REPORTABLE (19)

SECURITIES AND EXCHANGE COMMISSION OF ZIMBABWE
v
(1) PHIBION GWATIDZO N.O.
(2) FIRST TRANSFER SECRETARIES (PRIVATE) LIMITED
(3) MAST STOCK BROKERS (PRIVATE) LIMITED
(4) MASTER OF THE HIGH COURT N.O.

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & MAVANGIRA AJA
HARARE, JULY 4, 2014 & MARCH 14, 2017

D Ochieng, for the appellant
L Madhuku, for the respondent

HLATSHWAYO JA: This is an appeal against an *ex tempore* judgment of the High Court given on 11 November 2013. Detailed written reasons for the *ex tempore* judgment were availed on 3 April 2014.

At the end of hearing arguments from both parties in this appeal, we reserved judgment and indicated that judgment would be delivered in due course after consideration of the issues raised.

The order of the *court a quo* sought to be impugned reads as follows:

"IT IS ORDERED THAT:

1. The third respondent's directive to first and second respondents barring them from selling and/or registering the

shares of Renaissance Securities (Pvt) Limited (In Liquidation) be and is hereby declared unlawful, void and of no force.

2. The third respondent shall pay costs of this application on the scale of legal practitioner and own client."

Although the parties had approached the court below for a provisional order, by the consent of the parties, the above final order was issued. The factual background to this matter is undisputed and amply captured hereunder.

Renaissance Securities (Pvt) Ltd (the company) is in liquidation. The first respondent was appointed liquidator of the company. In the course of executing his duties as a liquidator, the first respondent instructed the third respondent to sell various parcels of shares in the company's name. Consequently, and as recorded in the judgment *a quo*, but with references to the parties (in brackets) appropriately modified:

> "Between 27 June 2013 and 9 July 2013 the (third respondent) sold shares valued at $308 683-57. The amount was deposited into a trust account established for that purpose. During the period between 28 June 2013 and 2 July 2013, the (3rd respondent) also sold shares to the value of $ 434 167-14. The (third respondent) is yet to tender the purchase price of the shares to the (first respondent).
>
> On 25 July 2013, the (3rd respondent) advised the (1st respondent) that the (appellant) had issued a directive to the effect that the (3rd respondent) stop selling any or all of the company shares and if it had already sold or transferred any such shares, to reverse the sales and cancel the registrations. Pursuant to the directive the (third respondent) has since stopped dealing with the shares and is demanding the reimbursement of the sum of $308 686-57." p.2 of cyclostyled judgment.

Aggrieved by the directive stopping the third respondent from selling the said company shares, the respondent approached the court a

quo on an urgent basis seeking a *declaratur* to the effect that the appellant had no power to interfere with a liquidation process in the manner it did. The first respondent averred that the appellant's directive was unlawful as one could only interfere with the liquidation process in terms of s 222(3) of the Companies Act [*Chapter 24:03*]. In essence, s 222(3) of the Companies Act permits a party aggrieved by an act or decision of the liquidator to apply to the court which court may make any order it deems fit. The first respondent's contention focused on this section which according to its interpretation was the only avenue to interfere with or challenge any decision of a liquidator.

The directive issued by the appellant was made in terms of section 4 of the Securities and Exchange Act [*Chapter 24:25*]. Section 4 of the Securities and Exchange Act mandates the appellant to *inter alia* provide high levels of investor protection.

It was and still is the appellant's contention that failure to protect investors by allowing the first respondent to sell shares whose ownership is uncertain would be an abdication of one of its primary duties in terms of s 4 of the Securities and Exchange Act. It is agreed between the parties that the shares in question were registered in the name of the company as a nominee shareholder. According to the appellant, these shares were owned by beneficial owners who are investors it sought to protect. According to the first respondent, he made various efforts to find the beneficial owners of those shares and no-one claimed them. Subsequently, first respondent drew what he regards as the only

reasonable inference that the shares belonged to the company in liquidation. The court a *quo* made a finding in favour of the first respondent declaring that the appellant's directive to the first and the third respondents was null and void.

The court a *quo* in its finding reasoned that any third party seeking to interfere with the duties of a liquidator regarding assets of a company had to seek leave of the court. The court referred to Roman Dutch Law concept of *concursus creditorum*. However, the application of the concept to the facts before it was not adequately explained. The court further reasoned that the appellant had the onus to prove that the shares in question did not belong to the company but to a third party. In the court a *quo's* view it would be unlawful for the appellant to exercise its powers in terms of the Securities and Exchange Act without ascertaining the owners of the shares.

Dissatisfied with the decision *a quo* the appellant noted this appeal challenging the decision on the following grounds:

1. The judge of the court a quo erred in finding that Appellant's powers could only be exercised through the court, and;

2. The judge of the court a quo erred in finding that First respondent had done all he could to identify the owners of the shares in question, and so had the right to sell the shares for the benefit of the company in liquidation.

In the light of these grounds of appeal, the two questions this court is seized with are:

a) Whether the appellant's powers in terms of Securities and Exchange Act can be exercised without leave of the court, and
b) Whether the failure by the appellant to identify the owners of shares leads to an inference that the shares are owned by the company. Alternatively, whether the 1st respondent discharged the onus expected of its office in the identification of the owners of the shares.

We shall deal with these questions separately hereunder.

a) Whether or not the appellant's powers in terms of Securities and Exchange Act can be exercised without leave of the court

The appellant strongly avers that in issuing the directive as it did to the first and third respondents it was acting pursuant to the Securities and Exchange Act. To this end the appellant maintains that no leave must be sought in executing its duties in terms of the Act clothing it with authority. As submitted by Mr *Ochieng*, for the appellant, the appeal raises the question whether a company in liquidation may escape the exercise of administrative powers by a regulator purely because it is in liquidation. According to the appellant a lawful directive of general application cannot be impugned on the basis of the provisions of the Companies Act requiring prior approval of a court.

The long title of the Securities and Exchange Act identifies the following as some of the objectives of the Act: to control and regulate the marketing of securities and investment in securities and to regulate and register securities exchanges. Section 4 of the Act outlines the objectives,

functions and powers of Securities and Exchange Commission of Zimbabwe (appellant in *casu*). Some of the appellant's objectives are to *inter alia*, provide high levels of investor protection; reduce systemic risk, that is to say, a risk that a failure on the part of one or more registered securities exchanges or licensed persons to meet their obligations may result in other registered securities exchanges or licensed persons being unable to meet their respective obligations, and to promote market integrity and investor confidence. It is clear that the powers conferred to the appellant by the Act to achieve its objectives and functions are not made subject to the Companies Act [*Chapter 24:03*].

The first respondent avers and affirms the finding a *quo* that a dispute between the liquidator and any other person relating to ownership of assets held by the company in liquidation can only be dealt with in terms of the relevant provisions of the Companies Act. Section 222(3) of the Companies Act provides as follows:

> "(3) Any person aggrieved by any act or decision of the liquidator may apply to the court after notice of motion to the liquidator and thereupon the court may make such order as it thinks."

The question therefore is whether or not the appellant is a person contemplated in s 222(3) of the Companies Act. Is the appellant's exercise of powers conferred to it by the Securities and Exchange Act subject to s 222(3) of the Companies Act?

A plain reading of the s 222(3) of the Companies Act shows that the "acts or decisions" intended are those of an individual liquidator

who must be notified of the approach to the court. That restricted meaning cannot be extended to include general regulation without producing absurd results. For example, a regulator who has noticed bad practices by liquidators across the board would have to seek the leave of the court citing each and every one of the errant liquidators before institution corrective measures of general application! The Securities and Exchange Act is meant to offer independent security to investors which duty cannot be properly discharged if one needs to first seek leave before engaging in acts that secure investments of investors generally.

The directive in question was issued to all securities dealing firms "instructing them not to carry out disposal instructions for firms that are either on suspension, are under liquidation, or had their licences cancelled, without obtaining prior approval from it". The directive is clearly of general application. It matters not that it might have been prompted by a singular instance of perceived potential market risk. Indeed, many pieces of legislation or regulation come about as responses to singular instances with a potential for systemic impact. By contrast, see *CW v Commissioner of Taxes* 1988 (2) ZLR 27 (HC) where a provision was so particularised, *viz,* an exemption from capital gains tax extended only to "those who did not contest" payments for the compulsory acquisition of their shares, that it was held unconstitutional "as it effectively penalized persons who sought to have their constitutional rights tested in the courts".

In *casu*, the appellant acted within its mandate of regulating trading and dealing in securities, supervising and regulating persons carrying on licensed activities and issuing notices and guidelines for any purpose that might facilitate the realization of its objectives and the fulfilment of its functions. It is difficult how the appellant can be said to have acted arbitrarily and unlawfully as submitted by Mr *Madhuku*, who alleges that:

"1. The directive was meant to deal specifically with one company in liquidation but pretended to be a general directive." However, I have already noted that a regulation may be prompted by a singular event but that would not detract from its lawfulness as long as it is of general applicability. The terms of the regulation cover more than just the first respondent.

2. The directive does not appear to have been in writing." It is regrettable that a copy of the directive was not made part of the record, but the terms thereof appear to be common cause and the substance quoted above was actually taken from 1st respondent's own heads of argument.

3. The directive was not communicated to affected persons by the appellant itself. In *casu*, the liquidator only heard about it from the second and third respondents". The argument is not fully developed as to why the first respondent was entitled to individual and direct communication of the directive and how the failure to do so renders the directive arbitrary and unlawful.

Equally undeveloped is the submission that "it is not clear which organ of the appellant issued the directive".

4. The appellant proceeded on the basis of a distinction between a 'nominee shareholder' and an 'owner' and assumed that it had powers to order a nominee shareholder to transfer the relevant shares to the 'owner'" However, in my view, this objection has no relevance to the lawfulness of the general regulation but may be raised when and if the appellant acts in terms thereof when the transactions are referred to it.

Accordingly, I have come to the conclusion that the directive was neither arbitrary nor unlawful and that the court below erred in holding otherwise and failing to make the necessary distinction between general regulation, on the one hand, and particular disputations pertaining to a given liquidation, on the other. The former does not require the prior leave of a court for its proper exercise. The latter does. Therefore, the appellant was not under any obligation to first seek leave of the court before issuing out the above-quoted general directive which affected the first and third respondents the way it did.

b) **Whether or not failing to identify the owner of shares leads to the inference that the shares are owned by the company. Alternatively, whether or not the 1st respondent discharged the onus expected of its office in the identification of the owners of the shares.**

This question is really a red herring when regard is had to the fact that what is at issue is the lawfulness of the directive, or, as already noted, the question can only properly arise upon the implementation of

the regulations, i.e., when and if the appellant acts in terms thereof when the transactions are referred to it. The substance of the question is couched in the following terms *a quo*:

> "…there is a disagreement between the (first respondent) and the (appellant) regarding the ownership of the shares in issue. The (first respondent) contends that the shares belong to the company as it is the registered nominee. He made various efforts to find beneficial owners, if any, of those shares and no one claimed them. This is confirmed by the respondent. He then concluded that they belong to the company. The (appellant) contends that the shares were registered in the name of the company as a nominee shareholder but were owned by beneficial shareholders."

The learned judge of the court below, then concludes:

> "The onus is on the (appellant) to prove that the shares do not belong to the company but to a third party. Before doing that, it has no basis for challenging the company's ownership of the shares in question. It would be clearly unlawful for the (applicant) to exercise its powers in terms of the Act without ascertaining the owners of the shares. Such exercise of power would be arbitrary and would undermine the rights of the owner, which is the company in this case, unless proven otherwise".

It appears to me, however, that there has been an unnecessary conflation of the issue of the lawfulness of the directive and the question of the disputed ownership of the shares. Although the directive was motivated by the disposal of what was perceived as 'nominee shares', the terms of the directive do not dispose of the issue of the nature of the shares. It simply requires that any disposal of shares by the identified entities, *viz.* "firms that are either on suspension, are under liquidation, or had their licences cancelled", be referred to it for its prior approval. It would be in the process of such approval or challenges to non-approval that the questions of onus would arise.

It is common cause that the company, Renaissance Securities (Pvt) Ltd (In Liquidation), was the nominee shareholder of the shares in question. The court a quo also found as much. A nominee shareholder holds shares for the benefit and on behalf of another person. A nominee shareholder is therefore not the true owner of the shares. The remarks made in the case of *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Compan y (Pty) Ltd* 1971 1 SA 441 (A) at 456F are apposite. The court had this to say:

> "The nominee does not have the authority to transfer the shares he holds; for such authority he must refer to his principal, the beneficial owner. Where a nominee has stolen or misappropriated shares registered in his name and transferred them without authority of the beneficial owner, our courts have permitted the beneficial owner to vindicate the shares from a *bona fide* third party who purchased the shares from the nominee."

HS Cilliers, M L Benade *et al Corporate Law* 2 ed at p 237 make reference to the *Oakland* case with approval. It is therefore clear that a nominee shareholder holds shares on behalf of the beneficial owner who is the person who is the real, *de-jure* owner of the shares, and entitled to all gains, profits and benefits accruing through such shares. It being common cause that shares in question were in nominee accounts, it follows therefore that in acting to put in place measures to ensure that such shares whose ownership is disputed are only disposed of with its approval, the appellant did not exercise its powers arbitrarily.

Disposition

In the light of the foregoing, I am satisfied that the appeal has merit. The appellant need not first obtain leave before executing its duties in terms of the empowering Act. The costs ordinarily follow the outcome and nothing has been submitted to merit a departure from this rule.

It is hereby ordered that:

1. The appeal is allowed with costs.
2. The Judgment of the Court *a quo* is set aside and substituted with the following:

   "The application is dismissed with costs".

GWAUNZA JA: I agree

MAVANGIRA AJA: I agree

Coghlan, Welsh & Guest Inc Stumbles & Rowe, appellant's legal practitioners
Mundia &Mudhara, respondent's legal practitioner