BACKLOADS (ZAMBIA) LIMITED
v
FREIGHT AND LINERS (ZAMBIA) LIMITED

HIGH COURT
WOOD, J.,
22nd July, 2011.
2008/HPC/0261

[1] Company law - Winding-Up Rules - Taxation of costs - Whether was prematurely proceeded with.

This was an appeal against the decision of the Deputy Registrar dismissing an application to stay the petitioners application to stay execution and sale of its goods on the grounds that there was nothing irregular with the certificate of taxation, and writ of fifa because the petitioners application for leave to appeal had been struck out. And further that the petitioner did not attend the hearing relating to the taxation.

Held:

1. Rule 51 of the Companies (Winding-Up) Rules, 2004, makes provision for any procedural defects to be cured unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and the injustice cannot be remedied by any order or the Court.

2. One of the defects with the petition was that it was not advertised in accordance with the Rules.

3. Rule 6(4) of the Companies (Winding-Up) Rules, 2004, shows that the Registrar of the High Court may extend the time within which a petition shall be advertised. Procedural defects are, therefore, curable.

4. Having come to the conclusion that procedural defects are curable under the (Winding-Up) Rules, the matter cannot be said to be at an end, in the absence of an order dismissing it for want of prosecution by the respondent.

5. The taxation was done contrary to Order 62, Rule 8(1) because the matter was not concluded.

6. There was also no order to the effect that the costs should be taxed earlier in accordance with Order 62, Rule 8(2).

Case referred to:

1. Avalon Motors Limited (In Receivership) v Gadsden (1998) Z.R. 41.

Legislation referred to:

1. Companies Act cap 388 s.296 (1).
2. Companies (Winding-Up) Rules of 2004. Statutory Instrument Number 86 of 2004. Rules 4, 6(4) and 51.
3. High Court Act, cap 27, Order 39, Rule 1.

Works referred to:

1. Rules of the Supreme Court, Order 62, Rule 8 (1) and (2).
2. Halsbury Laws of England, 4th edition, Volume 7 (2), Paragraghs 1487 and 1489.

R. Mainza of Messrs Mainza and Company for the plaintiff.
S. Sikota, SC, of Messrs Central Chambers for the defendant.

WOOD, J.: This is an application by the respondent to review a winding up order made by the Court on 4th November, 2008. Order 39 rule 1 of the High Court Rules cap. 27 states as follows:

"Any judge may, upon such grounds as he shall consider sufficient review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and re-hear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter."

I am reviewing this matter by virtue of the proviso since the Hon Judge who was seized of the matter is out of jurisdiction.

There is an affidavit in support sworn by Maninga Shimonde Lungu on 12th January, 2009. She states in her affidavit that she is the majority shareholder, and a director of the respondent. She learnt through a phone call made to her by one Sanderson E. Mweemba, the former director of Finance and Administration of the respondent on 5th January, 2009, that the respondent had been wound up as of the 4th November, 2008, due to its failure to pay debts. He urged her not to contest the liquidation as according to him it was in her best interest not to do so. He said that he had really worked hard for that to happen. This information came to her with surprise and shock in that, as a director and shareholder she was not aware of the alleged debt leading up to these proceedings as no notice was issued to her as majority shareholder, and director nor to the respondent's then Advocates Messrs. Chaiwila & Chaiwila whom the petitioners were aware represented the respondent. The petitioner's lawyer, Mr. Remmy Mainza was aware that the respondent was being represented by Messrs. Chaiwila & Chaiwila as there was an ongoing matter before his lordship Mr. Justice T. Kakusa under cause number 2008/HP/588, in which the petitioner was represented by Messrs. Mainza & Company, and the respondent was represented by Messrs. Chaiwila & Chaiwila who were on the 6th November, 2008, joined by Messrs. Central Chambers. In that action which was commenced by the petitioner on 16th June, 2008, the

petitioner was challenging a Warrant of Distress issued against it by the respondent claiming rent in the sum of K113,750,000.00, which was outstanding as at 30th June, 2008. This rent was in respect of the same subject matter over which the petitioner was now claiming the sum of K524,456,898.00.

Upon receipt of the phone call from Mr. Mweemba, she instructed Messrs. Central Chambers on behalf of the respondents to check the facts as to Mr. Mweemba's intimation. Messrs Central Chambers conducted a search initially at the Companies Registry whereupon they discovered that an order of appointment of Liquidator was filed by Mr. George Chisanga. It was very surprising that Messrs. Mainza & Company commenced winding up proceedings on 2nd July, 2008, just over two weeks after they commenced cause number 2008/HP/588, but elected not to serve the proceedings on Messrs. Chaiwila & Chaiwila whom they were aware were acting on behalf of the respondent. She later discovered that a law firm in the name of Messrs. Douglas & Partners was instructed by Mr. Mweemba on behalf of the respondent to represent the respondent in the winding up proceedings with specific instructions not to oppose the petition. When she and Messrs. Central Chambers confronted Mr. Friday Besa of Messrs. Douglas & Partners on 6th January, 2009, he commented that he had been instructed to act for the respondent with specific instructions not to oppose the Winding up petition, something she found very odd and strange. Mr. Besa did not receive the instructions from any authorized representative of the respondent. The scheme by the petitioner and Mr. Mweemba prevented the respondent from effectively participating in the proceedings.

The basis of the petitioner's claim was on a forgery and only surfaced after her uncle Mr. David L. Shimonde, the purported signatory to the same had died. The only lease agreement was the one made between the parties, and signed on 1st October, 2004.

Although agreements were entered into for the petitioner to carry out renovations to the property, it was not an express term of the lease. The petitioner was supposed to carry out the renovations for his own good and that was the reason the property was initially leased to the petitioner at the reduced rent of US$1000.00, per month for the initial year so that the petitioner could recover the costs of renovations to the property. There was no agreement to sell the property and all overtures to sell the property were declined. The renovations cost would have been subjected to verification and approval by the respondent which was never the case. No such intimation was made to the respondent, and exhibit 'AM6' was a confirmation of the conspiracy between the petitioner and Mr. Mweemba to convert the respondent's property.

The petitioner did not issue a formal demand for its purported claim even though Messrs. Chaiwila & Chaiwila had been asking the petitioner's advocates to provide quantification of the petitioner's claim. Furthermore, Mr. Sanderson E. Mweemba had no authority conducting business on behalf of the respondent when he had left the company. Mr. Mweemba had been trying to extort money from the respondent, and when he failed, he decided to collude with the petitioner to achieve his goal. The winding-up order granted to the petitioner ought to be reversed as the same was obtained on the basis of concealment, fraud, bad faith, and was a malicious orchestration of a scheme calculated to enrich the petitioner by trying to convert a property that did not belong to it.

The petitioner filed an affidavit in opposition on 1st June, 2009. Mr. Allan McNab denied that Ms. Maninga Shimonde Lungu was a majority shareholder and director of the respondent because there was no proof of a share certificate or a letter of appointment as director. This allegation does not help the petitioner in view of the companies form which shows that Ms. Maninga Shimonde Lungu is a director of the respondent. The affidavit in opposition goes on to state that a letter of demand (a copy of which has not been exhibited), and petition were served on the respondent's director, Mr. Sanderson E. Mweemba, and that this was sufficient service. This allegation must be rejected for the simple reason that at the time Mr. Sanderson E. Mweemba was being served with the documents, he had no authority to accept service let alone instruct Messrs. Douglas & Partners in the manner he did because at the material time he was no longer an employee of the respondent. This is confirmed by his own letter exhibit 'MSL11' attached to the respondent's affidavit in support. Mr. Sanderson E. Mweemba nor Mr. Allan McNab have denied the existence of this letter. Mr. Allan McNab attempted to give a feeble explanation that Mr. Mweemba was employed by the respondent at the material time. There is no such evidence in the exhibits.

There appears to have been a disregard for procedure by the petitioner. The petition was served contrary to paragraph 1460 of Halsbury's Laws of England 4th Edition volume 7(2) and Rule 4 of the Companies (Winding-up) Rules 2004, Statutory Instrument Number 86 of 2004 on Mr. Sanderson Mweemba who was not a director and who was not authorized to accept service. There is no proof that the petition was advertised in the Government Gazette, and newpaper which is a requirement under Rule 6 of the Companies (Winding-up) Rules 2004, and paragraph 1461 of the Halsbury's Laws of England 4th Edition volume 7(2). If a petition is not duly advertised, the Court may dismiss it.

What has emerged from the affidavit in opposition is that the petitioner has failed to explain to the satisfaction of the Court why all these glaring irregularities mentioned in the affidavit in support were not brought to the attention of the Court at the time the application for a winding-up order was made. Had this new evidence which has come to light now been brought to the attention of the Court earlier, the decision would, in my view, have been different.

Mr. Mainza submitted that the application for review was misconceived in law because the respondent did not seek leave of the Court to file an application for review of the winding-up order. He cited section 296 (1) of the Companies Act cap. 388 in support of his submission. section 296 (1) states:

"At any time after an order for winding-up has been made, the Court may, on the application of the liquidator or of any creditor or member and if it is satisfied that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether, or for a specified time on such terms and conditions as the Court thinks fit."

I cannot find anything in section 296 which requires the respondent to seek leave. section 296 deals with applications by the liquidator, creditor, or any member to stay the proceedings. Ms. Maninga Shimonde Lungu has demonstrated in her affidavits that she is a shareholder, and director. She is therefore a member and comes with the ambit of section 296.

In Avalon Motors Limited (In Receivership) v Gadsden and Another (1), the Supreme Court held that shareholders and directors, as well as anybody who is properly interested, and who has a beneficial interest to protect can sue a wrong doing receiver in their own names and in their own right.

Although Avalon Motors Limited (In Receivership) (1), dealt with a Receiver and the Supreme Court held that anybody who has a beneficial interest to protect can sue in their own names and in their own right, paragraph 1489 of Halsbury's Laws of England 4th Edition Volume 7(2) seems to suggest that in a liquidation, directors may appeal in the company's name from the winding up order. Paragraph 1489 states:

"The winding-up order also has the effect of discharging all the company's employees, of terminating agencies, and of dismissing its directors. It puts an end to the directors' powers of management: thus they cannot make calls. They may however, appeal in the company's name from the winding-up order; and they do not cease to be officers of the company for purposes of being ordered to answer interrogatories."

If directors can appeal in the name of the company, they can in my view, defend in the name of the company. Section 296 (1) supports this view as it allows applications by members of a company which has had a winding-up order made against it.

A perusal of paragraph 1487 of Halsbury's Laws of England 4th Edition Volume 7(2) referred to above shows that a Court has no jurisdiction to rescind a winding up order after it has been obtained by mistake. The proper remedy is for the company to apply for a stay of the winding up.

Rule 51 of the Companies (Winding-up) rules, 2004 seems to agree with paragraphs 1487, but it has an exception. Rule 51 reads as follows:

"No proceedings under the Act or under these Rules shall be invalidated by any formal defect or irregularity under these Rules unless the Court before which the objection is made is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order or the Court."

Order 39 of the High Court Rules gives the Court wide powers to "review any judgment or decision." A reading of Rule 51 of the Winding-up Rules shows that where there has been substantial injustice, the Court can intervene. There is sufficient fresh evidence in my view in this matter which shows that the Court should review its earlier decision. The evidence also shows that there would be substantial injustice caused by irregularities such as failure to make a formal demand, service on a party who had no authority to accept service, and the omission to advertise in the Government Gazette and newspaper.

I have therefore come to the conclusion that there are sufficient grounds on the basis of the affidavits filed in connection with this application to review the winding-up order of this Court made on 4th November,, 2008. I therefore reverse the previous decision with costs to the respondent.

Judgment reversed.