REPORTABLE ZLR (48)

Judgment No. S.C. 79/99
Civil Appeal No. 123/99

AFRICAN GOLD (ZIMBABWE) (PRIVATE) LIMITED v

MODEST (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, JULY 8 & 19, 1999

A J Dyke, for the appellant

A P de Bourbon SC, for the respondent

GUBBAY CJ: On 30 April 1999, and pursuant to the lodging of a certificate of urgency, the respondent obtained from the High Court, at Bulawayo, an order for the provisional winding up of the appellant company. The order, which was directed to be published in both the *Daily News* and *Government Gazette*, was returnable on 18 June 1999. It was issued by the learned judge notwithstanding that copies of the chamber application that gave rise to it, and the notice of set down, had not been served upon the appellant.

It was only on 12 May 1999 that these documents, together with the provisional order, were served by the Deputy Sheriff. Until that day officers of the appellant were totally unaware that the company had been placed under provisional liquidation.

The appellant moved with admirable expedition. On 14 May 1999 it instituted an urgent chamber application in which was sought the setting aside, with costs, of the order made on 30 April 1999 on the ground that it had been improperly obtained. The application was opposed by the respondent. The contention advanced was that it is permissible under the provisions of Rule 247(3) of the Rules of the High Court, as read with Form No. 29D thereto, to obtain an order for the provisional winding up of a company without first affording that company the opportunity of being heard.

It was this argument that found favour with the learned judge. In dismissing the application with costs on the scale of legal practitioner and client (a punitive measure for which there was no justification whatsoever) he said:-

> "The applicant company appears to have conveniently ignored the dictates of Statutory Instrument No. 120 of 1995 which introduced Form No. 29D. It also ignored the fact that procedure by way of petition (under Rule 5(2) of the Companies (Winding Up) Rules 1972, RGN 841 of 1972) was discontinued in this court for quite some time now. It completely disregarded the provisions of Rule 247(3) of the Rules of Court. … The respondent fully complied with the above provisions. … In the result, I am not at all persuaded that the provisional order was improperly obtained."

While it may be correct that the procedure by way of petition has been discontinued (see s 15(2) of the Interpretation Act [*Chapter 1:01*], which provides that any reference in an enactment to a petition to court shall be construed as a reference to an application), there can be no question of the applicability of Rule 247(3) to an application for the grant of a provisional winding up order. The rule is concerned solely with the form the provisional order is to take, the information required to be contained therein, and the manner of publication and service, once the order has been made by the High Court. It effectively enshrines a respondent company's right to be

heard on the day specified for the confirmation of the provisional order. It has nothing to do with what procedure has to be followed in order to obtain a provisional winding up order. That procedure is to be found in Rule 5(2) of the Companies (Winding Up) Rules, which reads:-

> "Except where the petition is presented by the company itself, a copy of the petition and the notice of set-down for hearing shall be served upon the company by delivery of such copy at its registered office or to an responsible person at its place of business, or, failing such service, to a director or secretary of the company or, if the company is in voluntary liquidation, to the liquidator. An affidavit of service shall be filed with the petition." (Emphasis added).

Mr *de Bourbon*, who appeared for the respondent, candidly conceded that he was unable to justify the failure to observe Rule 5(2). In my view, compliance therewith is mandatory. There is good reason that it should be. A respondent company must not be deprived of the opportunity to put forward its opposition to the grant of an order which will have the effect of causing it to suffer an immediate diminution in personal status and a removal of control over all its assets. These manifestly serious consequences flow from the issue of a provisional winding up order. The provisional liquidator is almost invariably vested by the court with the wide powers set out in paras (a) to (h) of s 221(2) of the Companies Act [*Chapter 24:03*]. See the remarks of HOFMEYER J in *Mackay v Cahi* 1962 (4) SA 193 (O) at 203 G-H, which though referring to sequestration proceedings are nonetheless apposite; and *Walsh v Kruger* 1965 (2) SA 756 (ECD) at 760B.

The importance attaching to compliance with Rule 5(2) of the Companies (Winding Up) Rules was recognised by BEADLE CJ in *Ex parte Smith NO: In re Dodge Mineral Production Company (Pvt) Ltd* 1964 RLR 93 (HC). In

that case although the petition applying for the provisional winding up order was served upon the company at its registered office, the managing director was out of town at the time and had no knowledge of the application until after the order was made. At the postponed return day the managing director applied for an order releasing sufficient funds to the company to enable it to appear by counsel to oppose the granting of a final order. In response, the learned CHIEF JUSTICE observed at 94 C-D:-

> "Now it appears to me in circumstances such as this the respondent company has never had a proper opportunity of being heard as it would have had had the application for the provisional order been brought timeously to its notice. One of the fundamental rules of our system is that defendants and respondents should be given an opportunity of being heard in matters such as this and to make a final order now would be to deprive the respondent of any chance of putting its case before the court."

His Lordship therefore permitted the managing director to place affidavits before the court in reply to those of the petitioner so that the court might determine whether the respondent company had an arguable case. If satisfied in that regard an order would be made releasing funds to the company for the purpose of funding its opposition. See also Christie *Business Law in Zimbabwe* 2 ed at 428; Nkala and Nyapadi on *Company Law in Zimbabwe* at 428.

A fortiori, so it seems to me, the present appellant being the victim of an inexcusable breach of procedure, the High Court ought to have afforded it the opportunity to oppose the application for the provisional order by the only means available, namely, by the setting aside of the order that had been improperly obtained.

The Court was informed by counsel that affidavits in opposition to the confirmation of the provisional order had been filed and answered by the respondent. This was done as a precaution against the dismissal of this appeal. It has, however, the advantage that at the renewed hearing of the application for the grant of a provisional winding up order, which I now propose to direct, the appellant's opposition will be before the High Court. In the circumstances, there is no reason why the application should not be set down with the utmost expedition.

In the result, it is ordered as follows:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is altered to read -

> "The application to set aside the provisional order of winding up is allowed with costs."

3. The chamber application for an order of provisional winding up, being case number HC 2028/99, is to be set down for rehearing before the High Court, at Bulawayo, as a matter of urgency.

4. The affidavits filed in case number HC 2028/99 are to be taken into account in the determination of whether a provisional winding up order should be made.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Y A Mukadam & Associates, appellant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners