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(115)

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 107/2005

HOLDEN AT LUSAKA/NDOLA

SCZ JUDGMENT NO. 10/2007

(Civil Jurisdiction)

In the matter of a winding up petition by Aristogerasimos Vangelatos for the winding up of Dar Farms and Transport Limited incorporated on the 16th July, 1979 with a nominal share capital of K1,000,000,000 divided into shares of 1,000,000,000 of K1.00 each fully paid for the reasons set out in the petition herein.

AND

In the Matter of Section 271(1) and Section 272(1)(f) of the Companies Act, 1994

BETWEEN:

ARISTOGERASIMOS VANGELATOS

Appellant

And

DEMETRE VANGELATOS

1st Respondent

METRO INVESTMENTS LIMITED

2nd Respondent

KING QUALITY MEAT PRODUCTS LIMITED

3rd Respondent

Coram: Lewanika, DCJ, Chitengi JS and Kabalata, AJS

On 26th September, 2006 and 23rd February, 2007

For the Petitioner : Dr. R.M.A. Chongwe SC of Messrs
RMA Chongwe & Company

For the Respondents : Hon. E.S. Silwamba SC, and Mr. L.
Linyama of Messrs Eric Silwamba & Co.

JUDGMENT

Chitengi, JS, delivered the judgment of the court.

Cases referred to: -

1. ***Jamas Milling Company Limited V Imex International (Pty) Limited SCZ Judgment No. 20 of 2002 (unreported).***
2. ***Dean Namulya Mung'omba Bwalya Kanyata Ng'andu and The Anti-Corruption Commission V Peter Machungwa, Golden Mandandi and the attorney-General SCZ judgment No.3 of 2003 (Unreported).***
3. ***Polini V Gray (1879) 12 CHD 438.***
4. ***Wilson V Church No.2(1879) 12 CHD 454.***

Statute referred to:

1. ***Companies Act Chapter 388 of the Laws of Zambia Sections 204 and 215(6).***

In this judgment we shall refer to the Appellant as the Petitioner and the Respondents as the Respondents which is what they were in the Court below.

This case is not without history. From what we can glean from the record of appeal it appears that a dispute has been raging between the Petitioner and the first Respondent, who are brothers, and directors in a company called Dar Farms

and Transport Company Limited, which is not a party to these proceedings.

The controversy between the Petitioner and first Respondent appears to relate to the management of Dar Farms and Transport Company Limited and the second and third Respondents. It appears that the Petitioner commenced a petition in the High Court to wind up Dar Farms and Transport Company Limited. The winding up proceedings were stayed by a Ruling of the High Court delivered on 16th January, 2006 pending the determination of an appeal by the first Respondent against an earlier Ruling of the High Court, dated 24th August, 2005, which dismissed the first Respondent's application to stay the hearing of the petition and refer the matter to arbitration.

On 3rd April, 2006 the Petitioner filed an application for what he called an order to prevent dissipation of assets. This application by the petitioner did not succeed, the learned trial Judge holding that the winding up petition proceedings having been stayed by the Ruling of 16th January, 2006 pending appeal, the Petitioner's application cannot be entertained until the determination of the appeal because the matters raised in the application are embedded in and cannot be separated from the winding up petition. This holding stimulated this appeal.

The Petitioner advanced five grounds of appeal but in fact there are only four grounds of appeal because ground five is a repeat of ground one.

The first ground of appeal is that the trial Judge erred in law in refusing to grant an order to prevent dissipation of company property during the stay of the winding up petition.

The second ground of appeal is that the learned trial Judge misdirected himself by holding that staying winding up proceedings meant freezing all proceedings including those intended to protect the interests of the property belonging to the company, interests in the company of the shareholders' creditors and employees.

The third ground of appeal is that the trial Judge misdirected himself by refusing to declare the law set out in Section 204 and Section 215(6) of the Company Act.

The fourth ground of appeal is that the trial Judge failed and refused to protect the interests of the Petitioner while at the same time he has continued to protect those of the Respondent.

Both counsel filed detailed written heads of argument which they augmented with oral arguments.

The sum and substance of Dr. Chongwe's written submissions on ground one is that the refusal by the learned trial Judge to grant the order sought by the petitioner means that one director of the company to the exclusion of the other can deal with the assets of a company. Further, it was Dr. Chongwe's submission that the learned trial Judge's refusal to grant a Mareva injunction to prevent the wrongs of one director means that the other director and his serious concerns must await the hearing of the winding up petition or the determination of the appeal by the Supreme court. It was Dr. Chongwe's submission that the learned trial Judge's reasoning is inconsistent with **Section 204 of the Companies Act⁽¹⁾** which forbids management of a company by not less than two directors. He pointed out that the power to stay is discretionary and it must be exercised by the court sparingly and only in exceptional cases and that in a proper case terms may be imposed.

In his submissions on ground two Dr. Chongwe explained that the purpose of a Mareva Injunction is to prevent the Petitioner being cheated out of the proceeds of the winding up petition. Further, Dr. Chongwe submitted that there is no precedent to support the principle that a stay of winding up petition freezes all actions against a director or shareholder aimed at stopping him from dissipating company assets.

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In ground three, Dr. Chongwe submitted that Sections 204 and 215(6) of the Companies Act require the endorsement of documents relating to payment and receipt of money by the company to be endorsed by at least two directors and that the affairs of the company shall be administered by at least two directors. He said the learned trial Judge ignored these provisions.

The argument on ground four is that the Petitioner has been kept out of funds to meet his living costs and legal fees to defend himself while the Respondent's legal expenses are met by the company.

As framed, the arguments in ground five refer to ground one. These arguments are in fact an elaboration of the arguments in ground one. These arguments emphasize that the court should not just sit and watch the first Respondent dissipate the assets of the company to the detriment of the Petitioner. It was Dr. Chongwe's submission that the company or a shareholder cannot suffer anything as result of an order for prevention of the dissipation of the company's assets. He pointed out that the one to suffer will be the one insisting on running the affairs of the company alone to his benefit.

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Dr. Chongwe's oral arguments are a repeat of his written heads of argument and it is not necessary to recite them.

In his written submissions, Mr. Silwamba replied to ground four first. He pointed out that ground four raises evidence from the Bar, a practice we have disapproved in many cases which include ***Jamas Milling Company Limited Versus Imex International (PTY) Limited***⁽¹⁾.

Mr. Silwamba then argued grounds one and two together. Mr. Silwamba pointed out that the issue is the status of proceedings that have been stayed pending appeal. Mr. Silwamba pointed out that the proceedings were stayed pending appeal and that the appeal hinges on the question whether the High Court should hear or determine the winding up proceedings or must refer the matter to arbitration. It was Mr. Silwamba's submission that the learned trial Judge in his Ruling was alive to this issue. It was also Mr. Silwamba's submission that a stay of proceedings is granted so that the Appellate Court's decisions are not rendered nugatory. As authority for this proposition Mr. Silwamba cited the case of ***DEAN NAMULYA MUNG'OMBA, BWALYA KANYATA NG'ANDU AND THE ANTI-CORRUPTION COMMISSION VS PETER MACHUNGWA GOLDEN MANDANDI AND THE ATTORNEY-GENERAL***⁽²⁾.

It was Mr. Silwamba's submission that the Appellant does not question the decision of the learned trial Judge but the effect of the decision. He submitted that the grant of the stay rendered the proceedings inactive pending the determination of the appeal by the Supreme Court. Citing the cases of ***Polini V Gray***⁽³⁾ and ***Wilson V Church***⁽⁴⁾, Mr. Silwamba submitted that rights acquired under proceedings that are stayed are suspended pending appeal. It was Mr. Silwamba's submission that in this case, the stay of proceedings is actually to suspend the rights the Appellant may have in the proceedings in the Court below pending the determination of the appeal in order to avoid a situation where the decision on appeal is rendered nugatory and merely academic. Mr. Silwamba pointed out that the order sought in the Court below hinged on the operations of Dar Farms and Transport Company Limited, hence it was dismissed on the ground that this court had yet to determine whether the learned trial Judge had jurisdiction to adjudicate over the matter. Mr. Silwamba further pointed out that this Court has yet to rule on which forum to resolve the dispute between the parties.

On ground four, Mr. Silwamba submitted that a perusal of the record reveals that the Appellant relied heavily on the Rules of the Supreme Court 1999 Edition which actually limits the Application of its provisions in winding up proceedings to

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the provisions of our Companies Act. Mr. Silwamba referred us to Order 2(2) which states in the table that proceedings relating to winding up of companies will be dealt with under the Companies Act. We say no more on this issue, which Dr. Chongwe also raised, because in the view we take of this case, we do not rest our judgment on these provisions of the Rules of the Supreme Court.

Mr. Silwamba then raised arguments on abuse of Court process and *res judicata* which we think are not matters upon which the determination of this appeal turns.

Finally, in his written submission, Mr. Silwamba pointed out that the issue that was before the court below was whether proceeding with the Petitioner's application would render the appeal nugatory and said that the learned trial Judge was on firm ground to hold so and to refuse the application.

In his oral submissions, Mr. Silwamba submitted that the supplementary record of appeal shows that the issue of looking after the assets of the company was dealt with as the learned trial Judge refused to appoint a provisional liquidator. He pointed out that on review the issue was raised again but rejected. Mr. Silwamba also pointed out that the issue of a *Mareva* Injunction was raised and also rejected, the Court

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below holding that it had no jurisdiction. It was Mr. Silwamba's submission that a *Mareva* Injunction is not the answer and that the Companies Act provides adequate mechanisms for preservation of company property.

In reply, Dr. Chongwe pointed out that page 12 of the record shows an Affidavit by the Petitioner explaining his financial embarrassment. Further, Dr. Chongwe pointed out that the Court has inherent jurisdiction where it sees injustice to protect the interests of the shareholders.

We have considered the facts of this case, the grounds of appeal, the submissions of counsel and the Ruling appealed against.

In the view we take of this appeal, we propose to deal with ground one, which Dr. Chongwe argued together with ground five, ground three and ground four together. The thrust of these grounds centers on the financial embarrassment being faced by the Petitioner, breaching of the provisions of the Companies Act resulting from the learned trial Judge's refusal to grant the Petitioner an order to stop the first Respondent from dissipating the assets of the company and an alleged failure by the learned trial Judge to protect the Petitioner while continuing to protect the first Respondent. After considering

the facts of this case and the Ruling appealed against, we must say, as we shall show later, that these are not the grounds upon which the Ruling of the learned trial Judge which refused to grant an order not to dissipate the assets of the Company can be challenged.

Dr. Chongwe argued and submitted that the learned trial Judge's decision is inconsistent with the provisions of Section 204 of the Companies Act which forbids companies being managed by less than two directors. These submissions are not only unsupported by the evidence but also do not state the correct position of the law. Apart from the fact that the two directors are quarrelling, there is no evidence on record that the Petitioner has ceased to be a director. In fact Dr. Chongwe's own submissions show that the Petitioner is still a director in the company. On the alleged inconsistency between the learned trial Judge's decision with Section 204 of the Companies Act, we see no inconsistency. Section 204 of the Companies Act does not deal with management of a company and does not prohibit one director from running the business of a company. What Section 204 prohibits is the company carrying on business when it has less than two directors. As we have already said the company has two directors, the Petitioner and the first Respondent, although the two are quarrelling.

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Dr. Chongwe also raised an issue that the learned trial Judge's decision failed to declare the law in Section 215(6) of the Companies Act which deals with the execution and endorsement of cheques, negotiable instruments etc by two directors and which provisions are mandatory. These submissions are not tenable. In terms of Section 215(6) the execution and endorsement of cheques, negotiable instruments by two directors is not mandatory as Dr. Chongwe submitted. Section 215(6) also provides that the cheques, negotiable instruments etc. can also be endorsed in such other manner as the directors may determine. There is no evidence on record that excludes the endorsement of cheques, negotiable instruments of the company in any other manner. In any case, looking at the Ruling and the evidence on the record we find nothing to suggest that the learned trial Judge was ever asked to rule on the effect of Sections 204 and 215(6) of the Companies Act. Further, a Mareva injunction is intended to prevent dissipation of assets and not to determine the rights of the shareholders.

About the alleged failure of the learned trial Judge to protect the interests of the Petitioner while he continued protecting the interests of the first Respondent, we say that when the case is cast in its proper perspective, no one can accuse the learned trial Judge of refusing to protect the interests of the

Petitioner while promoting the interests of the first Respondent.

Therefore, even without going into the details of Mr. Silwamba's submissions on these grounds, particularly those of giving evidence from the Bar, on ground four, we find no merit in grounds one, three, four and five and we accordingly dismiss these grounds of appeal.

In our view, the substantive ground of appeal is ground two. This ground, we think, given the history and the circumstances of this case, is the only ground of appeal, which should have been filed.

The critical issue in this appeal is whether after the winding up proceedings were stayed without any reservation, it was open to any of the parties to take further steps in the action. Therefore, whatever hardships that arose from the stay of the winding up proceedings cannot in themselves create a procedural right for a party to take further steps in proceedings that have been stayed or suspended until the happening of some event; in this case until the determination of the appeal.

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This case is not the usual case where judgment has been given and the losing party seeks a stay of execution of judgment on the ground that if execution takes place and he is later successful on appeal he may not recover the monies he has paid to the successful party or that his business may be closed. In this regard the cases of **Polini**⁽³⁾ and **Wilson V Church (No.2)**⁽⁴⁾, to the extent that they dealt with execution of judgments involving certain sums of money are not of much help, in and relevant to, this appeal.

In this case, the Petitioner commenced a winding up petition. Before the winding up petition could proceed an issue arose whether the matter should be dealt with under arbitration. The learned trial Judge ruled against arbitration. In other words the learned trial Judge ruled in favour of the Petitioner. The first Respondent, not being satisfied appealed to the Supreme Court against the Ruling of the learned trial Judge. The appeal against the Ruling of the Judge deciding that the winding up proceedings were not arbitratable and in which there is the stay of the winding up proceedings, is not before us now. What is before us is an appeal against the Ruling of the learned trial Judge that refused an order directing the first Respondent not to dissipate the assets of the company. In the event, whatever misdirection there may be in the Rulings in

the winding up proceedings, are not a subject for comment by us in this present appeal.

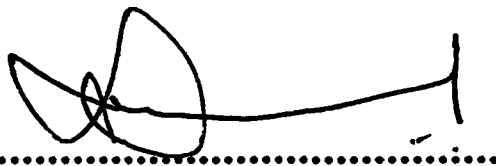
Dr. Chongwe argued and submitted that there is no precedent to support the principle that a stay of winding up petition freezes all actions against a director or shareholder aimed at stopping him/or her from dissipating company assets. The simple answer to this is that the learned trial Judge never made a holding of such wide application. As we understand the learned trial Judge's Ruling, he said the application could not be made in these particular proceedings. Further, Dr. Chongwe himself did not cite any authority either from precedent or doctrine to support the proposition that when proceedings in a case are stayed, a party can take further steps in the stayed proceedings before they are reactivated.

Dr. Chongwe also urged us to restore the status quo. We are not all too sure as to which status quo we have to restore. When the winding up proceedings were stayed the status quo was restored. In any case, as the appeal against the learned trial Judge's Ruling on whether the matter should be arbitrated or not is not before us we cannot attempt to restore a status quo in a case that is not before us on appeal.

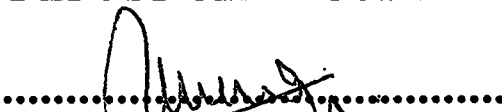
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All in all, we have found no basis upon which we can fault the learned trial Judge in refusing to allow the petitioner to take further steps in the stayed proceedings by way of an application for an order to stop the first Respondent from dissipating the assets of the company. The matters complained of were present at the time of the winding up proceedings. The learned trial Judge was not asked to make any reservation to his order of stay of proceedings. We find no merit in this appeal and we dismiss it. Costs to abide the outcome of the appeal on the main action.

All steps necessary should be taken by counsel to ensure that the appeal in the main action is listed in the monthly fast track for appeals on urgent matters, which has just been established.



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D. M. LEWANIKA
DEPUTY CHIEF JUSTICE



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PETER CHITENGI
SUPREME COURT JUDGE



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T. A. KABALATA
AG/SUPREME COURT JUDGE