

DISTRIBUTABLE (25)

PHILLIP NDLOVU N.O
v
(1) COMMERCIAL BANK OF ZIMBABWE
(2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, MAVANGIRA JA & UCHENA JA
BULAWAYO, JULY, 25 & 26, 2016 & APRIL 3, 2017

S Collier, for the appellant

H Moyo, for the respondent

UCHENA JA: The appellant was through two separate applications, Judgment No. SC 27/2017 appointed provisional liquidator of Archer Clothing Manufacturers (Pvt) Ltd and Lasker Brothers (Pvt) Ltd, companies duly registered in terms of the laws of Zimbabwe. The applications were for the winding up of each of the two companies. Subsequent to his appointment he in the course of his duties ranked the Commercial Bank of Zimbabwe (first respondent) a concurrent creditor of Archer Clothing Manufacturers (Pvt) Ltd. Civil Appeal No. SC485/15

The first respondent was grieved by the appellant's decision. It in terms of s 222 (3) of the Companies Act [Chapter 24:03] applied to the court *a quo* for the setting aside of the appellant's decision. It alternatively sought the rectification of the first mortgage bond registered against Lasker Brothers (Pvt) Ltd on the basis of which the appellant had made his decision, from a first mortgage bond against Lasker Brothers (Pvt) Ltd, to a surety bond securing the first respondent's loan to Archer Clothing Manufacturers (Pvt) Ltd.

The second respondent is the Registrar of Deeds. He was cited in his official capacity. He did not take an active part in the Court *a quo* and before this court.

The Commercial Bank of Zimbabwe (hereinafter called the first respondent) loaned US\$2 500 000-00 to Archer Clothing Manufacturers (Pvt) Ltd. It purportedly secured that loan by registering a first mortgage bond against stand 42 Plumtree Road, Belmont, Bulawayo owned by Lasker Brothers (Pvt) Ltd. The bond gave the impression that a loan had been granted to Lasker Brothers (Pvt) Ltd.

The bond was registered on 1 March 2011, contrary to an inter creditor agreement of 11 February 2011 entered into by the first respondent, BancABC Botswana Limited, Interfin Banking Corporation Limited, Kingdom Bank Limited and Archer Clothing Manufacturers (Pvt) Ltd. The inter creditor agreement prohibited registration or perfection by any participating creditor of its security against Archer Clothing Manufacturers (Pvt) Ltd.

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It was on the basis of these facts that the appellant, ranked the first respondent a concurrent creditor of Archer Clothing Manufacturers (Pvt) Ltd.

The court *a quo* granted the orders sought by the first respondent. The appellant believing that he had correctly performed his duties as a provisional liquidator appealed against the decision of the court *a quo* to this court.

The appeal raises the following issues for determination by this court:

1. Whether or not the decision of the appellant to treat the 1st respondent as a concurrent creditor was correct?

2. Whether the rectification of the first mortgage bond to a surety bond was procedurally and correctly ordered.
3. Whether the court *a quo* erred in ordering the appellant to pay the costs of the application.

Whether or not the decision of the appellant to treat the first respondent as a concurrent creditor was correct?

Mr Collier for the appellant submitted that the appellant was appointed provisional liquidator for the two companies through two applications. He thus had to deal with them as two different companies. He further submitted that the two companies' veil of incorporation had not been lifted therefore the appellant could not have dealt with them as a single economic entity. He submitted that the s 222 (3) application should have been dealt with on its own to determine whether the appellant had correctly ranked the first respondent as a concurrent creditor of Archer Clothing Manufacturer's (Pvt) Ltd. He argued that the reliance on the alternative application for the rectification of the first mortgage bond registered against the property of Lasker Brothers (Pvt) Ltd, to a surety bond securing the indebtedness of Archer Clothing Manufacturers (Pvt) Ltd is a factor the appellant could not have taken into consideration as it was not in existence at *concursum creditorium*.

Miss Moyo, for the first respondent, while conceding that the appellant's decision was prima facie correct, submitted that the appellant should have treated the two companies as one single economic entity and held the first mortgage bond against Lasker Brothers (Pvt) Ltd as a basis for finding that the first respondent was Archer Clothing Manufacturers (Pvt) Ltd's preferential creditor. She further submitted that the court *a quo* correctly rectified the first mortgage bond against Lasker Brother's property to a surety bond securing Archer Clothing Manufacturer's indebtedness to the first respondent. She argued that the rectification of the bond justified the setting aside of the appellant's decision. I do not agree.

It is common cause that when the appellant ranked the first respondent a concurrent creditor there was no mortgage bond registered between the first respondent and Archer Clothing Manufacturers (Pvt) Ltd. The bond which was in existence was a first mortgage bond registered against the property of Lasker Brothers (Pvt) Ltd, in favour of the first respondent. Lasker Brothers (Pvt) Ltd was not indebted to the first respondent. The first mortgage bond against Lasker Brothers (Pvt) Ltd was therefore not based on any obligation by Lasker Brothers (Pvt) Ltd to the first respondent.

The first respondent's application to the court *a quo* was triggered by the appellant's letter to the first respondent's legal practitioner's dated 29 January 2014 in which he said:

“On the issue of CBZ’s status they are as pointed out to yourselves, a concurrent creditor. They have no security as against Archer Clothing Manufacturers. You will note from the papers, copies of which you have that a credit facility was extended to Archer Clothing Manufacturers (Pvt Ltd on the 23rd December 2010. Judgment No. SC 27/2017 Appeal 4
The same document states clearly that a mortgage bond against 42 Plumtree Road Belmont in the name of Archer Clothing (Pvt) Ltd will be registered.

On 1 March 2011, a mortgage bond was registered, not against Archer Clothing Manufacturers (Pvt) Ltd, as the recipients of the money, but Lasker Brothers (Pvt) Ltd. This clearly was not valid as Lasker Brothers (Pvt) Ltd never got any money from CBZ your clients.” (emphasis added)

This is a correct statement on how Archer Clothing Manufacturers (Pvt) Ltd was granted the loan facility and a first mortgage bond was registered against the property of Lasker Brothers (Pvt) Ltd. The position is supported by the identity of the parties to the mortgage bond, and what is stated at p 33 of the record, which reads:

“And the Appearer declared that whereas the mortgagor has been granted certain loan, credit and/or facilities by CBZ Bank limited.”

It is common cause that Lasker Brothers (Pvt) Ltd was not granted any facility by the first respondent. The facility was granted to Archer Clothing Manufacturers (Pvt) Ltd against which it sought to be declared a secured creditor on the basis of a mortgage bond which the first respondent registered against the property of Lasker Brothers (Pvt) Ltd. The appellant had no authority to rectify the bond. He could not have changed things after *concurus creditorium*. He had to make a decision on the basis of the facts as they were, at *concurus creditorium*. *Concurus creditorium* occurs at the time of liquidation. In the case of *Ward v. Barret, N. O & Another N.O* 1963 (2) SA 546 which was relied on by the appellant, STEYN CJ at p 552 D-G said:

“In the result, creditors enjoy as from that date, the protection which is necessary to ensure payment according to recognised priority of claims and to prevent the satisfaction of one creditor to the prejudice of another. In *Walker v. Syfret* NO 1911 AD. 141 at p. 160 Lord De Villres, CJ, **held that the effect of an order winding up a company is to establish a *concurus creditorium*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors.** Innes JA (at p. 166), after stating that a sequestration order crystallises the insolvent’s position went on to say:

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‘the hand of the law is laid upon the estate, and at once the rights of the general body of creditors, have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.’ (emphasis added)

In terms of s 112 of the Companies Act all creditors and contributories are brought under *concurus creditorium* when a liquidation order is granted. Section 112 provides that:

“An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if the petition had been presented by all creditors and contributories jointly.” (emphasis added)

In my view the order operates in favour of each creditor as per the facts of his or her case on the date of the order. The order cannot act in favour of all creditors if some creditors are allowed to improve their status after the granting of the order. The liquidator must therefore act on the facts as they were at *concursum creditorium*.

The appellant had no authority to rectify or change the facts as they were at *concursum creditorium*. His decision was therefore guided by the facts which existed at that time.

I am aware that, in terms of s 222 (3) the court is entitled to make such order as “it thinks”. Section 222 (3) reads:

“(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 therein the court may make such order as it thinks.”

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The meaning of the words “as it thinks” must be ascertained from the power the High Court exercises in terms of s 222 (3).

The court cannot think anyhow. It must think judiciously. A court thinks judiciously when its thinking is guided by the law. It must think within the parameters of the powers given to it by the law. Section 222 (3) does not entitle a court to think outside the provisions of the law as set out by statutes and common law. The thoughts of a court must be guided by the facts found proved and the law applicable to such facts.

The applicant should therefore establish a basis for the court to interfere with the decision of the liquidator. If the applicant fails to do so the court must confirm the decision of the liquidator. If it cannot confirm the decision for some defect in the decision

making process it can make an order in terms of its review powers. The court's entitlement to make such order as "it thinks" does not mean it can make any order it thinks fit even if such order cannot be justified by the facts of the case and the law. A court order is a product of the facts of the case and the law applicable to such facts. The court should therefore judiciously make an order as can be justified by the facts and the applicable law.

An application in terms of s 222 (3) of the Companies Act is a review of the decision of an administrative authority. Such a review should be based on the facts which informed the appellant's decision. In this case the court *a quo* improperly allowed itself to be guided by the application to rectify the mortgage bond. Section 222 (3) does not entitle the High Court to hear another application as a court of first instance for purposes of enabling it to determine a review placed before it.

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A review should be confined to the facts on which the administrative authority made its decision. If those facts justify his decision, that should be the end of the inquiry. An application in terms of s 222 (3) is intended to assess the correctness or otherwise of the Liquidator's decision. The reviewing judge should simply determine whether or not the applicant's grievance is based on any errors made by the Liquidator. It cannot be based on things the liquidator had no authority to do and were not in existence when he made the decision against which the application is made.

In determining such applications courts must exercise judicial deference to the complexity of the task that confronted the administrative authority. In the case of *Logbro Properties CC v Bedderson N.O & Ors* 2003 (2) SA 460 (SCA) at p 471 A-C CAMERON JA commented on judicial deference as follows;

“It is in just such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted the committee. Deference in these circumstances has been recommended as

‘—a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for and the consequences of judicial intervention. **Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.**

I agree. The conclusion is unavoidable that the committee in 1997 acted unimpeachably in considering that the increase in property values might point away from immediate disposal of the property, and, albeit for somewhat different reasons, I agree with Skweyiya J’s conclusion.’” (emphasis added)

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In this case the court *a quo* set aside the decision of the appellant because it factored in its own power to rectify the mortgage bond which informed the appellant’s decision. The court *a quo* thus took into consideration factors which the appellant could not have taken into consideration. It failed to defer to the dictates of the facts which the appellant had to consider in arriving at the decision he did. It failed to confine itself to its review powers. It thus went beyond the reviewing of the appellant’s decision and relied on its own power to rectify the mortgage bond.

Procedurally an application in terms of s 222 (3) should not have been considered alongside an alternative application for rectification as its purpose is to inquire into the correctness or otherwise of the provisional liquidator’s decision and not to interfere with a decision duly and honestly made within the appellant’s discretion. In the South

African case of *Shidiack v Union Government* (Minister of the Interior 1912 AD 642 Innes

ACJ at pp 651 to 652 said:

“Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. This doctrine was recognised in *Moll vs Civil Commissioner, Pearl* (14 S.C., at p. 468); it was acted upon in *Judes vs Registrar of Mining Rights* (1907, T.S., p 1046); and it was expressly affirmed by this Court in *Nathalia vs Immigration Officer* (1912, A.D. 23). There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute- in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

The appellant’s decision is not afflicted by any of the factors mentioned above. It took into consideration the facts of the case as they were at the time and correctly determined the first respondent’s status at law.

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The appellant had no option but to declare the first respondent a concurrent creditor. The facts of the case and the law demanded it. The rectification of the bond by the court *a quo* to justify interference with the appellant’s decision confirms it. There would otherwise have been no need to rectify the bond. The appellant’s decision to rank the first respondent as a concurrent creditor of Archer Clothing Manufacturers (Pvt) Ltd is therefore correct.

The court *a quo* therefore erred when it set aside a decision the appellant correctly and lawfully made.

The same result would in my view have been more directly arrived at if the parties had realised that the High Court exercises civil review powers in terms of ss 26, 27 and 28 of the High Court Act [*Chapter 7:06*], ss 2, 4 and 5 of the Administrative Justice Act [*Chapter 10:28*] and common law. We were unfortunately not addressed on them. I therefore can only comment in passing on the effect they could have had on this case.

Section 26 of the High Court Act grants the court power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.

Section 27 provides for the following grounds of review:

- “(a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- (c) gross irregularity in the proceedings or the decision.”

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Subsection (2) saves reliance on “any other law relating to the review of proceedings or decisions of inferior courts, tribunals or administrative authorities.”

Section 28 provides for the court’s powers on review as follows:

“On a review of any proceedings or decision other than criminal proceedings, the High Court may, subject to any other law, set aside or correct the proceedings or decision.”

The court’s power does not include the hearing of another application by the High Court to enable it to determine the correctness or otherwise of the case under review.

Section 2 (d) of The Administrative Justice Act defines “administrative authority” as:

“(d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned.” (emphasis added)

Section 2 (d) therefore brings the appellant who is authorised by the Companies Act to exercise and perform administrative duties, within the meaning of “administrative authority”.

The High Court’s authority to review administrative decisions is regulated by s 4 of the Administrative Justice Act, which provides as follows:

“(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.

(2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate—

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- (a) confirm or set aside the decision concerned;
- (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
- (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
- (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
- (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.

(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision.

(4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2).”

It should be noted that the court’s power does not include the hearing and determining of a separate issue by the reviewing court to enable it to review the decision of the administrative authority.

Section 5 of the Administrative Justice Act, limits the ambit of things the High Court must take into consideration as follows:

“For the purposes of determining whether or not an administrative authority has failed to comply with section *three* the High Court may have regard to whether or not—

- (a) the administrative authority has jurisdiction in the matter;
- (b) the enactment under which the action has been taken authorises the action;
- (c) a material error of law or fact has occurred;
- (d) a power has been exercised for a purpose other than that for which the power was conferred;
- (e) fraud, corruption or favour or disfavour was shown to any person on irrational grounds;
- (f) bad faith has been exercised;
- (g) a discretionary power has been improperly exercised at the direction, behest or request of another person;
- (h) a discretionary power has been exercised in accordance with a direction as to policy without regard to the merits of the case in question;
- (i) a power has been exercised in a manner which constitutes an abuse of that power;
- (j) the action taken is so unreasonable that no reasonable person would have taken it;
- (k) there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken;

- (l) an irrelevant matter has been taken into account;
- (m) a relevant matter has not been taken into account;
- (n) a breach of the rules of natural justice, where applicable, has occurred;
- (o) the procedures specified by law have been followed;
- (p) any departure from the requirements of section *three* is in the circumstances reasonable and justifiable.”

Section 5 thus limits the issues the High Court can consider in reviewing the “administrative authority’s” decision. It includes, and adds to considerations mentioned in the case of *Shidiack (supra)*. It does not allow the court *a quo* to hear and determine an issue, not raised before the administrative authority and use such decision to invalidate the administrative authority’s decision.

It therefore seems to me that though not ventilated by counsel’s submissions ss 26, 27 and 28 of the High Court Act as read with ss 2 (d), 4 and 5 of The Administrative Justice Act set out the parameters within which the court *a quo* should have thought “fit” in terms of s 222 (3) of the Companies Act.

Whether the rectification of the mortgage bond to a surety bond was procedurally and correctly ordered.

Mr Collier for the appellant submitted that the rectification of the first mortgage bond to a surety mortgage bond securing the first respondent’s loan to Archer Clothing Manufacturers (Pvt) Ltd clouded the court *a quo*’s determination of the application in terms of s 222 (3). He further submitted that rectification where there are disputes of fact should be instituted by action procedure. Miss *Moyo* submitted that the court *a quo* correctly granted rectification and correctly used it to grant the first respondent’s application in terms of s 222 (3) of the Companies Act. I do not agree.

The rectification of the bond by the judge, before he reviewed the liquidator's decision is not provided for by s 222 (3) of the Companies Act. As already said the application in terms of s 222 (3) is in the form of a review of the Liquidators decision or conduct. A review merely deals with the correctness or otherwise, of the administrative authority's decision. It cannot be accompanied by some other application whose decision is intended to influence the setting aside of the liquidator's decision. That adulteration turns it from a review to an application in which the reviewing court exercises its jurisdiction both, as a court of first instance and a reviewing authority. That cannot be procedurally correct.

Rectification of the bond should, if it was possible for the 1st respondent to overcome the limitations imposed by *concursum creditorium*, have been applied for before the appellant's decision so that he would take it into consideration in determining its status.

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It is also common cause that rectification was ordered on the basis of an application which was afflicted by disputes of facts. There was a dispute over whether or not, rectification would prejudice parties with whom the first respondent had agreed not to "perfect or register outstanding security in respect of its claims". The appellant had at a creditor's meeting been asked by one of the creditors to follow up and clarify the 1st respondent's status.

In an inter-creditor agreement between the first respondent, BancABC Botswana Limited, Interfin Banking Corporation Limited, Kingdom Bank Limited and Archer Clothing Manufacturers (Private) limited it had been agreed that:

"No creditor Bank shall take any steps in any manner whatsoever which shall or is likely to have the effect of preferring or improving one Creditor Bank's position against the other Creditor Banks."

The rectification of the bond had the effect of preferring or improving the 1st respondent's position against other creditor banks, which held surety bonds against Lasker Brothers (Pvt) Ltd's properties in respect of Archer Clothing Manufacturers (Pvt) Ltd's indebtedness to those Banks. The appellant had at record pp 46 and 47 paras 6 (e) and 7 (c) raised the issue of the inter creditor agreement and the raising of the first respondent's status by other creditors at a creditor's meeting. This should have made it clear to the court *a quo that it* was being asked to make a decision which would violate the inter creditor agreement without hearing the first respondents' co-creditors.

The first respondent's application was made in circumstances which show that it was being made in a desperate attempt to improve its status in spite of the inter creditor agreement. This is exposed by a letter dated 10 July 2009 Annexure C, which it says was used to surrender the title deeds for the registration of the first mortgage bond. The letter reads:

“These title deeds are to be held as security by CBZ Bank Ltd **in respect of facilities afforded Archer Clothing Manufacturers (Private) Ltd.**”
(emphasis added)

The facilities for which the title deeds were being handed over had by 10 July 2009 been already afforded. Title deeds were not being handed over in respect of facilities still to be afforded to Archer. The facility for which the respondent purports to register the first mortgage bond was granted to Archer Clothing Manufacturers (Pvt) Ltd on 23 December 2010 long after the title deeds had been handed over to it for a different debt. (See Annexure B1). This means this facility had not yet been afforded at the time the title deeds were handed over. It therefore could not have been handed over for a debt which was to be afforded when it specifically states that it was being handed over for facilities already

afforded. In view of the above the court *a quo* should have realised that it was being misled. It should therefore have declined to determine the issue of rectification through the application procedure and in the absence of interested parties. It should have realised that the first respondent was seeking to alter its status after *concursum creditorium* using false information and without giving notice to those it had entered into an inter creditor agreement with.

It should in fact be stated that rectification was not a relevant factor in deciding whether or not the appellant had correctly determined the first respondent's status.

Costs

Mr Collier for the appellant submitted that the court *a quo* erred when it ordered the appellant whose decision was correctly made to pay the first respondent's costs in the court *a quo*.

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In spite of her earlier concession that the appellant had prima facie correctly held the first respondent to be a concurrent creditor Ms *Moyo* submitted that the court *a quo* correctly ordered the appellant to pay the first respondent's costs.

The court *a quo*'s order was made against a back ground where the appellant had correctly held that the respondent was a concurrent creditor of Archer Clothing Manufacturers (Pvt) Ltd. There was therefore no justification for an order of costs against a Liquidator who had acted in terms of the law. The court *a quo* misdirected itself in ordering the appellant to pay the first respondent's costs.

The appeal has merit and ought to succeed. It is accordingly ordered as follows:

1. The appeal is allowed with costs.
2. The decision of the court *a quo* is set aside and is substituted with the following;
“The application is dismissed with costs”.

GWAUNZA JA: I agree

MAVANGIRA JA: I agree

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Messers Web, Low & Barry, appellant’s legal practitioners

Messers Mawere & Sibanda, 1st respondent’s legal practitioners