REPORTABLE (120)

(1) COLLINS MANGENJE (2) GODWIN MANGENJE
v
(1) ISAAC TIGERE TICHARWA(In his capacity as the duly appointed executor dative of the estate of the late Kennedy Mangenje DRMRE 329/18**)**
(2) MANGENJE BROTHERS (PRIVATE) LIMITED (In liquidation) (3) CECIL MADONDO (In his capacity as liquidator of Mangenje Brothers (Pvt) Ltd**) (4) MASTER OF THE HIGH COURT**

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHATUKUTA JA
HARARE, 28 FEBRUARY 2022 & 7 NOVEMBER 2023

D. O'chieng, for the appellants

R. Mabwe, for the first respondent

J. Jera, for the second respondent

BHUNU JA:

1. This is an appeal against the whole judgment of the High Court (the court *a quo*) wherein it confirmed a provisional order against the appellants.

THE PARTIES

2. Both appellants are directors and shareholders of the second respondent, a company under liquidation, duly registered in terms of the laws of Zimbabwe. The first respondent is the executor dative of the estate of the late Kennedy Mangenje who was a founder and director of the second respondent company. The third respondent is cited in his official capacity as the liquidator of the second respondent, whereas the fourth

respondent is the Sheriff of the High Court of Zimbabwe cited in his official capacity as well.

FACTUAL BACKGROUND

3. The first respondent brought an application in the court *a quo* for the provisional liquidation of the second respondent in terms of s 5 (1) (b) (iii) of the Insolvency Act [*Chapter 6:07*] (the Act). The section authorizes one or more members of a company to apply for an order to wind up a company in circumstances where it is just and equitable that the company be liquidated. Section 4 (1) of the Act clothes the first respondent, in his capacity as executor with the authority to apply for the liquidation of the second respondent as a debtor of the deceased estate. The first respondent brought the application in a bid to protect the interests and rights of the deceased estate for the benefit of its beneficiaries. The appellants in turn countered by seeking to prove the *quantum* of damages they suffered placing reliance on s 3 of the Inquests Act [*Chapter 6:04*] (the Act)

4. The court *a quo* granted the provisional order on May 2022. A final liquidation order was granted on 28 September 2022 in the following terms:

> "IT BE AND IS HEREBY ORDERED THAT:
> 1. The first respondent, MANGENJE BROTHERS (PRIVATE) LIMITED be and is hereby finally wound up.
>
> 2. Subject to Section 41 of the Insolvency Act [*Chapter 6:07*], CECIL MADONDO is hereby appointed as the final liquidator of the first respondent company with the powers set out in Part X of the Insolvency Act.
>
> 3. The first respondent shall meet the costs of this application and the liquidation proceedings."

5. The court *a quo* found that the appellants as interested parties could not claim for damages in terms of s 8 of the Act. Consequently it ruled that the provision exclusively permits a debtor to claim the relief sought by the appellants. It therefore ruled that the express mention of debtor excludes all other parties to claim damages with the exception of a debtor.

6. The outcome of the confirmation proceedings did not go down well with the appellants, hence this appeal. They accordingly mounted the appeal on the following nine grounds:

GROUNDS OF APPEAL

"1. The court *a quo* grossly misdirected itself and erred at law in failing to find as it ought to have done that the provisional order issued on 4 May 2022 was a legal nullity on account of the application's fatal non-compliance with the mandatory provisions of section 5 (4) of the Insolvency Act.

2. The court *a quo* erred at law and grossly misdirected itself in failing to find as it ought to have done that the application before it was fatally defective and could not be granted due to first respondent's failure to attach a statement of affairs of the company as contemplated by section 5 (4) of the Insolvency Act.

3. The court *a quo* erred in finding that the two paged statement of assets and liabilities and statement of liabilities attached to the application constituted a statement of affairs of the 2nd respondent as required in terms of section 5 (4) of the Insolvency Act.

4. The court *a quo* grossly misdirected itself when it held that the appellant refused to supply the requisite information for the sake of compliance with the statute, when there was never any such request made by the Provisional Liquidator as required

in terms of the law and in circumstances where the 1st respondent was in possession of the company documents.

5. The court *a quo* erred at law and grossly misdirected itself when it held that appellant did not show that they were prejudiced by the nature of the application mounted by the 1st respondent without complying with rule 59 (1) of the High Court Rules notwithstanding the clear demonstration made that the 2nd respondent was not given any chance to oppose the application before the granting of the provisional order and that once the provisional order was granted, the appellants lost a right to oppose that application before the granting of the provisional order and that, once the provisional order was granted, the appellants lost a right to oppose the liquidation on behalf of the 2nd respondent which prejudice could not be cured by costs.
6. The court *a quo* erred and grossly misdirected itself in finding that the minutes of proceedings of the first meeting of the creditors of the 2nd respondent was the Master's report thereby proceeding without the requisite Master's report as required in terms of the law.
7. The court *a quo* erred in failing to find that by leasing out its properties, the 2nd respondent was actually trading and carrying on business as its memorandum of association authorised it to do so.
8. The court *a quo* erred and grossly misdirected itself in finally winding up the 2nd respondent when there was no just and equitable cause for its winding up, yet the court never got to relate to the merits of all the other grounds which the appellants had resisted the success of the application save for the issue concerning first respondent's non -compliance with section 5 (4) of the Insolvency Act.

9. The court *a quo* erred at law and grossly misdirected itself in winding up the company on the basis that it was now defunct when there was never any evidence led or submissions made to the effect that the company was defunct. In so doing it went on a frolic of its own."

POINT IN LIMINE

7. At the commencement of the hearing of the appeal, counsel for the first respondent Mrs. *Mabwe*, raised preliminary points of objection in terms of r 51 of the Supreme Court Rules 2018 (the Rules). Her initial objection is to the effect that the purported appeal is fatally defective such that there is no appeal before this Court. Mr *Jera*, counsel for the second respondent pitched his tent with Mrs *Mabwe* in attacking the validity of the appeal. The preliminary points raised are opposed by Mr *O'chieng*, counsel for the appellants.

8. In taking the point *in limine*, Mrs *Mabwe* contended that the appeal is fatally defective because:

    1. The appeal does not comply with r 37 (1) (d) and 37 (1) (e) of the Rules.
    2. The prayer sought is not exact.
    3. Grounds of appeal 4, 5 and 8 are fatally defective. The remaining grounds of appeal cannot be related to because the prayer is incurably bad.

Whether the appeal complies with rules 37 (1) (d) and 37 (1) (e) of the Rules.

9. Both rules regulate the mandatory requirements for filing a valid appeal. Rule 37 (1) (d) provides as follows:

    "CIVIL APPEALS FROM THE HIGH COURT

    37. Entry of appeal

    (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his or her legal practitioner, which shall state—

(a) the date on which, and the court by which, the judgment appealed against was given;

(b) if leave to appeal or condonation and extension of time to appeal was granted, the date of such grant;

(c) whether the whole or part only, and if so which part, of the judgment is appealed against;

(d) the grounds of appeal in accordance with the provisions of rule 44;

(e) the exact relief sought;

(f) the address for service of the appellant or his or her legal practitioner.

(2) The notice of appeal shall be filed and served on a registrar, a registrar of the High Court and the respondent in accordance with rule 38.

(3) If the appellant does not serve the notice of appeal in accordance with subrule (2) as read with rule 38, the appeal shall be regarded as abandoned and shall be deemed to have been dismissed."

10. Rule 37 (1) (e) requires that the relief sought be exact. The relief sought by the appellant is couched in the following terms:

"RELIEF SOUGHT

FURTHER TAKE NOTICE that the appellant seeks the following relief:

1. The present appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

(a) The provisional order granted by the High Court on 4 May 2022 be and is hereby discharged.

(b) The respondent be and is hereby granted leave to prove the damages suffered as a result of the winding up proceedings in terms of section 8 of the insolvency Act.

(c) The applicant shall pay the costs of suit on an attorney and client scale.

11. Having considered the objection as to whether the appeal complies with r 37 (1) (d) and (e), I am of the view that there was substantial compliance such that this objection should not detain us any further. That being the case, I now turn to deal with the real pertinent issues for determination.

ISSUES FOR DETERMINATION.

12. The grounds of appeal raise two pertinent issues for determination. These are:

(a) Whether or not the court *a quo* erred in finding that there was compliance with section 5 (4) of the Insolvency Act.

(b) Whether or not the court a quo erred in dismissing the appellant's claim for damages.

Whether or not the court *a quo* erred in finding that there was compliance with section 5 (4) of the Insolvency Act.

13. The appellants' contention is that the court *a quo* ought not to have confirmed the provisional order in circumstances where the first respondent had failed to comply with the mandatory provisions of s 5 (4) of the Act. The section requires that every such application must be accompanied by:

"(a) A statement of affairs of the debtor corresponding substantially with Forms A of the First Schedule

(b) A certificate of the Master issued not more than 14 days before the date on which the application is to be heard by the Court that sufficient security has been given for the payment of all costs in in respect of the application that might be awarded against the applicant."

14. The court *a quo* found that it was not disputed that a request for the second respondent's statement of its state of affairs was made on 12 June 2019. It further found that a two paged statement was availed by the second respondent's legal practitioners, hence the first respondent complied with the mandatory provision of s 5 (4) of the Act. It found

that the second respondent could not benefit from its wrong by providing a scanty document then turn around to challenge it on the basis of its inadequacy. As regards the Master's Report, it ruled that the Master's report though scanty was availed.

15. These being findings of fact the appellants came nowhere near discrediting the court *a quo's* factual findings in this regard. The finding that it was common cause that these documents had been sought and availed, was particularly damning to the appellant's case. The evidence tabled before the court shows beyond question that it is the second respondent's legal practitioners who supplied the document showing the second respondent's state of affairs. The appellants being directors of the company must be taken to have had a hand in the preparation of the scanty document. They cannot now be allowed to challenge the document and benefit from their own wrong.

16. As regards the issue of the Master's report, it is germane to note that the appellants are raising the issue for the first time on appeal. This they cannot do as it is a point of fact not law, see *Austerlands (Pvt) Ltd v Trade & Investment bank Ltd & Anor* SC 92/05. That case puts paid to the appellant's attempt to rely on a point of fact on appeal not previously raised in the court *a quo.*

17. The respondents having amply demonstrated that there was compliance with the mandatory provisions of r 5 (4), we are constrained to determine issue number one in the respondents' favour.

Whether or not the court *a quo* erred in dismissing the appellant's claim for damages.

18. Mrs. *Mabwe* further took umbrage at the appellants' suitability to claim damages as prayed for in para 2 (b) of the relief sought above. She contended that s 8 of the

Insolvency Act does not permit anyone other than a debtor to claim damages. The section provides as follows:

> **"8 Abuse of Court's procedures or malicious or vexatious application for liquidation**
>
> 1. Whenever the Court is satisfied that an application for the liquidation of a debtor's estate is an abuse of the Court's procedures or is malicious or vexatious **the Court may allow the debtor forthwith to prove any damages** which he or she may have sustained by reason of the application, and award him or her such compensation as it considers appropriate." (My emphasis).

19. Section 8 of the Insolvency Act is couched in clear and unambiguous language. It specifically mentions a debtor as the only person who may prove his or her damages. The non-mention of any other person who may be entitled to prove their damages excludes those not mentioned in the section. This is embodied in maxim "*expressio unius est exclusio alterius*". What this means is that it is only a debtor who is allowed to prove his or her damages and not any other person who is not a debtor.

20. It is common cause that the appellants are not debtors of the second respondent but its directors. It is clear that s 8 of the Insolvency Act makes no provision for directors of a company to prove damages on behalf of anyone. The appellants are therefore non-suited and lack the necessary *locus standi* to prove or claim any damages in terms of s 8 of the Insolvency Act.

21. That finding of fact leaves the appellants with no leg to stand on with the result that the appeal cannot succeed. The fact that the appellants lack the necessary *locus standi* to claim the relief that they seek in this respect disposes of the appellants' second issue in favour of the respondents.

DISPOSITION

22. Above all, the court *a quo* exercised its discretion in considering the order of final liquidation of the second respondent. It placed reliance on *Hull v Turf Mines Ltd* 1906 TS 68 at 75, and many others. I did not hear the appellants challenging the validity of the exercise of such discretion. That being the case, no fault can be laid at the court *a quo's* door.

23. Costs follow the result.

24. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

CHIWESHE JA : I agree

CHATUKUTA JA : I agree

Moyo & Jera, the appellants' legal practitioners

Chatsanga & Associates, the 1st respondent's legal practitioners.