

DISTRIBUTABLE (2)

(1) SUNKO MAURITIUS (2) JUDEX BURNETT
v
(1) VERSAPAK HOLDINGS (PRIVATE) LIMITED
(In Liquidation)
(2) CECIL HONDO MADONDO N.O. (Provisional Liquidator of
Versapak Holdings (Private) Limited

SUPREME COURT OF ZIMBABWE
MALABA CJ, BHUNU JA & CHIWESHE AJA
HARARE, 23 MARCH 2021 & 18 JANUARY 2022

Girach, for the appellants

E. Mubaiwa, for the respondent

Judgment No. SC 2/22
Civil Appeal No. SC 272/20

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BHUNU JA:

[1] This is an appeal against the entire judgment of the High Court (the court *a quo*) which placed the first respondent in final liquidation.

BRIEF BACKGROUND OF THE CASE

[2] The first respondent Versapak Holdings (Private) Limited (the company) is a juristic person incorporated in terms of the laws of Zimbabwe whereas the second respondent is the company's liquidator.

[3] The company has three shareholders being:

(i) **Sunko Mauritius (C15289)** an offshore Mauritian company with a shareholding of 1,100 ordinary shares.

(ii) **Versapak Employee Trust** with a shareholding of 73 ordinary shares.

(iii) **Versapak Management Trust** with a shareholding of 49 ordinary shares.

[4] The appellants have since acquired all the shares of the company with the result that it is now 100 per cent foreign owned.

[5] The company is in the business of manufacturing expanded polythene products which have since been banned by government through Statutory Instrument 84 of 2012. Owing to the banning of its products, scarcity of foreign currency and competition from cheap imports, the company fell on hard times. As a result, it became unviable as it was running at a loss. This prompted the directors of the company to initiate the process of winding down the company.

[6] On 14 December 2016 the company passed a special resolution authorising one Rangarirai Dadirai to commence the winding down process. They appointed the second respondent as the company liquidator. The Resolution reads as follows:

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WRITTEN RESOLUTIONS OF THE DIRECTORS OF THE COMPANY
PASSED ON THE 14TH DAY OF DECEMBER 2016

WINDING DOWN OF THE COMPANY

SPECIAL RESOLUTION/S

IT IS HEREBY RESOLVED THAT:

1. The Company shall commence the winding down of its operations as it is no longer capable of operating profitably. The main factors leading to the crippling of the company among others are:
 - a. The liquidity crunch and lack of foreign currency to pay for imported products and purchase raw material.
 - b. Stiff competition from cheap imports which affected the sales of the Company.

2. The Company will be wound down in terms of Section 206 of the Companies Act [Chapter 24:3] that is winding down by the Court.
3. Rangarirai Dadirai is appointed to sign all affidavits and documentation for purposes of process issued in the High Court of Zimbabwe in winding down the Company.
4. Rangarirai Dadirai be and is hereby authorised to appoint experts to assist in the attainment of the shareholders? Objective being the procedural winding up of Versapak Holdings (Private) Limited
5. The liquidator of the Company shall be Mr Cecil Madondo of Tudor House Consultants.”

[7] Pursuant to the special company resolution authorising the winding down of the company, it filed an *ex parte* court application for a provisional order for its winding down. The application was duly supported by the Master’s report dated 7 March 2017. The Provisional Order sought was granted *ex parte* that is to say in the absence of the other interested parties.

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[8] The order was crafted in the following terms:

“IT IS ORDERED THAT:

1. The applicant Versapak Holdings (Pvt) Ltd be and is hereby provisionally wound up, pending the grant of an order in terms of paragraph 3 or the discharge of this order.
2. Subject to Subsection (1) of Section 274 of the Companies Act [Chapter 24:03], Cecil Madondo of Tudor House Consultancy (Pvt) Ltd is appointed as provisional liquidator of the above mentioned company with the powers set out in Section 221 (2) (a) – (g) of the Act.
3. **Any interested party may appear before the court sitting at Harare on Wednesday the 15th of March 2017, to show cause why a final order should not be made placing the applicant company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.**

4.

The order shall be published once in the Government Gazette and once in the Herald Newspaper in a Friday edition. Publication shall be in short form annexed to this order.

5. Any person intending to oppose or support the application on the return day of this order **shall:**

5.1. Give due notice to the applicant on or before 10th of March 2017 at Nyakutombwa Mugabe Legal Counsel, 49 Old Enterprise Road, Newlands Harare, ref Joseph T Tazunguzwa.

5.2. Serve on the applicant a copy of any notice of opposition which he files with the Registrar of the High Court.” (My emphasis)

[9] As can be seen, in respect of the time honoured *audi alteram partem* rule, the *exparte* order provided a return date to afford all interested parties a chance to be heard on the issue before a final binding order could be made. The return date was set for 15 March 2017. It was widely published both in the Government Gazette and the Herald newspaper and it invited any interested person who had any objection to the final order sought to lodge their objection with the Registrar of the court *a quo* and also to appear on the return date. For the avoidance of doubt it read:

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“In the petition of Versapak, Holdings (Private) Limited, applicant.

TAKE NOTICE that on Wednesday the 15th of February, 2017, and before Mr Justice Foroma, the High Court at Harare issued an order for the provisional liquidation of Versapak Holdings (Private) Limited, and Cecil Madondo has been appointed provisional liquidator of the company.

Any interested person who wishes to oppose the winding up of the company shall file a notice of opposition with the Registrar of the High Court at Harare on or before the 10th of March, 2017, and shall serve a copy of the notice on the applicant’s legal practitioners. He/she should then appear before the High Court at Harare at the hearing of this matter on 15th March, 2017 to show cause why the company should not be wound up.

A copy of the application and of the full order granted by the court may be inspected at the office of the Registrar of the High Court at Harare, and the office of the applicant's legal practitioners – Joseph Tuzunguzwa, c/o Nyakutombwa/Mugabe Legal Practitioners 49 Old Enterprise Road, Newlands, Harare.” (My emphasis)

[10] The return date was subsequently extended to 26 April 2017 by court order under case number HC 2304/17 on the same terms and conditions as before. Any person intending to oppose the confirmation of the provisional order was now required to file their notice of opposition and serve a copy on the second respondent on or before 19 April 2017.

[11] The appellants did not file any notice of opposition or serve a copy on the second respondent by the due date as mandated by the provisional court order advertised in the government Gazette and the Herald Newspaper. The appellants instead filed a separate application seeking the discharge of the provisional order on the basis that it had been issued by mistake.

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[12] No founding affidavit was filed with the application for discharge of the provisional order. Only a supplementary affidavit for the application was belatedly filed on 21 April 2017 praying for an order discharging the provisional order on the return date which had already come and gone. They also sought an order directing the second respondent to return the cash and any documents belonging to the company. The appellants did not apply for any condonation or reprieve for noncompliance with the court order. The application was opposed by the second respondent resulting in both applications in cases HC 377 of 2020 and HC 773 of 2017 being consolidated and referred to the opposed roll.

ISSUES FOR DETERMINATION BEFORE THE COURT A QUO?

[13] Both applications raised the substantive issue of whether the application for the winding up of the company should be confirmed or discharged. At the commencement of the court hearing the second respondent however raised three points *in limine* for determination. In his first point *in limine* the second respondent objected to the appellants' *locus standi* that is to say their right to stand and be heard in the court *a quo*.

SUBMISSIONS FOR THE SECOND RESPONDENT BEFORE THE COURT A QUO?

[14] Counsel for the second respondent took a two pronged approach to attack the appellants' *locus standi*. Firstly, he argued that the effect of the court order placing the company on provisional liquidation was to divest the appellants of their directorships in the company and vesting them in the second respondent in his capacity as provisional liquidator. For that proposition of law, counsel placed reliance on the case of *Volkscas BPK v Darrenwood Electrical (Pvt) Ltd*¹. He further argued that the appellants had no *locus standi* because of their failure to comply with the mandatory terms of the provisional court order.

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SUBMISSIONS FOR THE APPELLANTS BEFORE THE COURT A QUO?

[15] The appellants took the view that they had the necessary *locus standi* to appear and be heard in the court *a quo*. Counsel for the appellants accepted that upon issuance of a provisional liquidation order directors of a company lose their rights and powers which are vested in the provisional liquidator.

He however countered that despite having lost their power and rights as directors they retain the residual power to challenge the liquidation process. For that proposition of law he placed reliance on the case of *Thaw Trading & Investments 005 CC v Central*

¹ 1973 (2) SA 386

*Lake Trading 214 (Pty) Ltd*² (30 May 2013 para 11-13). Counsel complained that although the point was raised in the court *a quo*, the learned judge *a quo* did not determine the legal point raised.

[16] As regards the second limb of the second respondent's argument, counsel for the appellants conceded that the appellants did not comply with the mandatory time lines set out in the provisional liquidation court order. He however argued that the parties entered into a consent order in which they agreed to purge the appellants' breach of the time lines set out in the provisional court order.

APPLYING THE FACTS TO THE LAW.

[17] It is convenient to deal with the procedural issue first as it has the potential of resolving all the other issues between the parties without delving into the substantive issues.

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[18] It is common cause that the appellants did not file and serve their notice of opposition by the due date of 19 April 2017 in terms of the mandatory provisions of the provisional liquidation court order. It is also correct that the parties entered into a purported consent order which was not sanctioned by the court.

[19] The purported consent order reads:

IT IS ORDERED BY CONSENT THAT:

1. In the matter under case No. HC 773/2017 (Ref Case No. HC 2304/2017). The Provisional Liquidator, Dr Cecil Madondo, hereby agrees and consents to the late filing of the Notice of opposition and opposing affidavit by Sunko (Mauritius) and Judex Burnett.
2. The late filing of the notice of Opposition and opposing affidavit by Sunko (Mauritius) and Judex Burnett in the matter under case No. HC 773/2017 (Ref Case No. HC 2304/17) be and is hereby condoned and the notice of

² (666/2012) [2013] ZANWHC 47

Opposition and Opposing Affidavit filed on 21 April 2017 in the said matter be and is hereby deemed to have been properly filed of record.

3. The chamber application for condonation filed under case No. HC 6963/2017 is withdrawn.
4. The parties shall be at liberty to file Supplementary Heads of argument in the matter under case No. HC 773/17 (Ref Case No. HC 2304/2017) should they deem it necessary and shall proceed to set down the said matter for hearing on the opposed roll.
5. The costs of the application for condonation filed under cases No. HC 5341/2017 and HC 6963/2017 shall be costs in the cause of this matter.

Signed

COSTA & MADZONGA
HARARE (NRM)

Signed

SCANLEN & HOLDERNESS
HARARE (GN)

Not signed ”
JUDGE/ REGISTRAR

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[20] It is a misnomer to say that the above pact constitutes a court order because it was not given or signed by any court. The effect of the so called consent order is a futile attempt to alter the provisional liquidation order issued by the court *a quo* without its involvement and consent. It is trite that once a court has made an order it binds all and sundry concerned. Everyone bound by the court order has a duty to obey the order as it is until it has been lawfully altered or discharged by a court of competent jurisdiction or statute. In *Hadkinson v Hadkinson*³ ROMER LJ recited the duty to obey court orders with remarkable clarity when he said:

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it even extends to where the person affected believes it to be irregular or even void.”

³ (19 522 All ER 567 (CA) at 569C

[21] What this means is that it was not within the parties' power to agree to condone the appellant's failure to comply with the extant provisional court order. It was equally not within their power to extend the period of compliance beyond 19 April 2017. The parties' purported consent order was therefore a nullity and of no force or effect as it sought to usurp the function and powers of the court *a quo*.

[22] The appellants' disregard of the time lines set out by the court *a quo* triggered an automatic bar shutting them out from being heard by operation of law. Consequently, the appellants were effectively divested of their *locus standi* before the court upon default. That being the case, the court *a quo*'s finding that the appellants had no *locus standi* is beyond reproach. That finding of fact effectively put the appellants out of court rendering it unnecessary to consider any submissions they would have made. This is for the simple but good reason that they were not entitled to be heard by the court *a quo* on any issue pertaining to the case.

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[23] The appellants' disdain of the time lines laid down by a court of law could only be purged by that court on the merits in a proper application for condonation and extension of time within which to comply with the terms set out in the provisional order. The appellant's withdrawal of that application sounded the death knell for any lawful reprieve for the appellants considering that the court *a quo* had already issued a substantive order confirming the provisional order.

DISPOSAL

[24] In the result the Court finds that there is no substance in this appeal. Costs follow the result. There is no reason why the respondents should be burdened with costs incurred by persons with no *locus standi*. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

MALABA CJ : I agree

CHIWESHE AJA : I agree

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Tafadzwa Ralph Mugabe Legal Counsel, the appellants' legal practitioners.
Hongwe Nyengedza Attorneys, respondents' legal practitioners.