NOXON INVESTMENTS (PVT) LTD
versus
CBZ BANK LIMITED
and
MEDWORTH PROPERTIES (PRIVATE) LIMITED
and
WINSLEY MILITALA
and
MASTER OF THE HIGH COURT (NO)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 April 2016 & 13 July 2016

Urgent Chamber Application

N. Bvekwa, for the applicant
S. Bhebhe, for the respondent

DUBE J: The applicant approached this court on an urgent basis seeking an order to stay execution of a winding up order granted under HC 3343/14 on 24 September 2014 in terms of s 227 of the Companies Act[*Chapter 23:03*], the Act .

At the close of submissions, I granted an order suspending the sale and leasing of Medworth's property pending the finalisation of this application and the application for the setting aside of a liquidation order against it. I have been requested for my reasons for the order. These are they.

The background to this application is as follows. Trinipack Investments obtained a loan from the first respondent. Medworth Properties bound itself as one of the sureties and co-principal debtors for the payment of sums of money owed. Trinipack Investments and failed to service the loan and the first respondent obtained judgment against Medworth and the other sureties. Medworth was placed under liquidation after failing to pay the debts under HC 3343/14 on 6 August 2014. The provisional order was confirmed on 14 September 2014. The applicant subsequently filed an application to set aside the liquidation order. In this

application, the applicant sought an order stopping the sale of its assets by the respondents pending the application to set aside the order for liquidation.

Applicant's basis for the challenge of the liquidation order was that Medworth was not properly served with the application for provisional winding up, it having been served at a wrong address. The applicant contended that the order was erroneously granted. The applicant submitted that implementation of the liquidation order is imminent as the respondents intended to proceed with the liquidation process. It contended that should the liquidation proceed, this will result in the sale of the assets of Medworth and prejudice occurring to it, rendering the application to set aside the liquidation order academic.

The respondents defended the application. The respondents challenged the *locus standi* of the applicant to bring this application. They also took issue with the applicant's failure to seek leave of the court before instituting these proceedings. On the merits, the respondents contended that service of the application constituted proper service and that the application to set aside the liquidation order lacked merit. At the hearing of this matter, the issue of the urgency of the matter was not formally raised and the court proceeded and dealt with the matter on the merits.

The approach that the court took was to consider whether the application met the requirements of an interim interdict. An applicant seeking an interim order is required to show that he has a *prima facie* right to the relief sought, that he has reasonable apprehension of irreparable harm and that the balance of convenience favours the granting of the interim relief. He must also show that he has no other remedy available to him .See *Setlogelo v Setlogelo 1914 AD 221*.

In considering whether the applicant had a *prima facie* right the court considered whether the application to set aside the liquidation order filed by the applicant has merit and is likely to succeed. The general rule is that a litigant may only approach a court for relief in a case where he has a right to do so. He must be able to show that he has sufficient interest in the relief claimed and that he is adversely affected by the wrong alleged. It was undisputed that the applicant is a 100% shareholder of Medworth. The applicant being the sole shareholder of Medworth falls into the category of "contributor'' as defined in s 202 of the Companies Act, [Chap 24;03], the Act. The court concluded that the applicant has sufficient interest in

what happens to Medworth and may be adversely affected by any wrong done to it and hence has *locus standi* to challenge the order placing it under liquidation.

Section 213 of the Act deals with a situation where a company has been placed under liquidation. It reads in part as follows,

> "**213 Action stayed and avoidance of certain attachments, executions and dispositions and alteration of status**
> In a winding up by the court—
> (a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;…''

The effect of this provision is that no action or proceedings shall be proceeded with or commenced against a company placed under liquidation except with the leave of the court. All claims against the company are suspended and no fresh claim may be brought. This section does not extend to challenges to liquidation orders. This application is made possible by s 227 of the Act. The section permits a court application by a liquidator, creditor or contributor, to stay or set aside winding up proceedings. Section 227 does not require a litigant bringing such an application to first seek leave of the court to institute these proceedings.

In this instance, the applicant did not bring any claim or proceedings against the company under liquidation but rather seeks to challenge the order placing the company under liquidation. In general terms, the right to apply for stay of execution or to set aside an order lies as of right to a litigant and there is no legal requirement to apply for leave from a court in order to bring the application .There is no bar to a person who is aggrieved by an order placing a company under liquidation to challenge such an order or to seek to stay the liquidation process. The applicant is not bringing a claim against the company placed under liquidation and is entitled to bring this application.

Section 112 of the Act places a duty on a company at all times to maintain a registered office to which all communications and notices may be addressed and at which all process may be served. A company that changes its registered address is required to notify the Registrar of Companies of such change. Service of process on a company or corporation is affected by delivering a copy to a responsible person at the body corporate's place of business or its registered office or by posting it to the address in terms of Order 5 r 39(2) (d) of the rules. The rule that a company may be served at its company's registered address is

premised on the presumption that where the company has not advised of any change of address, it still maintains the address.

The general rule is that once a person selects an address at which process is to be served in the event of litigation, any process served at the address is deemed to be proper service even if the place was on service, found vacant ground, had been abandoned or the party was known to be resident elsewhere. See *Loryan (Pvt) Ltd* v *Solarash Tea & Coffee (Pvt) Ltd* 1984 (3) SA 834 (W). The approach seems to be different with regards service of process on companies sought to be placed under liquidation. Rule 5 (2) of the Companies (Winding up) Rules, 1972 provides for situations where it is not possible to serve the process on the place of business or registered office of a company. In this case, service may be affected by serving one of the partners or directors of the company. The rule reads as follows,

> "Except where the petition is presented by the company itself, a copy of the petition and the notice of set down for hearing shall be served upon the company by delivering of such copy at its registered office or to a responsible person at its place of business, failing such service, to a director or secretary of the company or, if the company is in voluntary liquidation, to the liquidator. An affidavit of service shall be filed with the petition."

The consequence of this rule is that where an application for winding up cannot be served at the registered office or place of business, an attempt should be made to serve on a director or secretary of the company. The mischief behind the rule is to ensure that every company sought to be placed under liquidation is made aware of the pending proceedings to enable it to make representations regarding same. The courts are reluctant to grant applications for liquidation of companies where the companies sought to be placed under liquidation have had no notice of the intended action. In *African Gold (Zimbabwe) (Pvt) Ltd* v *Modest Pvt Ltd* 1999 (2) ZLR (SC) the court said the following service,

> "A respondent company must not be deprived of the opportunity to put forward its opposition to the grant of an order which will have the effect of causing it to suffer an immediate diminution in personal status and a removal of control over all its assets. These manifestly serious consequences flow from the issue of a provisional winding up order. The provisional liquidator is almost invariably vested by the court with the wide powers set out in paragraphs (a) to (h) of s 221 (2) of the Companies Act [Chapter 24:03]. See the remarks of Hofmeyer J in *Mackay* v *Cahi* 1962 (4) SA 193 (O) at 203G-H, which, though referring to sequestration proceedings, are nonetheless apposite and *Walsh* v *Kruger* 1965 (2) SA 756 (E) at 760 B. *A fortiori*, so it seems to me, the present appellant, being the victim of an inexcusable breach of procedure, the High Court ought to have afforded it the opportunity to oppose the application for the provisional order by the only means available, namely, by setting aside of the order that had been improperly obtained."

It is a fundamental rule of our law that an order for provisional liquidation is only granted once a court has been satisfied that the company sought to be placed under liquidation is aware of the pending proceedings. An order for winding up has the effect of depriving a company of control of its own assets, management and other affairs. A company sought to be put under judicial management is required to be afforded an opportunity to be heard before any adverse action is taken against it. It should not be denied an opportunity to be heard and present its defence to a proposed winding up. It is incumbent in every case of winding up of a company for proper service of the intended action to be effected on the company. Any suggestion that the company sought to be placed under liquidation may not have been properly served with the application is a valid reason for a court to decline to grant the order sought. The court that will deal with the application set aside the order will be required to decide whether the effect of r 5 (2) of the winding up rules is to require party who fails to serve a company at its registered office is at law required to proceed and serve its officials. It appears to me that that is the import of the rule. Where a petitioner has become aware that the company has moved offices and cannot be served at its registered or business place, the petitioner is required to make an attempt to serve its officials. It cannot insist on serving process at the registered office or business address. In the absence of any effort to serve the company's officials, such service cannot be termed proper service.

The application for the winding up of Medworth was served at 118 Simon Mazorodze Road, Southerton, Harare on 29 April 2014, its business address. The fact that Medworth had been evicted from the premises seems to be common cause. Despite having knowledge that the applicant had moved from the address, the respondents proceeded and served the application at a place they knew Medworth had vacated. The first respondent made no effort to serve officials of the company with the application in terms of r 5 (2) of the Winding Up Rules. By serving the application for winding up of Medworth at a place the first respondent knew Medworth had vacated, the respondent acted improperly. It was deceitful and wrongful for the first respondent to proceed to file returns with respect to another winding up application, giving the impression that the returns related to Medworth. The court that granted the provisional order may not have picked the mix-up. The first respondent was not forthright with the court and hoodwinked the court into finding that Medworth had been properly served with the application and preceded with the application as if service of the

application was above board. The first respondent snatched at a judgement. Had the court that dealt with the application for provisional liquidation become aware of the fact that Medworth had moved from its registered address at the time of service of the application and that the first respondent was aware of this fact, it is unlikely that the court would have acceded to the application. Litigants who are fond of playing hide and seek games with their opponents should not cry foul when the courts come down hard on them and express their displeasure at their conduct. This is the sort of conduct that attracts censure of the courts and deserves to be penalised with orders of costs at a higher scale against. The first respondent must count itself fortunate in that it was not penalised for this conduct at the time that I granted the order against it. Medworth was deprived of an opportunity to defend the proceedings.

The certificates of service that were used in support of the application for the provisional winding up are for two different matters. Both were served at 118 Simon Mazorodze Road. The one dated 30 July 2014 relates to the Trinipack Investments winding up brought under HC 3344/14. The other relates to Medworth and is dated 29 April 2014 .In the same file are returns of service dated 1 September and 29 August 2014 for service of an order related to Trinipack Investments under HC 3344 /14. There seems to have been a mix-up with the files with returns of service related to Trinipack Investments being filed in the Medworth winding up. The court seems to have acted on papers relating to a different company.

I must conclude that Medworth did not become aware of the application and the order was not properly sought. The company was denied an opportunity to make representations before an order for liquidation against it was made. The fact that the order was subsequently advertised in the papers on confirmation is neither here nor there and does not assist the respondents. The order for liquidation is based on incurably bad service and is incurably bad. One cannot avoid the conclusion that the order was granted in error. I am of the view that because the first hurdle of the application was not properly traversed, that fact constitutes a good enough reason for the order for liquidation to be upset. The applicant has an arguable case in the application for the setting aside of the winding up order. The interests of justice demand that the company is afforded an opportunity to challenge the winding up order. This can only be achieved by affording the applicant an opportunity to pursue the application to set aside the winding up order. The applicant has shown the existence of a *prima facie* right though open to some doubt. The applicant has no alternative remedy to address its situation.

It stands to suffer irreparable harm if the execution of the assets of Medworth proceeds and its assets sold. The application to set aside the liquidation order will be rendered academic if successful. The balance of convenience favours the granting of this application. In the result, I make the following interim order.

> Pending the finalization of this application and the application for the setting aside of the liquidation order, the sale and leasing out of the 2nd respondent's properties around the country be and is hereby suspended.

Bvekwa Legal Practice, applicant's legal practitioners
Kanter and Immerman, respondent's legal practitioners