REPORTABLE ZLR (37)

Judgment No. 42/07
Civil Appeal No. 275/06

PRIME SOLE (PRIVATE) LIMITED v MUNIR KAZI

SUPREME COURT OF ZIMBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, JUNE 26 & NOVEMBER 26, 2007

H Zhou, for the appellant

L Mazonde, for the respondent

GWAUNZA JA: The appellant approached the High Court seeking an order placing the estate of the respondent under provisional sequestration. It also sought an order for the appointment of a trustee to run and manage the financial and business affairs of the respondent. The High Court found that the appellant had failed to prove it was owed any money by the respondent, or that the respondent had committed an act of insolvency as defined in the Insolvency Act [*Cap* 6:04] ("the Act"). The court was also not satisfied on the facts before it that there was justification for declaring the respondent a debtor as defined by the Act. The court *a quo* having, consequently, dismissed the application, the appellant has now appealed to this Court.

In its grounds of appeal, the appellant alleges error and misdirection on the part of the court *a quo* in finding

(i) that the respondent had not committed an act of insolvency; and

(ii) that it (the appellant) had failed to establish the respondent's liability to it.

The appellant also charges that the court *a quo* misdirected itself in failing to find that the respondent had ***"executed a premeditated fraud on the appellant and deliberately generated invoices in the name of a third party and spread payments through his other companies and nominees as a way to disguise his plot to defraud the appellant of its money".***

The facts of the matter are largely undisputed. The appellant and the respondent negotiated an agreement, (which they did not reduce to writing) in terms of which the latter was to see to it that the former's obligations to its suppliers in South Africa, to the value of US$108 950.00, were met. This was to be effected through the use of free funds held outside the country. The applicant in its turn was to pay, in local currency, and in Zimbabwe, the Zimbabwean dollar equivalent of the funds owing, which was worked out at $5 687 839 653.75. With discount, the amount was reduced to $5 289 690 877.00.

The applicant thereafter made staggered payments between 12 July and 17 August 2005, totaling the discounted amount referred to. However none of the payments were made directly to the respondent. Instead, the payments were made to three

companies, Maniam Investments, Guistein Investments, and Gangnet Interprises, while one payment was made to someone referred to as I. Sutcliffe.

Despite these payments and contrary to the agreement between the parties, the appellant's obligations to its suppliers in South Africa were for the most part not met, since only ZAR55 830 had been paid towards the discharge of such obligations. Going by the then prevailing exchange rate, this amount was said to represent US$8 589.00. This therefore left obligations worth US$100 361.00 still to be discharged. When it became evident that the rest of its obligations, despite promises from the respondent, were not to be met, the appellant made repeated demands for re-imbursement of the US$100 361.00. These demands yielded no results, a circumstance that prompted the appellant to write to the respondent, threatening to take legal action against him. It was then that the appellant received three undated cheques each with a face value of $450 000 000.00 and drawn on the account of Guisten Investments. It is not in dispute that these cheques, which bore the signature of the respondent, were dishonoured by the bank upon presentation. The reason was that the account on which they were drawn had been closed. The appellant avers that it received no further repayment of the money that it had paid. It therefore proceeded to take the legal action it had threatened to take, which took the form of an application in the court *a quo* for the provisional sequestration of the respondent's estate.

The main dispute between the parties relates to the capacity in which the respondent acted in negotiating the agreement in question. He contends he was acting as

a representative of Maniam Investments, the company that had issued to the appellant, two invoices totaling the amount that it was to pay in terms of the agreement. The respondent argues on the basis of this that it is to Maniam Investments, and not him, that the appellant should look for repayment of the US$100 361.00. The appellant, on the other hand, insists that the respondent acted on his own behalf when he negotiated the agreement, and was therefore personally liable in terms of the Insolvency Act.

According to s 13 of that Act, the High Court shall not grant an order of provisional sequestration unless it is of the opinion that, *prima facie* -

(a) the debtor has committed an act of insolvency; and

(b) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated; and

(c) the petitioner has a claim against the debtor to the extent referred to in subs (1) of s 12 (of the Act).

The court *a quo* correctly considered, as a starting point, whether on the facts before it, the respondent could be described as a debtor as defined in the Act. It found that he could not, and opined as follows at p 8 of the judgment:

> ***"The applicant in the circumstances was under a most onerous burden to establish that the respondent was a debtor as defined by the Act. The applicant describes the companies into whose account it paid monies as the nominees of the respondent and yet has adduced no evidence to that effect. The respondent is alleged to be the principal officer of one of these companies, but that does not make the company in question a nominee of the respondent. It is trite that a company is separate from its members and the applicant has not even alleged that the respondent owns shares or is the controlling shareholder in any of the companies. The applicant has not made any effort to open up the relationship***

between the respondent and the companies it calls the nominees of the respondent. Without lifting the corporate veils of the said companies they remain distinct and separate from the respondent."

I respectfully agree with the learned Judge's reasoning and conclusion as outlined.

The relevant part of the definition of "debtor" in the Insolvency Act defines debtor as a person who ***"is a debtor in the usual sense of the word".*** The definition specifically excludes a body corporate or company or other association of persons which may be placed in liquidation or wound up in terms of the law relating to companies. Thus a debtor, according to this definition, must be a natural person. Such person is defined in the Concise Oxford Dictionary as **"*as one who owes money or an obligation***".

While the appellant clearly dealt with the respondent in negotiating the agreement in question, it has not tendered any proof that the respondent was representing himself personally. Given the latter's averment that he negotiated with the appellant in his capacity as a representative of Maniam Investments, the appellant did indeed have the onerous burden of laying a basis for a finding by the court that the respondent was acting on his own personal behalf. The appellant has not discharged that burden. Quite clearly, the appellant took a risk when it failed to ensure that a weighty transaction such as the agreement in question, was reduced to writing.

It may very well be true that the respondent did not deal with the appellant in good faith, and that he also engineered events in such a way as to shield himself from

personal liability. However, in the absence of evidence to corroborate the appellant's assertions, it is difficult to accept its say-so as regards the respondent's allegedly fraudulent conduct towards it.

As for the companies to which payment of the disputed amount was made, it is evident the appellant has not said anything to dispute their existence. The contrary is, in effect, suggested by the fact that such companies held active bank accounts into which the funds in question were deposited. In the face of this, the court *a quo* was correct to observe that as long as the appellant did not lift the corporate veil of these companies, they remained separate and distinct from the respondent. Thus, when one of these companies, whose separate identity from the respondent the appellant has failed to challenge, generates invoices and the appellant of its own accord makes payment to that company, it becomes difficult to challenge the respondent's assertion that he had negotiated the agreement in question on behalf of that company. If anything, such documentary evidence as the invoices and Real Time Gross Settlement, (RTGS) forms in favour of Maniam Investments does more to substantiate the respondent's assertions than disprove them.

The learned Judge was also correct in her finding that nothing much turned on the fact that the respondent had signed the three dishonoured cheques that were drawn on a closed Guisten Investments account. Companies, being artificial persons, do act through natural persons, and that includes the signing of cheques. Signing a cheque on behalf of a company - even where the account on which the cheque is to be drawn may be closed - does not of itself transfer the liability of the company to the individual who signs

the cheque. That such an act might have implications in respect of criminal law is not relevant to the dispute at hand. The argument that companies act through natural persons without the latter assuming the former's liabilty applies with equal force to the appellant's submission that the respondent was the principal officer of one of the companies concerned.

It was therefore evident in view of the foregoing, that the appellant failed in all respects to prove that the respondent was a debtor with regard to the debt in question, and in any case, for purposes of the Insolvency Act,

Having failed to prove that the respondent was its debtor, it followed that whatever act of insolvency the respondent might have committed had no bearing on the appellant's claim. In terms of s 11 (f) of the Insolvency Act, a debtor shall be deemed to have committed an act of insolvency if –

> ***"he gives notice to any of <u>his creditors</u> that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts; or..."*** **(**my emphasis)

The meaning of this provision is, in my view, quite clear. A person who owes money or other obligation, i.e. a debtor, commits an act of insolvency if, rather than pay such debt, he lets the people that he owed the money to, that is, his creditors, know that he has suspended or is about to suspend payment of what he owes.

I have already determined that the respondent in his personal capacity was not the appellant's debtor nor, conversely, was the appellant the respondent's creditor. As correctly observed by the *court a quo*, the respondent's conduct can only be examined in circumstances where he could be termed a debtor in terms of the Act.

The finding of the Court on the questions of whether the respondent was a debtor, or had committed an act of insolvency, is disposive of this appeal and makes it unnecessary for me to consider the other requirements listed in the Act for a provisional sequestration order.

I find in the result that the appeal has no merit.

It is accordingly ordered as follows –

The appeal be and is hereby dismissed with costs.

CHEDA JA: I agree

GARWE JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Ahmed & Ziyambi, respondent's legal practitioners