REPORTABLE ZLR (56)

Judgment No. SC 77/04

Civil Appeal No. 346/01

COSMOS CELLULAR (PRIVATE) LIMITED v

POSTS AND TELECOMMUNICATIONS CORPORATION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE, JULY 22 & SEPTEMBER 23, 2004

A Mugandiwa, for the appellant

E T Matinenga, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which granted a provisional judicial management order in respect of the appellant company ("Cosmos") at the request of the respondent ("the PTC").

The factual background in the matter was correctly set out by the learned judge in the court *a quo* as follows:

> "In November 1996 the PTC launched its cellular telephone service Net*One, with Cosmos and two other companies being service providers. In terms of the contracts entered into with the three service providers, the PTC was to set up a cellular telephone service centred around an electronic switching device ('the mobile switch') which receives and distributes electronically all calls so made, and notifies the service providers of all such calls, their destinations and the duration of each. The role of the service provider is to sign up customers to use the PTC cellular service, to provide them with Sim cards, and to bill the customers, collect the money due and pay the PTC its charges within thirty days. The service provider enters into a contract with each subscriber and provides the cellphone. For its services the service provider is entitled to a monthly commission on the charges it collects. It is responsible for, and must carry, the bad debts that occur.

In April 1999 the PTC issued summons claiming payment of $74 558 801.82. Cosmos admitted that as at July 1999 the amounts due to the PTC that were outstanding amounted to $92 471 168.86, but claimed that various amounts totalling just over $20 million were not in fact owing, and that it had a counter-claim for loss of revenue in the sum of $48 million. Therefore, the PTC avers Cosmos is incapable of paying its debts as envisaged by s 205(c) and 300(a) of the Companies Act [*Chapter 24:03*]."

The learned judge in the court *a quo* had to determine three questions. The first was whether, in September 1999 when the application for a provisional judicial management order was filed in the High Court, or in October 2001 when the application was heard, Cosmos was unable to pay its debts. The learned judge answered that question in the affirmative.

The second question was whether Cosmos was unable to pay its debts by reason of mismanagement. That question was answered in the affirmative.

And the third question, which was also answered in the affirmative, was whether it was just and equitable that Cosmos be placed under judicial management.

In the circumstances, the learned judge granted the order placing Cosmos under provisional judicial management forthwith. Aggrieved by that decision, Cosmos appealed to this Court.

In my view, there are three sections of the Companies Act [*Chapter 24:03*] ("the Act") which are relevant in determining the issues in this appeal.

The first section is s 205(c), which reads as follows:

"205 When company deemed unable to pay its debts

A company shall be deemed to be unable to pay its debts –

(a) – (b) …; or

(c) if it is proved to the satisfaction of the court that the company is

unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The second relevant section of the Act is s 299(1)(a), which reads as follows:

"299 Circumstances in which provisional judicial management order may be obtained

(1) Subject to section three hundred, the court may –

(a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order".

And the third relevant section is s 300(a), which reads as follows:

"300 Requirements for provisional judicial management order

The court may grant a provisional judicial management order in respect of a company –

(a) on an application referred to in paragraph (a) of subsection (1) of section two hundred and ninety-nine, if it appears to the court –

(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; and

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so."

It is clear from the above statutory provisions that in granting the provisional judicial management order the learned judge in the court *a quo* exercised a judicial discretion. In a number of cases, this Court has stated that its power to interfere with the exercise of a judicial discretion is limited.

Thus, in *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) at 618 B-C, GUBBAY CJ said the following about the exercise of a judicial discretion:

> "In considering the cogency of the submission, what should not be overlooked is that BARTLETT J exercised a discretion to hear the matter. That he did so is a significant factor at this stage of the proceedings. Unless it can be found that no reasonable judge would have acted other than to decline jurisdiction – certainly a length to which I am not prepared to go – the decision made is plainly beyond interference by this Court."

About three years later, in *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S), GUBBAY CJ again commented on the exercise of a judicial discretion and at 62F-63A set out the grounds on which this Court would interfere with the exercise of a judicial discretion as follows:

> "The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion - may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court."

A similar principle has been expressed by the judiciary in the United Kingdom. Thus, in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 2 All ER 343 at 345 B-C ASQUITH LJ said:

> It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

With that principle in mind, I now turn to the questions which the learned judge in the court *a quo* had to answer, and determine whether there is any basis for interfering with the exercise of his judicial discretion.

As already indicated, the first question considered by the learned judge was whether in September 1999 when the application for a provisional judicial management order was filed in the High Court, or in October 2001 when the application was heard, Cosmos was unable to pay its debts.

In this regard, I wish to make three points. The first is that in a letter to the PTC dated 30 November 1998 the chairman of Cosmos, Mr Siziba ("Siziba"), admitted that Cosmos owed the PTC at least $21 489 820.01. The letter, in relevant part, reads as follows:

> "You will note that we have taken the liberty of deducting interest charges raised by you in anticipation of your favourable consideration of our request that you waive your claim for interest.

This leaves the outstanding amount due to you as $21 489 820.01 which we undertake to pay to you by weekly instalments of not less than $1 500 000.00 payable by noon every Friday commencing 4 December 1998."

In my view, that was a clear admission by Cosmos that it owed the PTC more than $21 489 820.01. Cosmos was aware that interest was payable but hoped that the PTC would waive its claim in that respect. However, it gave no reason as to why the interest which the PTC was entitled to charge should be waived. In addition, the undertaking by Siziba that the debt of $21 489 820.01 would be paid off by weekly instalments of $1 500 000.00 was not carried out.

The second point I wish to make is that the papers show that at a meeting held at Kopje Plaza on 26 August 1999 Cosmos admitted that its cumulative outstanding debt to the PTC up to July 1999 was $92 471 168.86, but claimed that certain amounts had to be deducted from that sum.

The first deduction claimed by Cosmos was the sum of $7 278 761.62 in respect of commissions which Cosmos alleged were payable to it by the PTC. However, it is pertinent to note that as a result of a court application filed in the High Court by the PTC, and opposed by Cosmos, MUBAKO J issued a declaratory order indicating that the commissions in question were not payable by the PTC. There was, therefore, no basis for deducting the sum of $7 278 761.62 from the admitted debt of $92 471 168.86.

The second deduction claimed by Cosmos was the sum of $10 923 419.78 in respect of sales tax. In this regard, the contention by Cosmos was that it was liable to pay sales tax to the Commissioner of Taxes, and not to the PTC, for onward transmission to the Commissioner of Taxes. However, Cosmos did not dispute that the amount was payable in respect of sales tax. It follows, therefore, that the sum of $10 923 419.79 was a debt payable by Cosmos, either to the PTC or to the Commissioner of Taxes. Cosmos did not give any reason for not having paid the sales tax to the Commissioner of Taxes.

The third deduction claimed by Cosmos was the sum of $12 911 686.19 in respect of a July 1999 invoice. The deduction was claimed on the basis that the amount was not due and payable until a week later on 2 September 1999. However, that date came and went and the amount was not paid.

The fourth and final deduction claimed by Cosmos was the sum of $48 000 000.00, being the loss allegedly sustained by Cosmos as a result of the alleged failure by Net*One to supply Cosmos with 5 000 Sim cards when the service provider contract was signed in 1996. The PTC denied liability in respect of that claim, and Cosmos did not take any legal action against the PTC to enforce the claim.. In addition, there was no indication whatsoever of how the sum of $48 000 000.00 had been arrived at.

The third point I wish to make is that the answering affidavit filed by the PTC in June 2001 established that since the filing of the application for a provisional judicial management order in September 1999 the debt owed to the PTC by Cosmos had increased very substantially to about two hundred million dollars, and that it was not diminishing.

Counsel for Cosmos criticised the learned judge in the court *a quo* for taking into account allegations contained in the answering affidavit which had not been set out in the founding affidavit filed by the PTC.

Whilst it is correct that in general an applicant must stand or fall by his

founding affidavit and the facts alleged in it, and that he should not introduce new matter in his answering affidavit, this is not an absolute rule. Where, for example, the omission of the allegations from the founding affidavit has been satisfactorily explained, the introduction of the new allegations in the answering affidavit should be sanctioned. See *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205 F-I.

In the present case, the allegations in the answering affidavit relied upon by the PTC relate to events which took place after the application had been filed and could not have been included in the founding affidavit. That, in my view, satisfactorily explains why the allegations were not set out in the founding affidavit.

In the circumstances, the learned judge came to the conclusion that at the time the application for a provisional judicial management order was filed in the High Court in September 1999, and at the time the application was heard in October 2001, Cosmos was unable to pay its debts. I cannot see any basis for interfering with that conclusion, a conclusion reached by the learned judge in the exercise of his judicial discretion. The conclusion cannot be said to be plainly wrong, having regard to the evidence.

I now wish to consider the second question determined by the learned judge, which was whether Cosmos was unable to pay its debts by reason of mismanagement.

Dealing with that issue, the learned judge said the following at pp 9-11 of the cyclostyled judgment, judgment no. HH-199-2001:

> "Cosmos admitted that it had been remiss in that it has not kept detailed minutes of its various meetings. It also admitted that it had not produced financial statements for the years ended 31 December 1996, 1997 and 1998. It said that it had produced draft financial statements for each of the three years but they had not been finalised because of the ongoing commission disputes with the PTC. It is significant that none of these drafts were filed. Cosmos did not deny the allegation (that) it has never had any of its accounts audited since its inception. Neither did it deny the allegation that no statutory returns have been rendered to the Registrar of Companies since it was first registered. Cosmos also admitted that it had a debt recovery problem. …
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> In my view, the PTC has established that the failure by Cosmos to pay its debts could be said to be due to mismanagement. Cosmos has not refuted most of the allegations made by the PTC to support its claims of mismanagement."

I entirely agreement with the observations and conclusions of the learned judge.

Finally, with regard to whether it was just and equitable to place Cosmos under judicial management, the learned judge said the following at p 11 of the cyclostyled judgment:

> "The object of judicial management is to obviate a company being placed in liquidation if there is some reasonable probability that, by proper management or by proper conservation of its resources, it may be able to surmount its difficulties and carry on. There is no doubt that the PTC has very substantial claims against Cosmos, and if it were now to enforce its claims, Cosmos would be liquidated, to the detriment of its subscribers. The PTC has been more than patient … but has now come to the end of its tether and rightly so, because every month Cosmos' debts to the PTC are increasing, instead of diminishing. The alternative to judicial management is to place Cosmos in liquidation. In the circumstances, it seems to me that it is just and equitable to place Cosmos under judicial management."

I cannot find any fault with the learned judge's reasoning.

Before concluding this judgment, I would like to deal very briefly with the submission that since the granting of the provisional judicial management order Cosmos had ceased conducting its core business. I do not think that that is an issue which should concern this Court, because the alleged information is not properly before us. However, the information could form a basis on which Cosmos could oppose the granting of a final judicial management order on the return day of the provisional order.

There is, therefore, no basis on which this Court can interfere with the exercise of a judicial discretion by the learned judge when he granted the provisional judicial management order in favour of the PTC.

In the circumstances, the appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Wintertons, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners