a new business for it. Its existing valuable asset is her key to bringing it back to life. Theresa's continued oblivion of this obvious fact is unfortunate. Yet the existence of the property is a reality which cannot be wished away.

The application which Theresa filed in violation of s 306(m) of the Companies Act is of no force or legal effect. It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect and the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected (see *Schierhout* vs *Minister of Justice* 1976 AD 99). Failure to comply with a peremptory

requirement is usually presumed to entail a nullity (See *Maxwell's Interpretation of Statutes*, 7 ed., p 316).

It follows, from a reading of the foregoing excerpts, that Theresa's application for liquidation of HPS is so fatally defective that it cannot be resuscitated. Equally fatally defective is the sale of the property of the company in violation of s 307(i) of the Companies Act. The sale which is in violation of a peremptory provision of the Act is of no legal force or it. Nothing prevented her from applying to court to dispose of the property. The speed with which she proceeded to sell the property is very telling.

Theresa's statement which is to the effect that the notice which she should have given to members and creditors of the company as is stipulated in s 306(m) of the Companies Act was given to them by her predecessor cannot hold. There is no evidence which shows that the failed judicial manager served such notices on the company's members and/or creditors. However, even if he did, the same would not extend to the application which she filed. The application of her predecessor is not synonymous with her own application. The two are separate and distinct from each other. Their case numbers are different and so are the applicants in each case. The application of her predecessor cannot be her application. She should, therefore, have complied with para (m) of s 306 of the Companies Act. The provision is not directory. It is peremptory in both form and substance.

There is, in my view, a reason why s 307(1) was inserted into provisions of the Companies Act. The court supervise the work of judicial managers through the office of the Master of the High Court. As was correctly stated in *Feigenbaum & Anor v Germanis NO & Ors*, 1998 (1) ZLR 286 (HC):

> "Judicial management is an extraordinary procedure made available to a company by the court in special circumstances and for statutorily prescribed purposes **** The procedure is only adopted when the court is satisfied, on the facts contained in the application, that there is a reasonable probability that, if placed under judicial management, the company which is unable to pay its debts will be able to pay its debts in full, meet its obligations and become a successful concern….. The court can authorise the sale or disposal of the company's assets only if that enables the provisional judicial manager or the final judicial member to carry on the business of the company for the achievement of the purposes of judicial management …." (emphasis added).

It is only in the limited circumstances where the judicial manager is harmstrung to move forward in his judicial management work owing to lack of the financial resources that he seeks leave of the court to sell some of the assets of the company to raise the requisite capital with which to bring the company back onto its feet. Where he applies to sell the

assets of the company with a view to liquidating it, his motion will most probably find no favour with the court. It would not authorise him to do the very acts of disabling the company from becoming a successful concern.

Theresa's sale of the property of the company without leave of the court would appear to be not without a reason. She realised that, if she applied to sell, the court would not grant her application. It would not do so because it had identified the property as having been the only means by means of which the company's fortunes would be able to be turned around. She, therefore, disposed of the property to justify her application for winding up of the company. Her thinking process failed. It failed because she acted outside the law. Her application for liquidation of the company, therefore, fails.

Theresa sold the property of the company for $1 400 000. She does not state if she received the purchase price or not. Whatever the outcome of the unlawful sale which she conducted may be, Theresa cannot be allowed to transfer title in the property from Baledale Investments (Pvt) Ltd into the name of the person to whom she purported to have sold the property. She cannot be allowed, at law, to do so when the sale was in violation of the law. A sale which is in violation of the law, it is trite, is no sale.

Michelle's application for a caveat comes in handy to interdict both Theresa and the supposed purchaser of the property from making an effort to transfer title in the property from the one to the other. What Theresa should have done but failed to do was to transfer title in the property into the name of the company. She failed to do so out of an apparent *mala fides* on her part.

Having violated the law left, right and centre as is evident from matters which are filed of record, Theresa's propensity to want to continue to violate the law by transferring title in the property to the purported purchaser cannot be viewed lightly. She must, therefore, be estopped from doing so. The caveat which Michelle is moving for under HC 5877/19 serves the purpose of protecting the property and eventually allowing title in it to pass to its lawful owner which is the company.

The caveat, as was aptly stated in *Stenhop Investments (Pvt) Ltd v Blessing Mukoko & Anor* HH 132-18 is a notice or warning that is registered over a property by a person who claims to have some interest in the property concerned. The purpose of a caveat is to preserve and protect the rights of a person who seeks to have a caveat placed on a property. The effect of a caveat on a property is that the property cannot be sold or disposed of without giving effect to the caveator's interest. Once a caveat is placed over a property, the said

property cannot be transferred, mortgaged or disposed of without the caveator's consent……" (emphasis added).

It is the intention of Michelle to have title in the property transferred into the name of the company. It is his further intention to replace Theresa with a new judicial manager who would pull the company out of the mud into which Theresa and her predecessor drugged it. It is, therefore, his intention to arrest the situation so that it will not go out of hand by allowing title in the property to move into the name of the purported purchaser. Once the caveat is placed over the property, Theresa cannot transfer title to the purported new purchaser and the latter cannot do the same where he purportedly re-sells the property to another supposed purchaser. The caveat which Michele is moving me to grant to him does, therefore, serve a very useful purpose. His application matter HC 5877/19 is, accordingly, granted as prayed.

Muza and Nyapadi, applicant's legal practitioners
Coghlan Welsh & Guest, respondent's legal practitioners