IN THE SUPREME COURT OF ZAMBIA — SCZ NO. 28/2006

HOLDEN AT LUSAKA — Appeal Nos. 191 & 197/2004

(Civil Jurisdiction)

B E T W E E N:

LUSAKA ENGINEERING COMPANY LIMITED (IN LIQUIDATION)	**Appellant**
AND	
MATTHEW CHAIMA AND 28 OTHERS	**Respondents**
AND	
PHILLIP M. MILIMO AND 13 OTHERS	**Respondents**

Coram: Chirwa and Chitengi, JJS. Kabalata, AJS

on 20th April, 2006 & 18th May, 2006 and 25th September, 2006

For the Appellants : Mr. A. A. Dudhia of
Messrs Musa Dudhia & Company

For the Respondent: Mr. R. Mainza of
Messrs Mainza & Company

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to:-

1. ***Bernard Leigh Gadsden V Kitwe Meat Market Limited (1985) ZR 152.***

2. ***Derrick Chitala V The Attorney-General (1995/1997) ZR 91.***

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3. ***Emmanuel Nkhata Chirumba V Union Bank Zambia Limited SCZ Judgment No. 70 of 2003 (unreported).***

4. ***Langley Constructions (Brixham) Limited V Wells 1969 1WLR 503.***

Statutes referred to: -

1. ***Companies Act Chapter 388 of the Laws of Zambia Section 281.***

2. ***Companies Act Chapter 686 of the Laws of Zambia (repealed) Section 143.***

3. ***English Companies Act of 1948 Section 231.***

4. ***English Companies Act of 1929 Section 117.***

5. ***English Companies Act of 1908 Section 142.***

Works referred to: -

1. ***Palmer's Company Law 21st Edition by C. M. Shimittoff and J.H. Thomson (Status and Sons Limited London 1969).***

2. ***Buckley on the Companies Acts 12th Edition Pages 500 and 501.***

3. ***The Digest British Commonwealth and European Cases 10(2) 1990 2nd reissue Paragraph 10409.***

These two appeals have a common Appellant but different Respondents and were heard on different dates. But since each appeal raises precisely the same issue as the other, we decided to write one judgment in respect of both appeals.

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Reduced to a narrow compass for the purpose of these appeals, the facts are that the Respondents, in both appeals, were once employees of the Appellant. The Respondents in **Appeal No. 191/2004** were retrenched on 17th November, 1995 while the Respondents in **Appeal No. 197/2004** were retrenched on 12th February, 1997. The two groups of Respondents brought separate actions against the Appellant alleging that they were paid terminal benefits inferior to their entitlements under the Collective Agreement of 1993 - 1995 made between the Appellant and the Respondents' Union called the National Union of Building and Engineering Workers. The total amount alleged to be owing to the Respondents in Appeal No. 1991/2004 is K70,685,744.00 while the Respondents in Appeal No. 197/2004 are alleged to be owed K246,140,122.39. In all, all the Respondents' claim is **K316,825,866.39.**

The Appellant resisted both actions and filed Defences. To put the matter in proper perspective it is necessary to reproduce the material paragraphs in the Defence.

In Appeal No. 191/2004 the material paragraphs of the Defence read as follows: -

> "***2. The Defendant admits paragraph 2 of the Statement of Claim in as far as the Plaintiff were***

employees of the Defendant but denies that all the Plaintiffs served under the ZIMCO Conditions of Service and will aver that only 3 of the said Plaintiffs served under the said Conditions of Service.

4. *The Defendant denies paragraphs 4 and 5 of the Statement of Claim and will aver that the Plaintiffs were paid their retirement packages in full."*

The material paragraphs in the Defence in Appeal No. 197/2004 read as follows: -

"2. The Defendant Company denies the contents of paragraph 3 of the Plaintiff's Statement of Claim and will aver that with an exception of three of the Plaintiffs' herein, the rest were put on early retirement scheme agreed upon between the Defendants' and Plaintiff's recognized representatives.

3. *The Defendant does not admit the Plaintiffs' allegations as contained at Paragraph 4 of their Statement of Claim and will aver that the Plaintiffs were paid their terminal benefits in full and in accordance with the agreement made*

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4. ***between the Defendant and the Plaintiffs' recognized representatives dated 14th March, 1997.***

5. ***The Defendant will further aver that the 3 Exceptional Plaintiffs who were retrenched were equally paid their retrenchment packages in accordance with the relevant provisions of the Collective Agreement of 1993 - 1995 and as such will put the Plaintiffs to strict proof of their allegations therein.***

6. ***The Defendant further denies that the 10% discount charged on the Plaintiffs' terminal benefits was unlawful and will aver that the said discount was agreed to*** **between the Defendant and the Plaintiff's representatives."**

Before the Respondents' actions could be heard and determined by the High Court the Appellant went in liquidation, the Winding up Order having been made on the 24th day of September, 2001. Thereupon, the Respondents applied for leave in terms of ***Section 281 of the Companies Act***[1] to proceed with the proceedings against the Appellant.

The Appellant opposed the applications for leave on basis that the winding up is almost complete; that there was no money to pay the Plaintiff's claim; that the Respondent delayed in prosecuting their claims and that what the Respondents were doing was an abuse of court process.

Two different Judges heard the two applications for leave. The application in Appeal No. 191/2004 was heard by Mr. Justice Mushabati. Mr. Justice Mushabati granted leave to proceed without assigning reasons. Mr. Justice Kakusa heard the application in appeal No. 197/2004 and granted leave on the ground that liability was vehemently disputed by the Appellant.

The appeals are against the orders of the High Court granting leave to the Respondents to proceed with their actions. The grounds of appeal in both appeals are identical. Counsel who appeared for the parties in the High Court are the same who argued these appeals.

The first ground of appeal is that the learned trial Judge erred in law in granting leave as he did not take into account that as the Appellant company was insolvent the current action was pointless and the Respondent should have submitted proof of

debt form to the liquidator instead under the ***Companies Act Chapter 388 of the Laws of Zambia***.

The second ground of appeal is that the learned Judge erred in law in not taking into account the proof of debt under the Winding up Rules of 1929 which were in force at the time of his ruling.

Counsel filed written heads of argument on which they relied.

Critically looked at, the two grounds are actually one ground of appeal, Ground two being, we must say, a mere surplassage to Ground one. We have, therefore, considered the two grounds of appeal together.

Mr. Dudhia's arguments and submissions are that Section 281 of the Companies Act makes it mandatory to apply for leave to proceed with an action against a company in liquidation. It was Mr. Dudhia's submission that Section 281 is part of the courts overall duty to ensure that unsecured creditors are treated parri passu. Further, Mr. Dudhia submitted that provisions of the Companies Act impose a duty on the Court to consider and decide where an action should be proceeded with against a company in liquidation. Mr. Dudhia submitted that the requirement to apply for leave is not merely

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According to Mr. Dudhia, his diligent search led him to no authority on what it is required to satisfy the section. In the event, he invited the court to set the standard and threshold for the purpose of Section 281. Therefore, in dealing with Section 281, Mr. Dudhia invited us to follow the approach in dealing with the requirement to obtain leave for Judicial Review. In this regard, Mr. Dudhia referred us to the case of ***Derrick Chitala V The Attorney-General***[2] where we said, inter alia, that the purpose of the requirement of leave was to eliminate at an early stage any applications which are either frivolous, vexations or helpless. Mr. Dudhia urged us to adopt this test.

Lastly, Mr. Dudhia submitted that the proper course for the Respondents was to prove their debt to the liquidator.

Mr. Mainza, learned counsel for the Respondents, submitted that the learned trial Judges were on firm ground to grant leave under Section 281 of the Companies Act because liability was denied. He argued that the action is not pointless as contended by Mr. Dudhia because the action is intended to prove the claim which has been denied by the Appellant. It was Mr. Mainza's submission that the ***Gadsden case***[1] is distinguishable from this case in that in the ***Gadsden case***[1] the Plaintiff sought to establish a right to be paid, while in the

for the purpose of informing the Court, because if it were, Section 281 would not have given the court a discretion to do what is justice. According to Mr. Dudhia, the purpose of Section 281 is to ensure that pointless actions are not proceeded with against insolvent companies. He argued that if a pointless action is proceeded with, it will mean that there will be less money available for distribution parri passu to the unsecured creditors. Mr. Dudhia then submitted that under Section 281 the Court is the *"guardian at the gate"* to make sure that pointless actions are not proceeded with.

In this instant case, in an attempt to show that the Appellant is insolvent, Mr. Dudhia referred us to the Appellant's statement of affairs which he said showed that there was no money to pay the Respondents even if their actions were proceeded with and were successful. In this regard, Mr. Dudhia cited to us the case of ***Bernard Leigh Gadsden V Kitwe Meat Market Limited***[1] where we said that it was pointless to proceed with an action where the company was insolvent.

Mr. Dudhia also submitted that leave should not have been granted because the Respondents were guilty of laches. He said all people with knowledge of the facts pertaining to the actions are no longer in employment and it would be difficult for the Liquidator to find them to come and testify.

present case the Respondents seek to establish a right to the payment of a debt which has been disputed by the Appellant.

On the alleged lack of money by the Appellant, it was Mr. Mainza's submission that the statement of affairs referred to by the Appellant does not meet the Statutory requirement of Section 287 of the Companies Act with regard to details of assets, debts, and liabilities.

On delay, Mr. Mainza submitted that under the law, delay is a not criterion for refusing leave. On the difficulty to find the witnesses, Mr. Mainza submitted that the Appellant has already filed its bundles of documents and the liquidator, Cosmas Mwananshiku and Diago Cassilli, former Managing Director/Shareholder of the Appellant, can testify.

On the Respondents proving their debt, Mr. Mainza submitted that it was not necessary for the Respondents to submit Statutory Proof of Debt Form to the Liquidator because the Appellant denied liability.

We have carefully considered the facts of these two cases, the submissions of counsel and the judgments appealed against.

In his submission, Mr. Dudhia created the impression that this is the first time the interpretation of Section 281 has come before this court. This is not correct because we dealt with the effect of Section 281 in the case of ***Emmanuel Nkhata Chirumba V Union Bank Zambia Limited (In Liquidation)***[3]. In the ***Chirumba case***[3], we followed the principle in ***Palmer's Company Law(1) at Page 771,*** that where an outsider or individual is in some dispute with the company and it is desirable that the dispute be decided in an action by the ordinary tribunals, leave to commence or proceed with an action against a company in liquidation should be given. We went further and said that the fact that the liquidator has taken full charge of the matters affecting the company is immaterial. Furthermore, we said that some of the matters a liquidator inherits are pending suits for and against the company.

In the ***Chirumba case***[3] the learned trial Judge refused leave on the ground that the Plaintiffs' claim did not disclose any cause of action, an issue that was not before him for determination. We reversed the learned trial Judge, granted leave and ordered the trial to proceed before another High Court Judge.

In the instant cases, one learned trial Judge granted leave on the ground that liability was denied while the other learned Judge gave no reasons for granting the Respondents leave to proceed with their actions.

On the facts of the ***Chirumba case***[3] and the arguments that were before us, our judgment in the ***Chirumba case***[3] was necessarily limited to deciding whether in that particular case leave to proceed with the action should have been granted. The present appeals have a wider dimension. The facts of these appeals and the arguments from counsel call for a detailed discussion on the interpretation and purpose of Section 281.

As we said in the ***Chirumba case***[3], ***Section 281*** is not of our own creation but has its origin in the English Companies Act.

Section 281 corresponds to Section 143 of the repealed ***Companies Act Chapter 68 of the Laws of Zambia***[2] which corresponds to ***Section 231 of English Companies Act of 1948***[3] which corresponds to ***Section 177 of the 1929 English Companies Act***[4] which corresponds to ***Section 142 of the 1908 English Companies Act***[5].

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It is not a matter of debate that our Companies Acts are but the 1948 English Companies Acts we have referred to. To find the meaning of Section 281, we have, therefore, to have recourse to cases and works that have interpreted similar provisions in the English Companies Acts.

We have to refer to English authorities and other works because we do not have authorities that have dealt with Section 281 in extensio. As we have said above the facts and arguments in the ***Chirumba case***[3] which dealt with Section 281 necessarily limited the scope of our judgment to that case.

Mr. Dudhia cited to us the ***Gadsden case***[1] and the ***Derrick Chitala case***[2] which he said show the purpose of Section 281, namely to weed out pointless actions against a company in liquidation. We have paraphrased Mr. Dudhia's submissions because he did not put his argument in the way we have put it. We have no hesitation to say that these two cases are irrelevant to the issue at hand.

The ***Gadsden case***[1] dealt with Section 141 of the repealed ***Companies Act Chapter 686***[2] which corresponds to ***Section 276 of the present Companies Act*** and not *Section 143 which, as have said corresponds to Section 281*. In any case, the facts in the ***Gadsden case***[1] are different from the facts in

the instant cases. Further, unlike in the instant cases, the claim in the ***Gadsden case***[1] was admitted.

The Derrick Chitala case[2] dealt with leave for Judicial Review. What is involved in Judicial Review has totally nothing to do with the winding up of a company and what follows after winding up. We, therefore, find Mr. Dudhia's submissions, ingenious as they are, that we adopt the principle in the ***Derrick Chitala case***[2] that leave is required to weed out pointless actions against a company in liquidation, untenable. Principles of law and practice in Judicial Review are not in pari materia with principles and practice of company law for us to draw an analogy from Judicial Review Principles when interpreting provisions in the Companies Act. Because of lack of their basis in law and practice, Mr. Dudhia's submissions on this issue, therefore, make us anxious to reject them.

Since the arguments of both counsel seem to suggest that leave to commence or proceed with an action against a company in liquidation is intended to weed out unmeritorious actions against a company in liquidation, it is appropriate at this juncture to consider the purpose of ***Section 281***. As we have already stated, Section 281 is the same as Section 231 of the 1948 English Companies Act.

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The Court of Appeal had the opportunity to consider the purpose of ***Section 231 in the case of Langley Construction V Wells[4].*** In an opinion with which Lord Davies concurred, Lord Widgery had this to say about the purpose of Section 231: -

> ***"The purpose of Section 231 is to ensure that when a company goes into liquidation, the assets of the company are administered in an orderly fashion for the benefit of all the creditors, and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company. What is contemplated is that the Companies Court shall be seized of all the these matters and should see that the affairs are wound up in a dignified and orderly manner."***

Of course in Zambia, the "Companies Court" should read the "*High Court*". It is therefore, not correct to argue that the purpose of Section 281 is to weed out unmeritorious or pointless actions against a company in liquidation as Mr. Dudhia submitted. It is also erroneous to argue that Section 281 is intended to protect the unsecured creditors only as Mr. Dudhia's submissions suggest. Section 281 is intended to protect all creditors.

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What then is the effect of Section 281? In dealing with the effect of ***Section 231 of the English Companies Act of 1948***[3] which is equivalent to our Section 281, the learned author of Buckley on the ***Companies Act 12th Edition***[2] have this to say on pages 500 and 501: -

> "***After winding up Order is made, further proceedings are absolutely stopped until leave has been obtained from the Court."*** *Page 500*
>
> ***"In general leave to institute or proceed with an action will only be given where some question arises which cannot be properly determined in the winding up, and for whose determination an action is requisite."*** *P501*

Similar views are stated in ***The Digest***[3] at paragraph 10409 where it is stated that: -

> "The Court in exercising its discretion under ***Section 231 of the Companies Act 1948***[3] should do what is right and fair in all the circumstances. If the proposed action for which leave is sought raises issues, which can be conveniently decided in the course of the winding up then in the absence of special circumstances, permission to bring the action should be refused. There is positive benefit in having the issue decided in the liquidation

proceedings as this should be less expensive and quicker than an independent cause of action. Also a liquidator is obliged to act even handed by as between each class of claimant, the settlement of claims through the winding proceedings will normally not cause prejudice to any particular class of claimant. ***Exchange Securities and Commodities Limited and Others (1983) BCLC186***"

What emerges from these authorities and the wording of Section 281 itself is that Section 281 peremptorily stops commencement, or continuation of actions against a company in liquidation once a winding up order has been made by the court. It is also clear from the authorities and the wording of Section 281 itself that the granting of leave is not automatic and that it is within the discretion of the court. There is, therefore, no general principle that once a company has gone into liquidation leave to commence an action or proceed with an action against it must be given. Conversely, there is no general principle that once a company has gone into liquidation leave to commence or proceed with an action against it must be refused. In short, each particular case will be dealt with on its own merits. The arguments by Mr. Dudhia suggesting that mere insolvency of a company entitles the court to refuse leave to commence or proceed with an action against a company in liquidation must, therefore, break

down. In fact, it is the insolvency that triggers the operation of Section 281.

After reviewing the law, we must now consider whether the instant cases were proper cases where the learned trial Judges, had they applied their minds to the law as we have discussed it, would have granted the Respondents leave to proceed with their actions against the Appellant. To answer this question, we have inevitably to consider whether the Respondents' actions could not have been properly dealt with in the liquidation process.

On the facts of these cases, we have no hesitation to come to the conclusion that the Respondents' actions could not be properly dealt with in the liquidation process. The issues that the instances cases raised are such that they could not be properly dealt with in the liquidation process. In these cases, as Mr. Mainza pointed out in his submissions, liability is denied.

We have carefully read the pleadings in both cases. The pleadings raise serious issues of law, which require interpretation by the High Court. And in the event of success by the Respondent, assessment of damages may have to be

done by the High Court. These are not matters, which can be properly dealt with by the liquidator.

For these reasons, we are satisfied that the Respondents were entitled to leave to proceed with their actions against the Appellant. Accordingly, we find no merit in the appeals and we dismiss them with costs to the Respondents to be taxed in default of agreement.

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D. K. CHIRWA
SUPREME COURT JUDGE

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PETER CHITENGI
SUPREME COURT JUDGE

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T. A. KABALATA
AG/SUPREME COURT JUDGE