MEMBER CHIPAMBA
and
LINDA DEWA
versus
LEES INN HOTEL (PRIVATE) LIMITED
(under final liquidation)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 3 December 2015 and 17 February 2016

Opposed Matter

T Mpofu, for the plaintiff
L Uriri, for the respondent

MUNANGATI-MANONGWA J: The first and second applicants were shareholders and directors of Lees Inn Hotel (Private) Limited, the respondent, which company is now under final liquidation. It was at the instance of the two applicants in their aforementioned capacities that an application was initially made to place the respondent under provisional judicial management. To achieve such status, the two instructed Mr G N Mlotshwa of G N Mlotshwa & Company to make the necessary application. Ultimately Mr Winsley Militala was appointed the provisional judicial manager on 18 December 2013, when the respondent was placed under provisional judicial management.

Midway through the process, the applicants had a fall out with the judicial manager. Mr Mlotshwa proceeded to work with Mr Militala leaving the applicants to seek legal representation elsewhere.

On 16 April 2014 an order for provisional liquidation was granted by Uchena J, with the return date set for 30 July 2014. It is common cause that no official notice was served on the applicants, however the respondent placed notices in the Herald and the Government gazette on 9 July which notices only came out on 18 July 2014 as the original documents clearly show. The

advert called upon interested parties to file opposing papers by 25 July 2014 effectively giving any interested parties exactly 5 working days to do so. The applicants only filed their opposing papers on 28 July 2014. The applicants attended court with their legal practitioner on 30 July 2014 but the court did not entertain them as they had been barred. Proceeding on the basis that the application was not opposed the court granted a final order placing the respondent under final liquidation.

The applicants have now filed an application for rescission of that judgment. They state the following grounds as the basis of the application: that they were not served with the application by the respondent's lawyers; that they were not aware from the notice in the newspaper and government gazette that they were supposed to file their notice of opposition on or before 25 July 2014; that the period given in the advertisements was inadequate (5 days instead of 10 days) and that Mr G N Mlothswa was compromised. The applicants state that apart from not being in willful default they have a *bona fide* defence on the merits. For this defence, applicants are attacking the provisional judicial manager for taking the liquidation route where there was no consensus reached between the parties, including creditors, and where there was massive duplication of claims and the company's fate could be turned around.

The respondent in opposing the application made an issue about the absence of a statement in applicants' papers as to which rule the application was premised on; whether r 63 of the High Court Rules 1971 or r 449 of the same rules. The respondent further avers that the application cannot qualify under r 63 as it was not a default judgment, the applicants were not parties, the application having been made *ex parte* they therefore cannot make an application for rescission of the default judgment. Further, without a stay of execution order in existence liquidation had started in ernest. The applicants had failed to file opposing papers against final liquidation despite being aware earlier when they had in May 2014 collected the documents from the respondent's lawyers. The respondent maintains that the applicants were in wilful default and have no *bona fide* defence which carries good prospects of success. The respondent emphasizes that it's not even clear whether the applicants rely on s 227 of the Companies Act.

Mr *Mpofu* for the applicants submitted that the critical issue is whether the applicants had a right to be notified of the application and the provisional order. He maintained that as shareholders and the only directors it was incumbent upon the respondents to serve upon them

the aforementioned documents. Moreso, given that when the proceedings for judicial management were commenced this was a voluntary process driven by the shareholders who gave instructions and made payments for the process. Further, given a scenario where the legal practitioner later turned round, the greater the need. He argued that when the applicants later got the full set of documents on the matter they acted by preparing and filing opposing papers Advocate *Mpofu* submitted that judgment was by error as members had not voted for the process, no service was done on the applicant and given Mr Mlotshwa's conduct, if the court was aware of these factors judgment would not have been granted.

Advocate *Uriri*, for the respondent argued that the applicants did not require any notice as they were not members. He submitted that the filed papers did not establish membership of the applicants so as to entitle them to notice. He further contended that the applicants were not entitled to notice given that the petition was initiated by the company, the respondent. This therefore, excluded the application of r 5(2) of the Companies (Winding Up Rules) 1972 which required service on the company where the petition has been instituted by another party. In fact the applicants were aware of the return date, 30 July 2014, when they obtained relevant papers in May 2015. He dismissed the allegation that Mr Mlotshwa was conflicted as being without merit.

As Advocate *Mpofu* put it, the pertinent issue is whether the applicants had a right to be notified. Both counsel for the two parties dealt with the issue. I am bound to agree with Advocate *Mpofu* that as shareholders the applicants were members and therefore at law entitled to the requisite notice. Section 30(1) of the Companies Act *[Chapter 24:03]* (hereinafter referred to as 'the Act' provides the definition of a member as follows:

> (1) "The subscribers to the memorandum of a company shall be deemed to have agreed to become members of the company and on its registration shall be entered as members in its register of members.
>
> (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company."

The applicants herein are shareholders which aspect they pleaded. The applicants being subscribers to companies' memorandum are therefore members. Being members they would be entitled to this notice in terms of s 306 (m) of the act which provides for 14 days' notice to all members of the company.

Such notice was not given which makes the process fatally irregular. Had this been in the court's knowledge certainly the final order for the winding up of the company would not in my view have been granted.

Assuming I am wrong in reaching that conclusion, I would still allow the rescission of the judgment on other grounds. Advocate *Uriri* argued that, as the applicants had collected papers they were aware that their opposing papers had to be filed by 25 July and by filing them on 28 July the applicants were sluggard, and hence barred. He indicated that even applicant's legal practitioner who had appeared on the date with applicants conceded that they were barred.

Pertinent, is the fact that the applicants never served the order for provisional judicial management on the applicants. It is apparent on the papers and as alluded to by their counsel, it is the applicants who *mero motu* sought to have the papers by following up with the respondent's lawyers.

Rule 247 (3) (c) of the High Court Rules 1971 provides for service of such orders and reads as follows:

> "Where a provisional order relates to the sequestration of an estate, the winding up of a company or any……."

The order of 16 April 2014 which set the return date as 30 July 2014 when ultimately the final order was granted did not specify persons who were to be served with the provisional order. As correctly put in the matter of INRE*: Stand Five Four Nought (Pvt) Ltd (under provisional judicial management) for an order for final judicial management* HH 767/15 where there is an allegation of barment arising from failure to file documents within the *dies inducea*, in the absence of use of a Form 29 D of the court rules one should refer to the order to answer whether one is barred or not.

The scenario in that case *viz* the issue of bar in circumstances where there is a provisional order which stands to be confirmed is similar to the matter at hand.

In that case the provisional order which was subject of confirmation did not give the time limits within which to file opposing papers. It simply referred to the return date when any interested party could appear before the court and called upon any person intending to oppose or support the application to do so on the return day to give the notice to applicant's lawyers.

Given that the order was not in the appropriate format (form 29 D) and did not comply with the requirements of r 247 (3) (c) being failure to serve the provisional order and supporting documents on certain persons where it was appropriate to do so, Mathonsi J discharged the provisional order. Whilst the circumstances pertained to a creditor, the principle very well applies herein.

I would agree with Mr *Mpofu* who referred to this matter and did so correctly that, where a party's interests are known precepts require that there be service. One cannot ignore the background that the applicants were shareholders who themselves had instituted the proceedings for judicial management. The judicial manager had then run away with the process with applicants being marginalized. They remained not only very interested parties but it was appropriate for them to be served as demanded by r 247 (3) (c).

I further find that the *dies inducea* given is arbitrary. The proposed publication which was attached to the order had no date by which interested parties had to file opposing papers. It is the respondent who after the granting of the order elected to give 25 July as the last date of filing opposing papers. Notably, whilst the advertisement is dated 9 July, it only appeared in the Herald on 18 July 2014 giving interested parties 5 days within which to oppose. One wonders how the applicant opted for 5 days, instead of 10 days the standard provided days for opposition in court applications or provisional orders. In the order there is no reference to days apart from Clause 5 and 6 which read:

> "5. This order shall be published once in the Zimbabwe Government Gazette and once in the Herald Newspaper. Publication shall be in short form annexed to this order.
>
> 6. Any person intending to oppose or support the application on the return day of this order shall
>
> (a) Give due notice to the applicant at care of its legal practitioners, Messrs G. N. Mlotshwa & Company of Titan Law Chambers, 8th Floor Gold Bridge, Eastgate Harare
>
> (b) Serve on the applicant a copy of any affidavit which he files with the Registrar of High Court."

I make the same observations as Mathonsi J in *INRE: Stand Five Four Nought (Pvt) Ltd* case cited (*supra*):

> "Nowhere in that order is a *dies inducae* created. Such is only referred to in the publication that was published in the Herald and Government Gazette which called upon interested parties to file opposition by 30 October 2014 (25 July 2014 in this case) and serve it upon the applicant's legal practitioners. …. there is nothing on the papers to suggest that the publication's parentage can be found in the court order."

This is so precise and on point *viz* the case at hand.

In that regard the *dies inducae* not having emanated from the order and, not justified by any rule, and being only 5 days, as simply dictated by the notice of publication, I find it not only arbitrary but inadequate given the days normally set by the rules of court where opposition papers have to be filed.

In the result, as the order did not provide a *dies indicae* and the publication did not comply with requirements of r 247 (3) (c), the purported bar is a nullity and applicants should have been heard.

Whilst I agree with Advocate *Uriri* that it is the prerogative of the final judicial manager to apply for the cancellation of the relevant judicial management order and the issue of an order for the winding up of the company as per s 306 (m) this has to be done procedurally with relevant notices being given and with due compliance with the rules. This, the respondent failed to do. I do not find it necessary to deal with the other grounds which were raised in the papers which counsel for both parties correctly did not deal with as they were not pertinent to the determination of the matter at hand.

Given the observed inadequacies, which in my view if the court which gave the final order had known about, it would not have given the order. Thus for the aforegoing reasons I will allow the application. On the issue of costs, the applicants had prayed that each party bears its own costs. I therefore order as follows:

1. The application for rescission of judgment be and is hereby granted.
2. The final order for liquidation of Lee's Inn Hotel (Pvt) Ltd (under provisional liquidation) is hereby set aside.
3. Each party shall bear its own costs.

Muzenda & Partners, applicant's legal practitioners
G. N Mlotshwa & Co, respondent's legal practitioners