IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 74/2016**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

CHINIKA SERVICE STATION LIMITED **APPELLANT**

AND

AMANITA PREMIER OILS LIMITED **1ST RESPONDENT**

DIEGO-GAN MARIA CASILLI **2ND RESPONDENT**

GILLIAN LEE CASILLI **3RD RESPONDENT**

Coram: **Malila, Kaoma and Musonda JJS**

On 9th August, 2016 and 10th October, 2016

For the Appellant:	Mr. M. Mwitumwa, Messrs M. L. Mukande and Company
For the first respondent:	N/A
For the 2nd and third respondents:	Mr. J. P. Sangwa SC, Messrs Simeza Sangwa & Associates

---

J U D G M E N T

Malila, JS, delivered the judgment of the court

Cases referred to:

1. *July Danobo T/A Juldan Motors v. Chimsoro Farms (2009) ZR 148*
2. *NFC Africa Mining Plc v. Techro Zambia Limited (2009) ZR 236*

3. *Rosemary Chibwe v. Austin Chibwe (2001) ZR1*
4. *Tebuho Yeta v African Banking Corporation (Z) Limited, Appeal No. 117 of 2013*
5. *Cavmont Capital Holding Plc v Lewis Nathan Advocates, SCZ Judgment No. 6 of 2016,*
6. *Re Servers of the Blind League (1960) 2 ALL ER 298*
7. *G v. G (1985) 2 ALL ER 225*
8. *Beck v. Value Capital Limited (No.2) 2ALL ER 102*

The man on the Clapham Omnibus might well be astounded to learn that the liabililties of a company which has long been struck off the register of companies could still be a subject of active litigation against the deregistered company's former directors. A like situation arose in the action in the lower court which birthed this appeal.

The main issue implicated in the present appeal is whether a statutory declaration made pursuant to section 361(4) of the Companies Act, Chapter 388 of the Laws of Zambia, backed by a director's resolution, supporting the company's self-initiated deregistration, will bind the shareholders and/or directors of the company after the strike off of the company in respect of that company's debts consummated or made known after the company has been struck off the register of companies.

The appellant company had commenced proceedings against the first respondent company for certain monies allegedly due to it from the latter in respect of a fuel facility extended by the appellant company to the first respondent company. After protracted legal proceedings the appellant company subsequently obtained a judgment in the Supreme Court against the first respondent company on the 18th of December, 2012 in the sum of ZMK 118,667,902.00 for which payment the appellant company sought enforcement by way of a writ of *fieri facias* issued at its instance against the first respondent company, directing execution to be levied at the last known place of business of the first respondent company.

It was at that point that it occurred to the appellant company, that the first respondent company was no longer in existence having been deregistered and struck off the register of companies on the 4th June, 2012. Prior to its deregistration, the first respondent company had also donated its entire interest in the property from which it had conducted its business, to a third party called Zamanita Limited.

A search at the instance of the appellant company at the Patents and Companies Registration Agency (PACRA) confirmed that the first respondent company had, on the 15th November 2010, applied to the Registrar of Companies for deregistration of the first respondent company following what was called a special board resolution taken by the company's directors to wind up the company under the voluntary winding up procedure, and had to this effect, stated in the said resolution that the company had sufficient funds to meet the claims or debts of any creditors and to settle its liabilities as indicated in the audited financial statements for the year ended 31st March, 2010. This statement in the special resolution was substantially mirrored in the statutory declaration under Section 361(4) of the Companies' Act and made and filed on the same day at PACRA.

Displeased with this discovery and undeterred by the time lapse, the appellant company then took out an application for joinder/substitution of parties so as to join the second and third respondents who were directors in the first respondent company, to the proceedings, and further for an order compelling the directors and shareholders of the first respondent company to pay

the judgment debt, pointing to the statutory declaration alluded to earlier as evincing the intention of the first respondent company to meet all its liabilities.

The affidavit in support of the application, among other things, alleged that the first respondent's act of applying for deregistration while litigation was on-going between the appellant and the first respondent was a deliberate attempt to evade the company's liability on the judgment debt plus interest and costs and that the appellant could, in these circumstances, only seek to enforce the judgment debt by compelling the shareholders and directors of the first respondent company to honour the judgment.

The second and third respondents, who were the intended defendants in the lower court, robustly opposed the application stating, among other things, that they were directors in the respondent company but on the date of the deed of gift relating to the first respondent's business premises, being the 11th January, 2008, there was no judgment against the first respondent; that the said donation was in public domain, and was part of the wider restructuring under which the first respondent sold its business to

Zamanita Products Plc; that an initial judgment was passed against the first respondent on 14th February, 2008 in which the respondent was ordered to pay K59,333.96 which sum of money was paid to the appellant; that on appeal against that judgment the appellant, on 10th December, 2010, was ordered to refund the said judgment sum to the first respondent and that as at that time, the first respondent was not trading or operating, but merely collecting receivables and using the funds to pay off its secured creditors; and that on the 15th November, 2010, when the first respondent company resolved to have the company deregistered, there were no existing liabilities in regard to the appellant company. Consequently, on 19th November, 2010 the respondent company applied to be struck off as a registered company at PACRA and a notice of deregistration was published in the Government Gazette 5944 as notice No. 6 of 2011.

Before the learned trial judge, spirited arguments were made by the learned counsel for the parties in support of the parties' respective positions. In his ruling of 5th February, 2016, now being assailed through this appeal, the learned High Court judge came to the conclusion that the appellant only became a judgment

creditor on the 18th December, 2012, more than two years after the statutory declaration under section 361(4) was made on the 15th November, 2010 in which it was confirmed that the respondent had sufficient funds to meet its liabilities to all creditors.

In the view of the learned judge, as of 15th November, 2010 when the respondent company applied to be struck off the register of companies the appellant was not one of the respondent's creditors and further that the judgment obtained by the appellant on the 18th December, 2012 could not be enforced retrospectively. Accordingly, the appellant's wish that the second and third respondents be joined or substituted as defendants in those proceedings, and that they be ordered to pay the judgment sum because of the undertaking in the statutory declaration submitted under section 361(4) of the Companies Act, could not be sustained.

The learned judge also held that although section 362(1) of the Companies Act did provide a window of opportunity to any creditor or interested persons to apply, within two years of the striking off of a company, to the Registrar of Companies to restore a company that had been dissolved back on the register of

companies, the appellant in the present case failed to avail itself of that opportunity. The net result was that the application for joinder or substitution of parties was, in the learned judge's view, without merit and he dismissed it.

Unhappy with the lower court's ruling the appellant launched the present appeal enlisting three (3) grounds structured as follows:

1. **The lower court misdirected itself in law and in fact when it held that the Board Resolution and the Statutory Declaration referred to the status of the Defendant Company as at 15th November, 2010.**

2. **The lower court misdirected itself in law and fact when it held that as at 15th November, 2010, the appellant was not one of the respondent's creditors.**

3. **The lower court misdirected itself in law and in fact when it refused to compel the directors and/or shareholders of the respondents to pay the judgment debt out of the funds declared reserved for creditors as declared in the Statutory Declaration.**

As we shall elaborate later on in this judgment, at the hearing of the appeal it did not surprise us that the first respondent company was unrepresented.

Mr. Mwitumwa, learned counsel for the appellant, relied on the heads of argument filed in court and dated the 29th of April, 2016 as well as on the submissions made in the lower court. He augmented these with brief oral submissions. He argued grounds one and two together.

In regard to grounds one and two Mr. Mwitumwa contended that both the special board resolution to wind up the first respondent company as well as the statutory declaration made pursuant to the provisions of section 361(4) of the Companies Act, Chapter 383 of the Laws of Zambia, were made with the full knowledge of the relief given by the Supreme Court judgement made on the 10th February, 2010 which ordered a refund to the respondent of the sum of K59,333.96. The board resolution and statutory declaration were both made on the 15th November, 2010. In Mr. Mwitumwa's view, this could not be a mere coincidence. He submitted that the first appellant had deliberately intended to avoid its obligation to satisfy the judgment against it as the Supreme Court had at the time of the company's application to be struck off ordered a new trial.

The gist of Mr. Mwitumwa's submission under ground one, was that the statutory declaration which stated that the first respondent company had enough funds to meet all liabilities, was deliberately tailored to mislead the Registrar of Companies by showing that the first respondent company had no liabilities because the company stopped its operation in 2008 when in fact, it had contingent liability due to the appellant on the latter's claim. This position, according to Mr. Mwitumwa, was reinforced by the accounts of the first respondent where the appellant did not appear as a creditor. The learned counsel quoted section 361 of the Companies Act, sub-section 4(b) which requires a company in the position of the first respondent, to lodge with the Registrar of Companies, a copy of the resolution, summary of accounts, and a statutory declaration of two or more directors showing what disposition the company has made of its assets and that the company has no debts or liabilities. Mr. Mwitumwa noted that according to a statement of the auditors in the said accounts, there were no contingent liabilities of the company as at 31st March, 2010 and 2009. The learned counsel urged us to take note of the fact that in the said accounts there was no list of creditors produced.

He submitted that the contingent liability to the appellant could, however, not be ignored. For the first respondent to have omitted that information in its financial statement was not only imprudent but also misleading. It is for these reasons that the learned counsel submitted that the finding of the trial court that both the special resolution of the board and the statutory declaration referred to the status of the first respondent as at 15th November, 2010 was a misdirection. In his view the statutory declaration related to liabilities as and when they fell due and was not confined to liabilities existing as at 15th November, 2010.

Furthermore, according to Mr. Mwitumwa, the board resolution referred to *any* creditor mentioned in the audited accounts and, as no creditors were specified in the creditors' accounts, it would only mean creditors able to prove that they were owed money by the first respondent.

In his supplementary oral submissions, Mr. Mwitumwa contended that the directors of the first respondent company were liable in their individual capacities based on section 361(6)(a) of the

Companies Act. He essentially reiterated what was contained in the filed heads of argument on this point.

In regard to ground three, Mr. Mwitumwa complained that the trial court placed much emphasis on section 362(1) of the Companies Act which calls for the liquidator or an interested party to petition the court to declare a dissolution of a company void on terms to be ordered by court. Such an application is required to be made within two years after the dissolution of the company. Mr. Mwitumwa argued that the trial court missed the basis of the appellant's argument in that the first respondent declared to the Registrar of Companies that it had funds to meet the company's obligations as and when they fell due. He reiterated that the appellant had no interest in having the dissolution of the first respondent company declared void. The learned counsel also argued that the two year period referred to in section 361(1) was not relevant to the case at hand.

Mr. Mwitumwa further posited that the funds set aside by the first respondent company to carter for liabilities were not confined to any time limit but were available as and when the first

respondent's liabilities arose and, therefore, there was no reason for the appellant failing to access such funds in 2012 when they obtained the second judgment. He quoted, in support of his submissions, section 345(1) of the Companies Act, arguing that contingent liability is recognized by the law and that settlement therefor was based on proof. He also referred to the respondents' affidavit in which they state that after the sale of the first respondent to Zambeef Plc they continued to collect receivables and pay their debt.

Mr. Mwitumwa concluded his submissions on a rather portentous note. He argued that the two directors intended to be joined to the proceedings were being called upon on behalf of the company, and not in their private capacities, to account for the funds set aside for liabilities to the first respondent company as, after all, it was on this basis that the Registrar of Companies proceeded to deregister the first respondent company. He ended by praying that the appeal be upheld.

Mr. Sangwa SC, equally relied on the submissions filed on behalf of the second and third respondents dated the 29th of April,

2016. He supplemented those with oral submissions. In the written heads of argument, Mr. Sangwa SC began by raising technical issues with regard to the record of appeal which he claimed was defective in material respects. He cited rule 68(2) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, which stipulates that:

> **"if the record of appeal is not drawn in the prescribed manner the appeal may be dismissed."**

He went on to submit that rule 58(4) of the Supreme Court Rules states what should be contained in the record of appeal and the order in which the content should be placed. He noted that the memorandum of appeal should have come before the purported notice of address for service in accordance with rule 58(4)(d) of the Supreme Court Rules, and further that the record of appeal does not contain the affidavit of service of the notice of appeal required by rule 58(4)(e) of the Supreme Court Rules if the appellant is stating the respondent's last known address for service. The relevance of this, according to the learned State Counsel, is that only the second and third respondents were represented. We were referred to a number of authorities in which we have stated that a non-conforming record of appeal is liable to be discountenanced

and the appeal dismissed. These authorities include the case of **July Danobo T/A Juldan Motors v. Chimsoro Farms Limited**[1] and that of **NFC Africa Mining Plc v. Techro Zambia Limited**[2].

In responding to grounds one and two of the appeal, it was the learned State Counsel's submission that although the memorandum of appeal alleged error in law on the part of the trial judge, no such error in law has been highlighted in the argument by the appellant in respect of grounds one and two. He maintained that in holding that the board's resolution and statutory declaration in issue referred to the status of the first respondent company as at 15th November, 2010, the learned trial judge was on firm ground.

It was further contended by Mr. Sangwa SC that the trial judge had made a factual finding in holding that the board resolution and statutory declaration referred to the status of the first respondent as at 15th November, 2010 and that as at that date the appellant was not one of the respondent's creditors. The learned counsel further argued that the decision of the trial court was supported by the auditor's opinion which the learned counsel

quoted from lines 2 to 5 at page 259 of the record of appeal as follows:

> **"In our opinion, the financial statement present fairly, in all material respects, the financial position of Amanita Premier Oils Limited at 31st March, 2010 and its financial performance and cash flows for the year then ended in accordance with International Financial Reporting Standards.".**

We were urged to consider the fact that the first respondent had no assets at the time of its dissolution; it had no cash and bank balances either. It equally had no fixed assets.

Counsel pointed out that from the first respondent's financial statement for the year ended 31st March, 2010 and filed at PACRA, there were no contingent liabilities for the first respondent and that this fact was brought out in evidence before the lower court. The court, therefore, made appropriate findings based on the evidence adduced before it in keeping with the direction given by this court in **Rosemary Chibwe v. Austin Chibwe**[3]. The learned counsel submitted that, in respect of the statutory declaration, it cannot be read in isolation from the financial statements which were attached and filed together at PACRA on the 19th of November, 2010.

The learned State Counsel impugned the suggestion that the declaration entailed liabilities of the first respondent as and when they fell due given that the first respondent was not trading or operating after 2008.

The learned counsel also referred us to the Government Gazette Notice No. 6 of 2011. It notified the public that three months after publication of the notice the first respondent was to be struck off the Register of Companies unless due cause to the contrary was shown. According to State Counsel Sangwa, nothing stopped the appellant from showing cause to the contrary based on its alleged position as a contingent creditor, that is to say, as to why the first respondent should not have been struck off. During the period that the Registrar of Companies, gazetted his notice and advertised the intention to dissolve the first respondent, the appellant should have come forward to declare its contingent liability and, therefore, urge the Registrar of Companies not to deregister the company. It was the learned State Counsel's submission that business would be impossible if the purpose of advertising in the gazette is not given full force and effect.

P. 1469

Section 48 of the **Interpretation and General Provisions Act**, Chapter 2 of the Laws of Zambia was quoted. That provision is to the effect that the production of a copy of the gazette containing any written law or notice shall be *prima facie* evidence in all courts of the due making and tenor of such written law or notice. The learned State Counsel ended his submissions on these two grounds by suggesting that the appellant's arguments advanced in the entire appeal were curiously unsupported by authorities. The case of **Tebuho Yeta v African Banking Corporation (Z) Limited**[4] was cited to buttress the point that for legal arguments made, there should be adduced supporting authorities.

In responding to ground three, the learned State Counsel attacked the provisions pursuant to which the appellant's application was made. In this regard it was noted that the appellant premised its application on the basis of the provisions of Order XVI, Rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia; Order III, Rule 2 of the High Court Rules and Order 15, Rule 7(2) of the Rules of the Supreme Court (White Book 1999 edition). State Counsel Sangwa argued that the trial court was also confronted by section 262 of the Companies Act. He cited the case

of **Cavmont Capital Holdings Plc v Lewis Nathan Advocates (Suing as a firm)**[5] where an objection had been taken that a certain legal provision was not raised in the lower court. In dismissing that objection, we stated in that case that in determining the issue before it, it was incumbent upon the lower court to consider and take into account the provisions in question and indeed all other relevant laws and rules. On this basis, State Counsel Sangwa submitted that section 262 of the Companies Act was relevant even though the appellant in the lower court did not cite it, and the learned trial judge was, therefore, correct in adverting to it.

The learned State Counsel also cited the English case of **Re Servers of Blind League**[6], where a company was dissolved under a section similar to section 261(4) of the Zambian Companies Act. Counsel contended that the exercise of power under that provision was discretionary. He alerted us to the difficulties implicit in the exercise of discretionary powers and how it is difficult for discretion to be exercised in a regimented way. The cases of **G v. G**[7] as well as that of **Beck v. Value Capital Limited**[8] were cited by the learned State Counsel to buttress the point.

Mr. Sangwa SC also submitted that the trial court was right to rely on section 262(1) of the Companies Act and, therefore, concluded that the appeal questioning the learned trial judge's reference to that provision must be dismissed.

In his supplementary oral submissions, Mr. Sangwa SC reiterated the point that the appellant advanced no authority whatsoever to support the arguments that were made in this appeal. State Counsel Sangwa argued that matters relating to registered companies are governed by the provisions of the Companies Act, and disputes arising in relation to companies ought to be resolved within the provisions of the Companies Act. The appellant, according to the learned State Counsel, did not finger a single provision in the Companies Act, as allowing them to do what they sought to do, namely to have the second and third respondents joined to the proceedings in the court below or alternatively made to pay liabilities attributable to a deregistered company. He reiterated that the appellant should have proceeded by the route envisioned by section 362(1) of the Companies Act.

Mr. Sangwa SC impugned the appellant's argument that its interest lay solely in recovering the money, arguing that the money the appellant sought to recover belonged to the company. Therefore, there was no logically satisfactory reason why the appellant could leave the company and go for its directors. The learned State Counsel ended his submission by reiterating that the arguments made by the appellant in support of the appeal were moral rather than legal and that the appeal itself was needless. We were urged to dismiss it for lacking merit.

In his brief retort, Mr. Mwitumwa made the point that it was not the intention of the appellant to make the directors of the first respondent company personally liable. Rather, the intention was to enforce the provisions of section 361(4) of the Companies Act.

We have considered the trial court's judgment and have scrupulously examined the documents on the record of appeal. We have also benefitted immensely from the submissions of the learned counsel for the parties. As we see it, the appeal raises recondite points of law, both procedural and substantive, in the realm of company law, gyrating around the efficacy of a resolution

and a declaration by directors that a company to be deregistered has the capacity to meet its liabilities.

We wish to begin by stating that Mr. Sangwa's submissions on the need to observe strictly the rules relating to the preparation of the record of appeal are entirely correct. We have repeatedly stated in numerous case authorities that a record of appeal which does not conform with the rules is liable to be discountenanced and the appeal dismissed. There is no need for us to repeat this very clear position. We note that the appellant's learned counsel chose to say absolutely nothing in regard to the alleged defects in the record of appeal. He saw the respondents' heads of argument and he heard Mr. Sangwa's adoption of them. He had the opportunity to say something about this point when he addressed us twice; at the commencement of the appeal and when he replied to Mr. Sangwa's submissions. He opted not to. The learned counsel for the appellant clearly let an opportunity to rebut the submission that the appellant's record of appeal was defective, to go begging. Without more, we would be inclined to accept Mr. Sangwa's arguments on this point and dismiss the appeal. We note, however, that the argument relating to the defect in the

record of appeal was raised within the main appeal, though as a peripheral argument. It should have been raised as a substantive issue by way of a preliminary issue. Raising a matter as significant as a defect in the record of appeal as a point in *limine* has the effect of calling attention to the court on the need not to hear the substantive arguments until the preliminary issue is addressed.

In the present case, the respondent adopted a somewhat lukewarm approach to attacking the record of appeal on the technical point of non-compliance with the rules, thus allowing the appeal to be heard on the substantive grounds raised by the appellant. We shall adopt a similar pattern as the appellant.

Ground one, in our view, raises a point of mixed law and fact. Did the statutory declaration made by the directors in terms of section 361(4) of the Companies Act as well as the special board resolution guaranteeing availability of funds refer to liabilities of the first respondent company only as at that date or those that accrued even beyond the date of the said statutory declaration and the board resolution? We shall revert to this issue shortly in this

judgment. We pause in the meantime to consider the many side issues raised by the facts of the present case.

We note to begin with that the dissolution of the first respondent company was done under section 361 of the Companies Act. That section falls under the provisions regulating the dissolution of defunct companies. Section 361(1) empowers the Registrar of Companies, where he has cause to believe that a company is not carrying on business or is not in operation, to initiate the process of dissolution of the company, by sending an inquiry to the company and asking it to show cause why it should not be deregistered. The section proceeded to state in subsection 4 as follows:

> **"(4) Where a company –**
>
> **(a) by ordinary resolution requests the Registrar to strike it off the register; and**
>
> **(b) lodges with the Registrar a copy of the resolution of two or directors showing what disposition the company has made of its assets and that the company has no debts or liabilities.**
>
> **The Registrar shall cause to be published in the gazette a notice to the same effect as that referred to in subsection (2).**

P. 1476

(5) After the expiration of three months from the publication in the gazette of a notice under this section, the Registrar shall, unless cause to the contrary is shown, strike the name of the company off the register, and shall cause notice thereof to be published in the gazette.

(6) On the publication in the gazette of the notice that the name of the company has been struck off the register, the company shall be dissolved, but –

(a) the liability, if any, of every officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and

(b) nothing in this subsection shall affect the power of the court to wind up a company which has been dissolved under this section."

Our understanding of this provision is that a strike off of a company under section 361 is quite a distinct and separate procedure from a members' voluntary winding up under section 304 of the Companies Act although both ideally have the same effect of ending the life of an otherwise solvent company. There are, however, material differences. Under a voluntary winding up of a company sanctioned by section 304 of the Companies Act, the company must pass a special resolution which should be lodged with the Registrar of Companies within seven days of its passage. Such a company should generally cease to carry on its business

from the time of the passing of the special resolution to wind up. We say 'generally' because section 307 of the Companies Act allows a company which is being wound up to continue carrying on business for the purpose of the beneficial winding up thereof. There is also the requirement for the directors to make a declaration of solvency under section 308 to the effect that they have made a full inquiry into the affairs of the company and have formed the opinion that the company will be able to pay its debts and liabilities in full within a period specified in the declaration, being a period not more than twelve months after the commencement of the winding up. The documents required to be attached to such declaration are set out in section 308(2) of the Act. There are personal liabilities attaching to the directors for the company's full debts where a declaration of solvency is made without having reasonable ground for the opinion that the company will be able to pay its debts in full within the period stated in the declaration.

The situation with regard to the dissolution of a defunct company under section 361 is markedly different even where the striking off is done at the instance of the company itself. It is clear

from section 361(4) that there is no requirement for a declaration of solvency where an application to strike off has been made. There is no requirement for a special resolution either; all that is required is an ordinary resolution which, together with a statutory declaration of two or more directors, showing what disposition the company has made of its assets and that the company has no debts or liabilities should be lodged with the Registrar of PACRA for the purpose of effectuating the same.

It seems to us that in applying to have the first respondent company struck off, the first respondent company may well have confused the two distinct processes of members voluntary winding up, and the company's application to be struck off.

We have perused the resolution as well as the statutory declaration. The resolution was signed by two directors namely, Diego Gan-Maria Casilli and Gillian Lee Casilli. It is titled "Special Board Resolution to wind up the company under voluntary winding up." It is clear that there are a number of statutory requirements under the Companies Act that the first respondent company had clearly missed or misapprehended. First, the resolution required

under section 361(4) is an ordinary resolution, not a special one. Second, it should be a resolution by the company, that is to say, the members or shareholders of the company and not the directors. Third, the resolution should be made with a view to having the company struck off the register of companies, and not voluntarily wound up. The heading of the resolution should therefore reflect this intention.

It is clear that the resolution used to support the application to strike the first respondent company off the register of companies, was a non-conforming resolution as far as section 361(4) of the Companies Act is concerned.

Leaving aside the resolution that grounded the application for striking off the company, we note that the statutory declaration made under section 361(4) was signed by two directors of the company. The said resolution speaks to two things as follows:

> **"1. In accordance with the attached Accountant's Report, there are enough funds to meet all creditors; and**
>
> **2. The company has enough funds to meet ALL liabilities of AMANITA PREMIER OILS LIMITED as and when they fall due."**

We have already stated that by section 361(4)(b) what is required to be lodged with the Registrar is a copy of the resolution of two or more directors showing what disposition the company has made of its assets and that the company has no debt or liabilities. It is evident that the directors' resolution that was lodged with the Registrar of Companies does not show what disposition the company had made of its assets. The declaration does not state, as per requirement of section 361(4)(b), that the company has no debts or liabilities. It states, instead, that the company had enough funds to meet all creditors and all liabilities as and when they fell due. We believe that, this requirement is more relevant to a voluntary winding up under section 304.

In spite of the shortcomings we have identified above, the Registrar of Companies accepted the documents and proceeded to act on them as if they were regularly drawn and in strict conformity with the requirements of the Companies Act. The company was struck off the register of companies, meaning it was deregistered and ceased to exist as a registered company. An action could not, therefore, be maintained or be continued against the company. At the beginning of this judgment we stated that we were not

surprised that the first respondent company was not represented. The reason is not far to seek. It was deregistered as a company and effectively ceased to exist. It therefore lost one of the significant incidences of incorporation as given in section 22(1) of the Companies Act namely, "the capacity, rights, powers and privileges of" a natural person of full age including the right to sue or be sued in its own name.

To revert to the issues raised in this appeal. Did the board resolution and statutory declaration refer to the status of the company as at 15th November, 2010? We stated earlier on that this, to us, is a question of mixed law and fact.

The statutory declaration made on 15th November, 2010 states that there were enough funds to meet all debts of the first respondent company and enough funds to meet all liabilities of the company as and when they fell due. The tenor of the declaration is that all liabilities as and when they arose, were covered. It could not be said to have been confined to liabilities existing only on the 15th November, 2010. And yet the special resolution cannot be understood in isolation from the legal requirement. In our view,

the legal provisions which we have alluded to earlier override the statutory declaration. In other words, if there is any variance or any ambiguity between the provisions of a statutory provision and those of a resolution the statutory provision should prevail to the extent of the inconsistency.

We earlier on quoted section 361(4)(b) of the Companies Act. We indicted that all that the said provision requires is that the resolution lodged with the Registrar of Companies should be so lodged together with a summary of accounts, and a declaration showing what disposition the company has made of its assets and that the company has no debts or liabilities. The requirement is not that the company is able to meet its debts and liabilities.

The financial statements of the first respondent for the year ended 31st March, 2010 which were filed at PACRA together with the board resolution shows at page 13 that "there were no contingent liabilities as at 31st March, 2010 and 2009.

In our considered view, the legal requirement was for the board resolution and the statutory declaration to have merely stated that the company had no debts or liabilities. This should

have represented the position obtaining at the time the resolution and the declaration were made. Any gratuitous reference in the board resolution or in the declaration as to the future liabilities or the ability to meet future obligations could not have been intended to go beyond the requirements set out under section 361(4) of the Companies Act.

Accordingly, we are of the considered view that the reference in the board resolution and in the declaration of debts and liabilities to anything suggestive of debts or liabilities should be understood to mean reference to the subject company's debts and liabilities as at the 15th November, 2010.

We are not unmindful of the fact that at the time of the making of the special board resolution and the statutory declaration in question, there was indeed pending, an action in court involving the first respondent. The outcome of that litigation was at that point unknown. We are unable to accept Mr. Mwitumwa's submission that the statutory declaration and board resolution were intended to deceive the Registrar of Companies.

The fact before the lower court was that the first respondent company had stopped trading in 2008.

We, consequently, hold that ground one of the appeal has no merit.

Ground two of the appeal regarding whether or not as at 15th November, 2010 the appellant was not one of the first respondent's creditors, should elicit a straight forward factual answer. It is common cause that the judgment of the Supreme Court which in effect made the appellant the judgment creditor, was delivered on the 18th December, 2012, just over two years after the special board resolution and the statutory declaration were made by the first respondent company's directors and lodged with the Registrar at PACRA.

We must state that we are sympathetic with the submission made by Mr. Sangwa SC that the learned counsel for the appellant preferred no authority to support the bold submission that he made.

As Mr. Sangwa SC correctly submitted, the auditor's opinion contained in the financial statement lodged with the Registrar at PACRA show clearly that at the time of its dissolution, the first respondent company had no cash, no bank balances and no fixed assets. There were no contingent liabilities indicated either. Mr. Mwitumwa himself readily conceded in his submissions that no creditor was mentioned in the company's accounts but that what that meant was that any creditor could come forward and prove their claim. We do not think so.

On the totality of the facts before it, the lower court cannot be faulted for finding as it did, that as at the 19th November, 2010, the appellant was not one of the creditors of the first respondent. Ground two is bound to fail and we dismiss it.

Under ground three, the contention is that the trial court misdirected itself when it refused to compel the directors to pay the judgment debt out of the funds declared reserved for creditors in the statutory declaration.

We must observe that Mr. Mwitumwa made an interesting point in regard to this ground. He insisted that the appellant was

not advocating for the lifting of the corporate veil as against the two directors intended to be joined to the action, but that the appellant was seeking to have the directors compelled to honour the undertaking implicit in the declaration out of funds set aside for that purpose by the first respondent company. He went on to argue that those directors were liable in their individual capacities based on section 361(6)(a) of the Companies Act. That section enacts as follows:

> **"(6) On the publication in the Gazette of the notice that the name of the company has been struck off the register, the company shall be dissolved, but-**
>
> **(a) The liability, if any, of every officer and member of the company shall continue and may be enforced as if the company had not been dissolved."**

Our understanding of this provision is that it relates to liability of directors which will have crystalised at the time of the dissolution of the company. It cannot refer to liabilities that had not attached to the director's personally at the time of the company's dissolution. If the latter position was intended, the provision would have said so in forthright language. The liability of directors which arises in this respect, relates to wrongful actions of the company undertaken under the watch of the directors. We do not believe that the situation as arose in the present case would

be said to fall within the intendment of section 361(1)(a). We, therefore, do not accept Mr. Mwitumwa's argument in this respect.

With regard to the provisions of section 362 of the Companies Act, we entirely accept the learned trial judge's interpretation of that clear provision. The appellant had a window of opportunity within the twenty-four months following the dissolution of the company to pursue its claim by insisting that the dissolution be rendered void by the Registrar of Companies while the claim against the first respondent was being followed up.

On a proper conspectus of the evidence and the law as applies to the circumstances of this case, we are satisfied that the appellant's appeal is without merit. It is dismissed accordingly. There shall be costs for the second and third respondents to be taxed if not agreed.

.....
M. Malila SC
SUPREME COURT JUDGE

.....
R. M. C. Kaoma
SUPREME COURT JUDGE

.....
M. C. Musonda
SUPREME COURT JUDGE