LYTTON INVESTMENTS [PVT] LIMITED
versus
REGINALD FRANCIS SARUCHERA N.O.
[*In his capacity as provisional liquidator of Gulliver Consolidated Limited – in provisional liquidation*]
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 31 May 2016; 4 July 2016 and 21 December 2016

Opposed application

Prof *L. Madhuku,* for the applicant
Mr *A Mugandiwa,* for the first respondent

MAFUSIRE J: The citation of the first respondent as "… *provisional liquidator of Gulliver Consolidated Limited* ["**Gulliver**"] – *in provisional liquidation* …" was wrong, a detail not lost to his eagle-eyed counsel. Gulliver having been finally wound up, the first respondent was no longer the provisional liquidator, but the final liquidator. However, nothing turns on this, except to correct the record.

This judgment is simply to determine who, between the parties, should bear the costs of suit, the main dispute between them having been eventually resolved out of court at the court's prompting. But because the parties could not agree on costs, all that saving in time, costs and energy that the court had hoped to achieve by encouraging settlement, went up in smoke because in determining the liability for costs, the court necessarily has to go back to the merits and make an academic determination on liability. It seems such a waste.

The dispute was, in my view, unskilfully allowed to get out of hand. It was almost petty. It arose as follows. After Gulliver's liquidation, its creditors proved their claims in the ordinary course of events in the winding up process in terms of the Companies Act, [*Chapter 24:03*]. The applicant submitted a claim for $52 630-97 for capital and interest. Gulliver's internal audit acknowledged the capital claim at $50 939-42. When the first respondent was appointed liquidator, he, among other things, and roughly two years after the proof of claims, prepared what he termed a "Liquidation Report". It was quite comprehensive. Amongst the

list of creditors, which the report acknowledged had been approved at the first meeting of creditors, was the applicant at $52 631-00. However, the applicant was also listed as owing Gulliver an amount in the sum of $50 187-00. The applicant queried this and engaged the first respondent to explain how it could be listed as both creditor and debtor at the same time.

The applicant said the first respondent was not forthcoming, allegedly contending that he was still investigating. When pressed, his attitude, as alleged by the applicant, was that the applicant should itself furnish proof that it did not owe the money. The applicant alleged the first respondent failed to attend a meeting which had been scheduled by prior arrangement to iron out the problem. Feeling it had hit a brick wall, the applicant brought the present proceedings. It sought the following orders:

1 that the first respondent should, within seven days, furnish the applicant with the factual and legal basis for his decision to list it as Gulliver's debtor for $50 189;

2 in the alternative, in the event of non-compliance, that the first respondent should be directed to amend Gulliver's accounts by removing applicant's name from the list of debtors;

3 that the first respondent should pay the costs of suit on a legal practitioner and client scale.

The first respondent opposed the claim. It raised mainly technical defences. The first was to attack the manner of his citation, in passing, correcting that he was no longer the provisional liquidator but rather the final one; and in substance, as I understood him, saying that he should not have been cited in his individual name but in his official capacity as the liquidator for Gulliver. As this defence seemed manifestly spurious, I dismissed it out of turn. Save for the mistaken reference to the first respondent as the "*provisional liquidator*", which mistake the applicant readily conceded, the first respondent taking no further issue, I was satisfied, and still am, that the citation of the first respondent and the description of his official capacity, had been sufficient.

The first respondent's second technical defence was that the relief sought by the applicant was grounded on nothing, as neither the common law nor any statute recognised it.

This argument was further developed to say that the Liquidation Report was one prescribed by s 277 of the Companies Act. In terms of this provision, within three months of his appointment, a liquidator is required to submit to a general meeting of creditors and contributors a report on, *inter alia*, the estimated amount of assets and liabilities of the insolvent company.

The thrust of the first respondent's argument in this regard was that in winding up the insolvent company the liquidator is required to prepare a plan of distribution or liquidator's account in term of ss 279 to 285 of the Act. Such account lies for inspection for a specified period during which interested parties can lodge objections. The Master, the second respondent herein, adjudicates on any such objections. Any person aggrieved by the Master's decision can then apply to court to set aside his decision.

The substance of the first respondent's argument was that the applicant had jumped the gun. He was still to prepare his account. Only if the applicant was unhappy with such an account, and was unhappy with the Master's decisions on any objection he might make, could he approach the court, not before. As such, the argument went on, the applicant had not exhausted his domestic remedies and he had shown no special circumstances warranting the court's premature intervention. A whole gamut of cases on the need to exhaust domestic remedies first before one approaches court were cited and extensive quotations plucked from them.

On the merits, the first respondent professed ignorance of any meeting that the applicant might have called him to attend over the issue, but argued that nonetheless, such an issue would appropriately have been dealt with in the winding up process.

In my view, the first's respondent's stance was manifestly unproductive and unnecessarily costly. All what the applicant at first queried was its inclusion in the Liquidator's Report as both creditor and debtor of Gulliver in liquidation. All that it sought was information on how it was indebted to the company in an amount almost equal to the size of its own claim against the company, which claim had been duly accepted.

In my view, the first respondent, in all probabilities, had just made a mistake. If not, then his decision to include the applicant amongst the list of debtors must have been predicated on some document or piece of information. It was that which the applicant said it wanted to verify. It was incumbent upon the first respondent to explain. But instead of doing so, he failed and/or refused to cooperate. And when the matter degenerated into a full-scale

legal confrontation, he went on to devote acres of space arguing unimpressive technicalities, all in an effort to avoid furnishing simple information. It seemed so petty.

In my view, the applicant was entitled to come to court in the face of such unreasonable intransigence. Contrary to the first respondent's argument, there is nothing in the Companies Act that precludes a person in the applicant's position to seek relief from the court. The applicant was a creditor in the insolvent company and had successfully proved its claim. It was entitled to express surprise if its debt was to be whittled down almost to nothing by what manifestly seemed a mistake by the liquidator. It had a right to protect its asset. It did not need to wait for the mistake, if indeed it was, to be escalated and duplicated onto the liquidator's final distribution account. A liquidator sits in a fiduciary position in relation to both the insolvent company and the creditors. The first respondent should simply have addressed the applicant's query.

The argument that the applicant jumped the gun and that he ought to have exhausted its domestic remedies was misplaced. The applicant was not challenging the liquidator's final distribution account in terms of s 277 to 285 of the Act. It was not challenging the Master's decision. As I have already said, he did not have to wait for that. If it raised a query on a report prepared by a liquidator in terms of s 277 of the Act and the liquidator ignored it, or was unreasonably recalcitrant, there was nothing, in my view, and in accordance with its constitutional rights, that stopped it from approaching the court.

In the premises, I am satisfied that the merits of the case were overwhelmingly in favour of the applicant. Accordingly, it should be the first respondent that should be liable for the costs of the application. What only remains is to determine the level at which those costs should be paid, given that the applicant prayed for an attorney and client scale. On this I can do no better than pluck my concluding remarks in my judgment in *Steward Bank Limited* v *Mayor Mangeya*[1] and paste them here:

> "The award of costs is a matter wholly in the discretion of the court: see *Graham* v *Odendaal*[2] and *Kruger Brothers & Wassermen* v *Ruskin*[3]. The court's discretion is exercised judiciously and not whimsically or capriciously.
>
> In my view, it is wrong, both in law and in equity, that a litigant, having been put through to great lengths to enforce its right, or rights in the face of unreasonable resistance, should be left without adequate recompense of the expenses incurred. The law says where costs of suit

[1] HH 474-16
[2] 1972 [2] SA 611 [AD]
[3] 1918 AD 63, at p 65 - 67

are incurred unnecessarily, the court can order the party responsible to pay them. DEVILIERS JP put it this way in *Fripp* v *Gibbon and Company*[4]:

> 'To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, proved to have been unnecessarily or ineffectually incurred should, as a rule, be borne by the party responsible for such costs.'

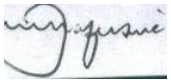
However, in spite of all that conduct by the defence counsel, which I consider regrettable, I felt I had to treat the issue of costs *de bonis propriis* with restraint. I still subscribe to, and wish to abide by my view in the recent case of *Exor Holdings [Private] Limited t/a Exor Petroleum* v *Mubvumbi*[5]. Dealing with a request for a special order of costs, I said:

> 'In litigation, there is always some level of tolerance required so as not to unduly stifle citizens from enjoying and exercising their freedom of expression and access to the courts. *In casu*, I may not have been impressed by the respondent's defences. However, I would not go so far as to penalise him on costs beyond the ordinary scale, especially given that there was also no precision or anything impressive in the manner the applicant's case was cast.'"

In casu, implicit in the point taken by the first respondent was that the Master could probably have easily and cheaply resolved the matter had the applicant made the right approach. This was not a spurious point, even though I have rejected it as one that the first respondent could have raised as a defence to the relief sought. Therefore, for the first respondent having unsuccessfully opposed the application, at least initially, I do not condemn it in costs beyond the ordinary scale.

In the premises, the costs of this application shall be borne by the first respondent.

21 December 2016



Mundia & Mudhara, applicant's legal practitioners
Wintertons, first respondent's legal practitioners

[4] 1913 AD 354, at p 363
[5] HH 447-16