

REPORTABLE (15)

GML EXPLOSIVE (PRIVATE) LIMITED
v
LACKSON GONO AND 29 OTHERS

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & MATHONSI JA
HARARE: OCTOBER 29, 2020 & MARCH 25, 2020

T. Magwaliba, for the appellant

R. Stewart, for the respondent

MATHONSI JA: On 15 August 2019, the High Court (the court *a quo*) issued a provisional order for the provisional winding up of the appellant at the instance of the respondents who are its former employees. The court *a quo* confirmed the provisional liquidation order by judgment delivered on 20 November 2019. This appeal is against the judgment confirming the liquidation.

BACKGROUND

The respondents filed a court application for the winding up of the appellant in terms of s 206 (f) and (g) of the repealed Companies Act [*Chapter 24:03*] on the basis that it was unable to pay its debts and that it was just and equitable that the company be wound up. They alleged that the appellant had admitted owing them a combined sum of US480 330.00 in wage arrears as at 9 June 2014. In total, they alleged that the appellant owed over US\$1,3 million in arrear salaries and wages alone and that its legacy debt in respect of all its creditors was estimated at US3 670 241.00.

The respondents stated further that the appellant had cited “operational challenges,” that the company had closed shop and was “non- operational” as the reasons for its inability to pay debts. In that regard, the respondents’ case was that the appellant was commercially insolvent, being unable to discharge debts it acknowledged as owing.

As I have said, a provisional liquidation order was granted on 15 August 2019. When no opposition was filed, except for what was called “affidavits of the interested parties” by individuals who stated that they did not support the liquidation, confirmation of the provisional liquidation order was sought on an unopposed basis.

DECISION A QUO

The court *a quo* noted that the handwritten affidavits by the interested parties merely dissociated the individuals in question, some of whom were also former employees of the appellant, from the application for winding up. It found that none of the interested parties had tendered evidence to challenge the basis upon which the winding up of the appellant was sought.

The court *a quo* further found that one of the individuals who had submitted an affidavit of interest was Mathias Ndere, the Finance Manager of the appellant, who had made an admission that the appellant had failed to pay its debts. It concluded that the admitted failure to pay the respondents what was due to them is evidence of inability to pay debts and that it was not up to the appellant to choose how and when it was to pay what was long overdue. As the confirmation of the provisional liquidation order remained unopposed, the court *a quo* confirmed it.

THE APPEAL

The appellant was aggrieved by that turn of events and appealed to this Court on five grounds. At the hearing of the appeal, Mr *Magwaliba* who appeared for the appellant sought to amend ground four, which amendment was granted. He then abandoned the remaining grounds of appeal electing to motivate the appeal entirely on the amended ground four. It reads:

“A *fortiori*, the court *a quo* grossly misdirected itself in confirming the provisional order on the basis that it was just and equitable to do so.”

Having elected to ground the appeal on the basis that the court *a quo* confirmed the liquidation because it was just and equitable to do so, it becomes apparent that the appellant does not assail the court *a quo*'s finding that it was unable to pay its debts. A close reading of the judgment of the court *a quo* shows that the final order of liquidation was based on the proven inability to pay debts as provided for in s 206 (f). The court *a quo* made reference to that provision of the repealed Act.

SUBMISSIONS ON APPEAL

At the commencement of the hearing Mr *Magwaliba* made an application to adduce further evidence on appeal. An application had been filed on 22 October 2020 to which was attached the evidence sought to be adduced. The evidence consists mainly of schedules and proof of payments made to some of the appellant's creditors after the judgment of the court *a quo*. According to the appellant, the evidence would show that, subsequent to the liquidation, the appellant's shareholder had mobilised resources and paid off “all the creditors” save for a few whose account details were not available at the time of payment.

Mr *Stewart* for the respondent did not oppose the application having taken the view that the evidence sought to be adduced on appeal did not advance the appellant's case in any way. The application to adduce evidence was then granted by consent.

It was Mr *Magwaliba's* submission that the court *a quo* considered the circumstances of the appellant which prevailed at the time the matter was heard but had no regard to its future circumstances. What has since transpired is that the inability to pay debts has morphed into ability to pay. The appellant has paid all the debts since the liquidation order was granted. As a result, there is no longer any cause for liquidation. It has no purpose, so it was argued, and should be set aside.

Per contra, Mr *Stewart* for the respondents premised his case on two fundamental points. Firstly, he submitted that at the time the court *a quo* determined the matter the appellant was hopelessly insolvent. Its inability to pay debts was admitted and a request had been made on its behalf for a moratorium of about six months during which time it hoped to pull itself out of that incongruent financial quagmire.

The appellant was not trading and is still in that position up to now. For that reason, so it was argued, the court *a quo* correctly granted the final order of liquidation.

Secondly, Mr *Stewart* submitted, even the further evidence adduced on appeal clearly demonstrates that the appellant is still in the same state of insolvency. The evidence shows that the appellant has not paid all that it owes to its creditors. Months after the final

liquidation order was made, the schedule of payments shows that part payments were made to a number of former employees leaving outstanding balances.

Mr *Stewart* submitted further that the debts were denominated in United States dollars. What the appellant has done is to take advantage of the judgment of this Court in *Zambezi Gas Zimbabwe (Private) Limited v N.R Barber (Private) Limited and Another* SC 3/20 which determined the rate of exchange following the introduction of the Zimbabwe dollar at the rate of one to one to the United States dollar.

According to Mr *Stewart* the appellant has made part-payments to its creditors in Zimbabwean currency several months after liquidation and used that to seek to claw its way out of insolvency. He submitted that there is no legal basis for setting aside the judgment of the court *a quo* even if regard is had to the evidence adduced on appeal.

ANALYSIS

The winding up of the appellant was sought on the basis that it was unable to pay its debts. This is set out at p 10 of the founding affidavit in the following terms:

“This is an application for the winding up of the respondent company GML Explosives (Private) Limited based upon the fact that the respondent is unable to pay its debts when due and critically, the fact that it has persistently failed to provide proof that:

- 10.1 It is in a position to pay its debts;
- 10.1 (sic) It is not preferring one creditor above another”.

It is common cause that at the time the application for winding up was made the appellant had failed to pay its employees and that some of the arrears dated back to 2009. In a memorandum written by the appellant’s Human Resources Officer on 22 February 2018, it

was admitted that “the company is still experiencing operational challenges,” and further that “the company is not operational.”

Section 206 (f) of the then Companies Act [*Chapter 24:03*] gave the court *a quo* a discretion to order the winding up of a company unable to pay its debts. The discretion arose from the use of the word “may” in that section. The court *a quo* found that the appellant’s failure to pay the respondents what was due to them “is evidence of its inability to pay the debts”. In my view that finding cannot be faulted at all.

In granting the relief sought, the court *a quo* was engaged in the exercise of judicial discretion. A creditor is ordinarily entitled to a winding up *ex debito justitiae* where the grounds for it provided for in the Act have been satisfied. The court is however said to have a narrow discretion to withhold the winding up in very exceptional circumstances. See *Croc-Ostrich Breeders of Zimbabwe (Private) Limited v Best of Zimbabwe (Private) Limited* 1999 (2) ZLR 410 (H) at 414 G 415 A.

The *onus* of proving the existence of exceptional circumstances as would inform the withholding of a winding up where grounds for it exist lies on the party opposing it. In this case it rested on the appellant. The application was not opposed and the affidavits of interested parties did not raise any exceptional circumstances. There was therefore no basis for withholding the winding up where it had been shown, and indeed admitted, that the appellant was unable to pay its debts, an ailment which continues to afflict the appellant long after the court *a quo* rendered judgment.

In any event, an appeal court will only interfere with judicial discretion where, first and foremost, it appears in the grounds of appeal that an improper or incorrect exercise of the court's discretion is what is put in issue. See *African Century (Private) Limited v Megalink Investments (Private) Limited & Ors* SC 44/18. The often cited case of *Barros and Anor v Chimponda* 1999 (1) ZLR 58 (S) AT 62F-63A is authority for the proposition that the general rule governing an appellate court in an appeal against a judgment of a lower court granted in the exercise of its judicial discretion, is that it is not enough that the appellate court considers that if it had been in the position of the lower court, it would have adopted a different course.

For the appellate court to interfere, it must appear that some error has been made in exercising the discretion:

“If the primary court acts upon a wrong principle, if it allowed 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....”

Mr. *Magwaliba's* suggestion that the court *a quo* failed to consider the future ability of the appellant to mobilise funds to pay its creditors does not even begin to meet the threshold for interference with judicial discretion set out in the authorities. For a start, no evidence was placed before the court *a quo* to show that the appellant would, in future, be able to mobilise funds. So the court *a quo* was not equipped with material with which to look into the future.

More importantly, the appellant did not discharge the *onus* of setting out exceptional circumstances that would trigger the exercise of discretion in favour of

withholding a winding up. As if that was not enough, even the further evidence adduced on appeal almost a year after the court *a quo* determined the matter, does not show that the appellant is out of the woods.

DISPOSITION

There is no basis upon which this Court may interfere with the judgment of the court *a quo*. The appeal is demonstrably devoid of merit and ought to be dismissed.

On the issue of costs, they normally follow the result. It has not been suggested that the usual position should be departed from and I see no reason why that should be resorted to.

Accordingly it be and is hereby ordered that the appeal is hereby dismissed with costs.

MAVANGIRA JA: I agree

MAKONI JA: 1 agree

Hogwe Nyengedza Attorneys, appellant's legal practitioners

Messrs Matizanadzo & Warhurst, 1st to 34th respondent's legal practitioners