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Fred M'membe and Post Newspapers Limited (in liquidation) v. Abel Mboози and Others
SCZ Appeal No. 07/2021
Chanda Chungu¹

Facts

The Supreme Court in this case dealt with the liquidation of the Post Newspapers, a company which was responsible for publishing the popular *The Post* newspaper. A group of people who claimed to be creditors of the Post filed a petition in the High Court for the winding up of the company. Mr. Lewis Chisanga Mosho was subsequently appointed as the provisional liquidator.

The appeal before the Supreme Court dealt with issues and questions relating to the proper procedure and process relating to the liquidation and the liquidator, the role of the court and the rights of shareholders and directors during the liquidation process.

The Supreme Court identified the three following issues that it felt were at the core of the dispute, namely:

- the use of ex-parte proceedings;
- the court's failure to hear the grievances of the company in liquidation about the process and the liquidator;
- the consent judgment entered into.

From the filing of the petition for winding up to the liquidation of the Post Newspapers, the company was never heard or afforded an opportunity to address their concerns relating to the appointment of Mr. Mosho and other matters relating to the way the liquidation was carried out. The court had on several occasions only heard the creditors, including the appointment of the liquidator without affording the company itself a chance to give its side of the story. Other decisions which the company was not heard on was the removal of Messrs. Nchito and Nchito as the company's representatives in favour of Messrs Lewis Nathan, a law firm in which the provisional liquidator was a partner in.

Thereafter Messrs. Lewis Nathan, acting on behalf of the Post Newspaper entered into a consent judgment with the creditors to confirm Mr. Mosho as the liquidator. Mr. Fred M'membe filed a Notice as an interested party protesting Mr. Mosho's appointment but once again he was never heard by the court.

Mr. M'membe and the Post Newspaper subsequently commenced an action seeking to set aside the consent judgment on the basis that it was illegal and fraudulent.

Holding

The Supreme Court confirmed that under the Companies Act, Chapter 388 of the Laws of Zambia which was applicable at the time of the events in question, creditors of the company could initiate the winding of the company. The court confirmed that a provisional liquidator could be appointed after the presentation of the winding up petition and before the final winding up order.

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The Winding up Rules provide that the provisional liquidator may be appointed ex-parte but the court must thereafter issue a date, referred to as an inter-parte hearing, where the other party may be heard. The Supreme Court held that the inter-parte hearing is crucial because at this stage the court has the power to confirm, vary or discharge the appointment of the provisional liquidator, which is an important power given the serious consequences that the appointment of a provisional liquidator carries.

The Supreme Court thereafter highlighted that the primary duty and responsibility of a provisional liquidator is to preserve the assets of the company pending the winding-up order. The appointment of a provisional liquidator according to the Supreme Court is dependent upon two considerations that the court must consider namely satisfaction that on the hearing of the winding up petition, an order for winding up is likely to be made. Thereafter, the court must consider that it is right in the circumstances to appoint a provisional liquidator.

The court thereafter interpreted Rule 6 and 10 of the Winding Up Rules which provide for a person needing to file a notice of their intention to be heard when the winding up petition is heard. The Supreme Court guided that these provisions in the Rules give an interested party the relevant and requisite standing to protect their interest during the winding up of a company and their role is limited to simply opposing the petition rather than being a party to the proceedings.

Malila CJ held that the giving of an opportunity to be heard at an inter-partes hearing regarding the liquidation process is a formality and legal requirement set out in the law that must be complied with.

As the Consent Judgment, the Supreme Court confirmed that it should be set aside by commencing a fresh action. Where a winding up is made, the Supreme Court held that it could be set aside on the grounds of illegality, procedural impropriety, or lack of jurisdiction.

Lastly, the Supreme Court confirmed that although the powers of the directors cease and the power of management transfers to a liquidator during liquidation, the directors can carry out any power that has not been given to the liquidator by the court or one which the law does not preclude the director from carrying out during liquidation proceedings.

Based on the irregularities identified, the Supreme Court found that the actions of the liquidator prior to and following the liquidation of the Post Newspaper had no legal effect, and the liquidation itself was faux.

Significance

It is worth briefly highlighting the process for the confirmation of a liquidator. In the case of winding-up by the court, a provisional liquidator is firstly appointed by the court when the winding up presentation has been made, before the winding-up order is made.² After the court finds that winding-up is appropriate based on one of the grounds in s57(1), a liquidator is appointed. The time between the appointment of the provisional liquidator to the confirmation of the winding up order and confirmation of the liquidator was the material issue in dispute in this matter.

² Section 67(1) of the Corporate Insolvency Act.

The court guided that the law at the time and even to this day sets very strict guidelines for the winding up of a company given the consequences it could have on the company in question. As such, the Supreme Court was adamant that a court should take the necessary steps to carefully hear and assess any opposition that the relevant stakeholder to the liquidation process may raise in court. It is for these reasons that the obligation to have an inter-parte hearing should be respected to afford a party an opportunity to be heard.

As it relates to the notice of intention to be heard, the Supreme Court per Malila CJ guided that:

Our respectful view, therefore, is that a person who gives a rule 10 notice does not become a party to the proceedings in the conventional sense of being either a petitioner, a respondent, a third party, an interested party or an intervener from inception. Rather such party is an interested party and as such acquires locus standi to protect his/her position. Does the notice giving party under the rule 10 of the Companies Winding Up Rules by reason of the notice become entitled to participate to the same extent as an ordinary party to litigation? Our view is that the notice giving party's rights are necessarily circumscribed to the actual purpose for which the right to be heard in the winding up proceedings is given, namely to voice out for or against the petition at its hearing.

Therefore, the filling of the Notice in terms of Rule 10 of the Winding Up Rules merely gives an interested party the standing to simply be heard on the petition and bring out the grounds for the opposition. According to the Supreme Court, the interested party has a statutory interest to present his objection or support. The purpose is to enable a party recognised as an interested party to protect themselves and their interests during winding up proceedings.

Significantly once an interested party had given their position, the Supreme Court was clear that the court would have the full picture to make a comprehensive determination on the winding up petition. The Supreme Court restated the options a court has when hearing a winding up petition which to either make the winding up order, dismiss the petition or make any order that it thinks is fit.

The Supreme Court was clear that for a court to make a sound decision, the process of hearing all parties at an inter-party hearing before is mandatory and must be complied with in all circumstances. Issues such as the confirmation of a liquidator cannot be made without the set procedures being complied with.

In the circumstances of this case, Mr. Mosho was appointed as provisional liquidator and thereafter confirmed as liquidator by a consent order without an inter-partes hearing. This according to the Supreme Court amounted to an abdication of the court's supervisory authority of the liquidation process.

To this end the Supreme Court, per Malila CJ made a ground-breaking statement on the liquidation process in Zambia:

The point we make is that provisions of the law regarding winding up of the insolvent companies entrust upon the court a heavy responsibility of consciously supervising the liquidation. It is a responsibility that the court must take very seriously and solemnly. Compliance with the provisions of the law at every stage cannot be departed from by

the court, nor can the obligation to comply be cast upon any other entity, not even on the parties. The point is that a court cannot abrogate or abdicate its responsibility under insolvency law to make judicious decisions in winding up proceedings in fairness to all parties concerned.

The above statement reminds the public at large of the role of the court in liquidation proceedings. The court is mandated of supervising the liquidation process ‘consciously’ – in other words, administer and oversee the process in a diligent manner, given the dire consequences liquidation has on a company in question. This role must be taken earnestly, with the court ensuring the processes and procedures provided for by the law are adhered to as the liquidation process must be both procedurally and substantially fair.

In relation to setting up a winding up order, the Supreme Court guided that it could be set aside on the grounds of illegality, procedural impropriety, or lack of jurisdiction. It is the author’s position that the Supreme Court’s creativity in this matter was necessary in the interests of justice given the way the liquidation had been carried. As such, notwithstanding the fact that the Companies Act did not provide for the setting aside of the winding up, the Supreme Court’s pronouncement was appropriate and guides on the relief to be given to disgruntled interested parties where the liquidation is carried out in an unfair or unjust manner.

The Supreme Court was clear that if such a consent judgment adversely affects the rights of a party, such a party should be given the opportunity to be heard. As such, the consent judgment confirming Mr. Mosho as liquidator failed to consider the interests of the company in liquidation as an interested party, the court set aside the consent judgment.

The Supreme Court also had the opportunity to address the residual powers of the directors of the company during winding up proceedings. The Supreme Court confirmed that once the company is placed in liquidation, the powers of the directors divest or ceases as the power of management transfers to the liquidator. This is in line with the decision of *Measures Brothers Limited v. Measures*³ where it was held that:

By operation of a winding-up order...the office itself came to an end...after that order was made the company could not employ him in the office...he has ceased to hold him office.

Further, Lord Stendale MR in the case of *Re Farrow’s Bank Limited*⁴ where it was stated that

There is no express provision in the Act in the case of a compulsory liquidation as there is the case of a voluntary liquidation, that the powers of the directors shall cease on the appointment of a liquidator, but they do in fact cease on the appointment of a liquidator in a compulsory liquidation. In that case the liquidator is imposed upon the company compulsorily by the court to do acts on behalf of the company and to carry on the business of the company so far as it shall be necessary for the purposes of the winding up. It is quite true that the company does not choose him; he is put there by the court; but he is put there to do the acts which the directors of the company did before their powers ceased, with this restriction, of course, that in all that he does he must have regard to the interests of the creditors.⁵

³ (1910) 2 Ch 248.

⁴ (1921) 2 Ch 164.

⁵ My emphasis.

The position in the *Re Farrow's Bank* case thereby best explains what happens to the director's powers during winding-up by the court. Whereas the office continues to exist, their powers cease as the liquidator now carries out the duties of managing the business. This was carefully and clearly brought out by the Supreme Court in this case. The Supreme Court did also state that the directors have the power to oppose the confirmation of a provisional liquidator or go to court to remedy a wrong done to the company as the directors can exercise powers that the law or the court does not proscribe them from exercising.

Lastly, what can be gleaned from the judgment of the Supreme Court is that the Winding up Rules cannot be avoided, and must be followed throughout any winding up/liquidation proceedings. It is worth nothing that notwithstanding the repeal of the Companies Act, these rules continue to apply as they have not been expressly repealed. This is based on section 15 of the Interpretation and General Provisions Act.

Section 333 of the now repealed Companies Act guided that:

Subject to this Act, the acts of a liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

The above provision has been preserved by section 113 of the Corporate Insolvency Act. According to the said provisions, the acts of a liquidator remain valid even if he wasn't validly appointed or there was a defect in relation to his qualifications

In the circumstances of this case, the Supreme Court did not adequately consider and address itself to section 333 of the now repealed Act which applied at the time when it held that the actions of liquidator prior to and post the liquidation of the Post Newspapers Limited had no legal effect.

Without seeking to overly critique a landmark decision of the court, it is the author's view that the court could have dissected the above provision and set aside the liquidator's conduct considering the provision. The Supreme Court should have found his acts to be valid based on the provisions of the law but held him personally liable to the company in liquidation for his acts based on the illegalities and procedural flaws identifies. This would have been a neater way of holding the liquidator liable in the circumstances.

This Supreme Court's judgment is a landmark decision in relation to company law and liquidation in Zambia. At the forefront, the Supreme Court confirmed that the supreme and crucial role of the court in diligently monitoring and supervising the liquidation process due to the consequences of liquidation. As such, the court is mandated to ensure proper procedures and formalities are complied with, including giving any interested party the opportunity to oppose the process or not.

As it relates to the rights of an interested party, where the interested party is a shareholder, the Supreme Court adamantly pointed out that they need to be given an opportunity to be heard given the consequences it could have on their property rights. The opportunity to be heard is to not only protect their interests and enable the court to make a more logical decision considering

the representations from all parties. The said opportunity to be heard goes to the core of fairness and justice in the liquidation process.

The Supreme Court stated that notwithstanding the directors no longer holding the powers of management of the company in liquidation, the directors retain the power to carry out any function that they are not expressly prohibited from carrying out by the law or not conferred on the liquidator such as the power to litigate any wrongs done to the company and the power to oppose the confirmation of a liquidator. This is significant because the court clearly brought out that the directors still have the window to carry out duties in terms of the law and in specific circumstances.

Overall, the Supreme Court's approach in outlining the laid down procedure that must be followed and the role of the court, the way an interested party can register their interest and oppose the liquidation and the residual powers of directors, the Supreme Court's judgment gives clarity on liquidation proceedings in Zambia as a whole.