REPORTABLE (68)

Judgment No. SC. 74/05
Civil Appeal No. 368/03

INNOCENT NYATHI vs

(1) TAGARIRA BROTHERS (PRIVATE) LIMITED
(2) ASSISTANT MASTER OF THE HIGH COURT
(3) BARBRA LUNGA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & CHEDA AJA
BULAWAYO, JULY 25, 2005 & JANUARY 25, 2006

J C Andersen SC, for the appellant

V Majoko, for the first respondent

No appearance for the second respondent

No appearance for the third respondent

MALABA JA: This is an appeal against the judgment of the High Court granted on 27 November 2003 declaring the first respondent the purchaser of Sukasihambe Special Express (Pvt) Ltd as a going concern, together with its movable and immovable assets for the sum of seven million two hundred thousand dollars, and directing the second respondent to transfer ownership of the said assets to the first respondent and sign all documents necessary to effect the transfer.

Sukasihambe Special Express (Pvt) Ltd is a company incorporated in accordance with the laws of Zimbabwe. The appellant was one of its directors. The company was placed under provisional liquidation in terms of an order granted on

6 April 2001. Its assets comprised two industrial stands, eight buses, four of which were non-runners, a Mazda B2500 truck, one safe, one compressor motor, spares and a 20 000 litre underground fuel tank. The provisional order directed the second respondent to appoint the third respondent as the provisional liquidator. She could not perform the duties of a provisional liquidator until 11 October 2002 because she had failed to furnish the security required under s 274 of the Companies Act [*Chapter 24:03*] ("the Act").

On 26 September 2002 the court *a quo* reviewed the progress made towards the final liquidation of the company and made an order in these terms:

> "1. This matter be and is hereby postponed to the 7th November 2002, and the rule *nisi* is extended to that date.
>
> 2. The Assistant Master be and is hereby directed to convene a meeting of the creditors and shareholders and the provisional liquidator of the applicant before the 24th October 2002 for the express purpose of trying to settle this matter, but it shall also be for the purpose of –
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> (a) allowing all creditors of the applicant to prove their claims;
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> (b) allowing I. Nyathi to make proposals to the creditors to discharge the debts owed to them by the applicant; and
>
> (c) allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares.
>
> 3. The provisional liquidator shall cause a notice of the aforesaid meeting to be published in a Friday edition of a local newspaper at least seven days before the proposed meeting.
>
> 4. The costs are costs in liquidation."

The meeting of creditors convened by the second respondent in terms of the court order took place on 11 October 2002. Before the meeting the third respondent furnished the required security for the due performance of her duties as a

provisional liquidator. It was on that day that she was given letters of appointment that restricted her powers to the performance of acts specified in s 221(2) (a) to (g) of the Act, excluding the power to "sell, deliver or transfer the movable and immovable property of the company" contained in subpara (h).

At the meeting of the creditors on 11 October 2002, the first respondent made the highest offer to purchase the company as a going concern at a price of $7 200 000, which was sufficient to pay all the creditors. The creditors instructed the legal practitioners who also represented the provisional liquidator to apply for a final order of liquidation on the return day, have the third respondent appointed as the liquidator and accept the sum of $7 200 000 offered by the first respondent as the purchase price of the company's assets.

On 28 October 2002 the appellant's legal practitioners wrote to the provisional liquidator's legal practitioners, saying that he had raised the sum of $7 200 000. They indicated that they were holding the money in trust for payment to the creditors after the discharge of the provisional order of liquidation on the return day. They disclosed that the money had been advanced to the appellant in terms of agreements with third parties, which required that some of the movable assets of the company be delivered to them after its removal from provisional liquidation.

On 7 November 2002 the provisional liquidation order against the company was discharged by consent and the sum of $7 200 000 paid to the creditors. It is important to note that the provisional liquidator and the creditors, through their legal practitioners, consented to the discharge of the order.

On 6 December 2002, having changed lawyers and when she was no longer a provisional liquidator, the third respondent purported to enter into an agreement with the first respondent to sell the movable and immovable assets of the company at the price of $7 200 000. Notwithstanding the fact that the provisional order of liquidation had been discharged on 11 November 2002, the third respondent described herself as the "liquidator".

On 17 December 2002 the first respondent made an application to the High Court for the order that is the subject of this appeal.

A number of points were taken by Mr *Andersen* on behalf of the appellant. They show that the learned judge misdirected himself in granting the order to the first respondent.

The first point was that the company was not cited as a party in the application before the court *a quo*. It was improper for the learned judge to make an order against it. It was common cause at the hearing before the court *a quo* that the company had been removed from provisional liquidation at the time the application was instituted. As such, it could not be represented by the third respondent in the proceedings because she was no longer a provisional liquidator.

The second point was that the effect of the discharge of the provisional order of liquidation on 11 November 2002 was that ownership and control of the movable and immovable assets of the company reverted to the shareholders and

directors of the company. At the time the court *a quo* made the order on 27 November 2003 neither the second respondent nor the third respondent had possession of the assets to transfer to the first respondent.

The third point was that the first respondent had not purchased the assets of the company. The first respondent could only have purchased the assets of the company if the third respondent, in her capacity as a provisional liquidator, had the power to sell them. Only the second respondent or the court could give her that power. It is clear from the letters of appointment that the second respondent did not give the third respondent in her capacity as the provisional liquidator of the company the power to sell its assets. The power to sell, deliver or transfer the company's assets, contained in s 221(2)(h) of the Act, was excluded from the list of powers given to the third respondent. She was being told in no uncertain terms by the second respondent that she could not sell, deliver or transfer the assets of the company without the leave of the court.

It was suggested in argument on behalf of the first respondent that the leave of the court to sell the assets of the company was given to the third respondent in the order of 26 September 2002. That order made no reference to the sale of the assets of the company. It provided for the provisional liquidator being allowed to present "proposals by any other buyers interested in purchasing the applicant's shares". Whilst there was reference to the purchase of "shares" of the company, there was no reference to the selling of its assets. The construction of the terms of the order shows that no leave was given to the third respondent, acting as the provisional liquidator of the company at the time, to sell its movable and immovable assets. One

must assume that the court granted the order in the terms it did because it was aware that leave to exercise the powers listed under s 221(2)(h) of the Act is ordinarily granted to a liquidator after a final winding-up order has been made by it.

The learned Judge found as a fact that there was a sale of the movable and immovable property of the company at the meeting of 11 October 2002. He found that the creditors accepted the offer by the first respondent to purchase the assets of the company at the price of $7 200 000.

Assuming for a moment that the factual finding made by the learned Judge was correct, it could not support the conclusion that there was a sale of the company's assets in terms of the law because creditors have no power to enter into an agreement of sale of assets of a company under liquidation by a court. It would be the provisional liquidator or the liquidator, with the authority of the Master or the court, who would sell, deliver or transfer assets of a company under liquidation by a court.

I would accordingly allow the appeal with costs, set aside the judgment of the court *a quo* and substitute in its place the following –

"The application is dismissed with costs".

SANDURA JA: I agree.

CHEDA AJA: I agree.

Webb, Low & Barry, appellant's legal practitioners

Majoko & Majoko, first respondent's legal practitioners