

REPORTABLE (84)

RIO ZIM (PRIVATE) LIMITED
v
TRUST BANK CORPORATION LIMITED
(In Liquidation)

SUPREME COURT OF ZIMBABWE
MAKARAU JA, HLATSHWAYO JA & UCHENA JA
HARARE: 28 MARCH 2019 & 6 JULY 2021

T Magwaliba, for the appellant

L. Uriri, for the respondent

Judgment No. SC 87/21
Civil Appeal No. SC 735/18

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MAKARAU JA: On 19 September 2018, the High Court sitting at Harare dismissed with costs on a legal practitioner and client scale, an application by the appellant for leave to sue the respondent, a banking corporation in liquidation. This is an appeal against that order.

Background

The dispute between the parties arises from a loan transaction. In 2011, the appellant borrowed the sum of US\$3 875 000.00 from the respondent. By 2012, the loan had ballooned to US\$5 789 262.00 resulting in the parties concluding a written agreement to restructure the loan. Thereafter the appellant made certain payments towards the restructured loan.

In March 2014, before it was placed in liquidation, the respondent issued summons against the appellant claiming the balance due under the loan. It obtained a default judgment in the sum of \$1 824 505.05 together with interest thereon at the rate of 45 per cent per annum. A few months later, in September 2014, it was placed in provisional liquidation.

Before the order winding up the respondent was made final, the appellant approached the court *a quo* seeking rescission of the default judgment. It brought the application under r 449 of the High Court Rules 1971, alleging that the default judgment against it had been granted in error. The application, which was prosecuted without the prior leave of the court, was granted in the absence of the respondent and its provisional liquidator.

In 2017, the defective order against the respondent was set aside at the instance of the liquidator. An appeal to this Court against that decision was, with the consent of both parties, dismissed with costs.

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Still desirous of having the default judgment against it varied or corrected, the appellant filed an application for leave to sue the respondent in terms of s 213 of the Companies Act [*Chapter 24:03*]. Attached to the application for leave was the proposed application, again to be brought under r 449 of the High Court Rules, 1971.

In the proposed application, the appellant avers that the default judgment against it was granted in error as it did not take into account payments made subsequent to the granting of the order in the sum of US\$1 381 166.00. The appellant further avers that the default judgment

erroneously levies interest on the outstanding amount at the rate of 45 per cent per annum when there is no contractual basis for such a rate.

Giving nine reasons for doing so, the court *a quo* dismissed the application as stated above, giving rise to this appeal.

The appeal

Before this Court, the appellant raised four grounds of appeal as follows:

- “1. The High Court grossly misdirected itself in determining the substantive merits of the intended application for rescission of judgment in terms of r 449 of the High Court Rules, 1971 instead of considering whether, on a *prima facie* basis, the application was not frivolous or vexatious.
2. The High Court further erred in finding that the appellant’s cause of action in the intended application was for the correction of the writ of execution when in fact, its cause of action was for the correction of the judgment which was erroneously granted without having regard to amounts paid by the appellant subsequent to the issuance of summons but before judgment.
3. Further, the High Court grossly erred in finding that the appellant was not contesting the rate of 45 per cent per annum when that was one of the grounds upon which the intended application for rescission of judgment would be based.
4. Further, the High Court erred in finding that the Deposit Protection Corporation which had filed an affidavit in opposition was not a party before the High Court and therefore ought to have been cited in both the appealed proceedings and intended proceedings for correction of judgment.”

From the above grounds, the appellant raises four potential arguments. These are that the court *a quo* determined the proposed application instead of finding whether or not the application for leave to sue the respondent was *prima facie* not frivolous or vexatious; that the court *a quo* misconstrued the cause of action in the proposed application; that the court *a quo* erred in finding that the appellant was not contesting the interest rate levied in the default judgment and finally, that the court *a quo* erred in finding that the liquidator of the respondent had not been cited in the proposed application.

The issue

It appears to me that the appellant has indiscriminately attacked each and every finding of fact that the court *a quo* made. This has tended to obfuscate the real issue that falls for determination in this appeal. Accepting as we must, that leave to sue a company in liquidation is not a right enforceable upon demand but is an indulgence or latitude granted in the discretion of the court, then the real issue that falls for determination in this appeal is whether or not the court *a quo* properly exercised that discretion in denying the indulgence sought. The rest of the arguments raised by the grounds of appeal are red herrings.

The law

The application before the court *a quo* was one for leave to sue the respondent in terms of s 213 of the Companies Act [*Chapter 24:03*]. The Act simply provides that the leave of the court is required before a company in liquidation can be sued. It does not lay out the test or factors that a court granting such leave must take into account, leaving the matter in the discretion of the court, which discretion the court must exercise judiciously.

The factors that a court may take into account in determining an application for leave to sue a company in liquidation are not exhaustive. The broad consideration remains the need for the court to protect the interests of all the creditors of the company under liquidation and to ensure the orderly administration of the process of liquidating such debts.

The bedrock of the law on the winding up of companies is that once *concursum creditorum* is established, the business of the company being wound up is thereafter carried on

solely for the purpose of distributing its assets amongst its creditors and not for gain or for the benefit of the shareholders. The oversight function of the court is similarly focused on ensuring that this ensues as expeditiously as is practicable. Thus, by operation of law, all legal processes against the company in liquidation are stayed and can only proceed with the leave of the court. It is the duty of the court to ensure not only the smooth and orderly administration of the assets of the company but more importantly, that after winding up has commenced, no creditor obtains an advantage over other creditors as a result of any conduct on the part of the company or its debtors. (See *Meaker N.O. v Campbell's new Quarries (Pvt) Ltd* 1973 (3) SA 157 (R) and *Letsilele Stores (Pty) Ltd v Roets* 1958 (2) SA 224 (T)).

Analysis

In dismissing the application *a quo*, the court put out nine reasons. A reading of the reasons indicates that the court formed the view that the intended application had no merit, was unnecessary and amounted to an abuse of process which would prejudice the interests of the respondent. Five out of the nine reasons have a bearing on the intended application and discuss, in detail, its alleged shortcomings. This may explain the argument by the appellant in its first ground of appeal that the court *a quo* determined the intended application.

The court *a quo* appears to have been greatly influenced in its reasoning by the averment in appellant's founding affidavit that it had made payments towards the reduction of the debt subsequent to the granting of the default judgment. The court *a quo* therefore reasoned, and correctly so in my view, that if this was indeed the case, then the default judgment was

correct and what needs revision is the amount to be collected by way of writ as the outstanding judgment debt.

I pause momentarily to note that there is an obvious disconnect between the averments in the appellant's founding affidavit and the grounds of appeal regarding when the payments reducing the appellant's indebtedness to the respondents were made. In the founding affidavit, as stated above, the appellant avers that the payments were made subsequent to the granting of the default judgment. This explains the finding by the court *a quo* that the figure to be corrected is the amount of the judgment debt on the writ of execution rather than the amount in the order of court. In the second ground of appeal reproduced above, the appellant argues that the payments were made subsequent to the issue of summons but before the judgment was granted. Whatever the correct position may be, the appellant is bound by the averments made in the founding affidavit and not by what is alleged in the grounds of appeal.

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The appellant cannot therefore escape the finding by the court *a quo* that the correctness of the amount awarded in the order of the court is not affected by any payment that the appellant may have made subsequently. It is the one that alleged that all further payments were made subsequent to the judgment.

In the court *a quo*'s final analysis, the respondent, being a company in distress had to be protected from the intended litigation which in its view was not only unnecessary but would make things worse for the respondent.

As stated above, the appellant argues that the court *a quo* determined the merits of the intended application. It did not. It merely assessed the prospects of success of the intended application. In doing so, it may have gone further than was necessary and further than most courts would. Whilst this is not ideal, it is not an irregular exercise of discretion. In consequence, it does not trigger the review jurisdiction of this court. The position is now settled that where a lower court exercises a discretion, the higher court cannot interfere unless the lower court has committed one or more of the four cardinal errors. These are, acting upon a wrong principle, allowing extraneous or irrelevant matters to guide or affect it, mistaking the facts or failing to take into account some relevant consideration. (*Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S)).

In casu, there was no error by the lower court in the exercise of its discretion as envisioned by the law. It acted on the correct principles and did not take into account any factors that it should not have. I thus find no basis for interfering with its decision which must be upheld by dismissing the appeal.

Disposition

The respondent has been successful in opposing the appeal. I see no reason for denying it the costs of doing so.

In the result, I make the following order:

The appeal is dismissed with costs.

HLATSHWAYO JA : I agree

UCHENA JA : I agree

Kuhuni and Associates, appellant's legal practitioners

Chihambakwe, Mutizwa and Partners, respondent's legal practitioners

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