KENNETH RAYDON SHARPE
versus
TETRAD INVESTMENT BANK LIMITED
(under provisional judicial management)
and
TETRAD HOLDINGS LIMITED
and
EUGENE MLAMBO

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 28 July 2017 and 28 August 2017

Opposed Matter

Adv F *Girach,* for the plaintiff
Adv *T Magwaliba,* for the 1st defendant

CHIWESHE JP: The applicant issued summons claiming against the defendants, jointly and severally, the one paying the others to be absolved, payment of the sum of $1 702 451.00, arising from moneys lent and advanced to the first defendant for which second and third defendants stood as sureties.

The plaintiff's averments, as per declaration, are to the following effect. By way of written agreement dated 22 October 2013, plaintiff loaned and advanced to first defendant the above sum. The terms and conditions of the loan agreement were that the loan would attract interest at the rate of 18% per annum, that the amount loaned would be repaid within 14 days from the date of disbursement and failing payment by due date, interest would be compounded every 14 days and the entire amount outstanding would be repaid as one lump sum.

The loan amount was disbursed on 22 October 2013 and was repayable with interest on 5 November 2013. The first defendant had not made repayment at all as at due date and remains so indebted, plus further interest at the rate of 18% per annum, compounded every fourteen days with effect from 29 August 2016. Second defendant signed a guarantee in

favour of the first defendant on 22 November 2013. The third defendant did so in December 2013.

The first defendant entered appearance to defend on 26 September 2016 and filed a special plea on the basis that the plaintiff lacks *locus standi* to institute the present action without leave of the court for the reason that the first defendant was placed under judicial management on 29 January 2015, and, in terms of that court order, the plaintiff could not sue first defendant without first obtaining leave of court. No such leave was obtained prior to the institution of this action. For that reason, argues the first defendant, the plaintiff's claim must be dismissed with costs on the legal practitioner and client scale.

The court order placing the first defendant under provisional judicial management is filed of record. It was given under case number HC 219/15 on 29 January 2016, at Bulawayo, under the hand of my brother MAKONESE J. The first defendant relies on the provisions of paragraph 1 (f) thereof, which reads:

> "(f) All actions and applications and the execution of all writs, summons and processes against the applicant shall be stayed and not proceeded with without leave of this Court."

The provisional judicial management order was granted in terms of s 301 of the Companies Act [*Chapter 24:03*] which provides:

> **"301 Contents of provisional judicial management order**
> (1) A provisional judicial management order shall contain—
>
> (*a*) the date of the return day, which shall not be less than sixty days from the date of the grant of the provisional judicial management order; and
>
> (*b*) directions that the company named therein shall be under the management, subject to the supervision of the court, of a provisional judicial manager appointed in terms of section *three hundred and two*, and that any other person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and
>
> (*c*) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary; and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court.

(2) The court or a judge may at any time and in any manner, on the application of a creditor, a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management order concerned, vary the terms of a provisional judicial management order, including the date of the return day, or discharge it." (my underlining)

I agree with the plaintiff that neither the wording of s 301 (c) of the Companies Act nor that of para 1 (f) of the provisional judicial management order granted in favour of the first defendant apply to any litigation commenced after the company has been placed under provisional judicial management. The express words of the order are that "all actions and applications and execution of all writs, summons and other processes against the applicant shall be stayed and not proceeded with without leave of this Court." The wording of the order and indeed of s 301 (c) itself indicates that only existing actions and processes may be stayed. There is no reference to any future litigation as is the case under s 213 of the Act which provides"

"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."

In *ZFC Limited* v *KM Financial Solutions (Pvt) Ltd and Anor* HH 47-15, HC 5984/14 my brother ZHOU J made similar observations. At p 3 of the cyclostyled judgment the learned judge observed as follows:

"The second aspect is that the use of the words "be stayed and be not proceeded with" in s 301(1) means to me that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provisional order is granted. In the *Longman Dictionary of Contemporary English* the word "stay" is explained as follows: "to stop from going on, moving or having effect; hold back.

Put in other words, it is only an action, proceeding, writ etc which is already in existence which can be stayed. If it is not yet in existence then there would be nothing to stay. If the legislature had intended that once an order of provisional judicial management had been granted the instituting of proceedings against the affected company should be prohibited then it would have expressed the provision in the appropriate language. The language used in ss 209 and 213 of the Companies Act which relate to the winding up of a company illustrates the distinction between "staying" of proceedings and prohibition of commencement of proceedings against a company. In s 213 (a) the words used are: "no action or, proceeding shall be proceeded with or commenced against the company except by leave of court…."

I am in entire agreement with these sentiments. The learned judge also makes the pertinent observation that the staying of actions and other processes including execution of writs and summons "is not an automatic or inevitable consequence of an order of judicial management. Rather, it is relief which the court may in its discretion grant". The use of the word "may" in section 301 (1) (c) confirms this position. See also *Bindura University of Science Education* v *Tetrad Investment Bank Limited (Under Provisional Judicial Management) & Anor* HH 319-17.

The words employed in the construction of s 301 (1) of the Companies Act are clear and unequivocal. The order placing the first respondent under provisional judicial management is equally clear. More specifically the order captures verbatim the provisions of the enabling section under para 1(f) thereof. The golden rule is to give the words employed their ordinary and literal grammatical meaning. In *Coopers and Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767 D-F, it was stated thus:

> "According to the golden rule of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or inconsistency with the rest of the instrument," See also *Madoda* v *Tanganda Tea Company (Ltd)* 1999 (1) ZLR 374 (S), and *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S).

The defendants have argued that a literal interpretation of the words used in the enabling section would result in some absurdity, firstly because it would remove the protection afforded to entities under judicial management, and, secondly, because litigants are likely to evade any limitation by withdrawal of cases instituted before the provisional order was granted and then resurrecting them as new cases to be filed after the grant of the provisional order. It appears to me that an entity under judicial management does not enjoy the blanket protection afforded to a company that is being wound up. A company under judicial management enjoys limited protection granted at the discretion of the court. That is clear from the wording of section 301 (1) (f). As for the mischief that litigants may engage in, I opine as follows. Firstly, such mischief would be a clear abuse of court process. Secondly, no one would get away with it. Once an action or proceedings has been stayed, it cannot be subsequently brought up as fresh process when the parties and the cause of action remain the same. Objections will be raised and upheld. A party so engaged risks being censured in the strongest possible terms. The defendant's fears in that regard are without foundation.

The first defendant has enjoined the court to depart from the golden rule of interpretation in favour of a purposive interpretation which would literally amend section 301 to bring it on par with s 213, by including the words "commenced" or interpreting same as if that word had been included in its provisions. I disagree, for to do so would be to usurp the powers of the Legislature where its intention has been positively, clearly and properly pronounced.

It appears to me that the Legislature intended the consequences of an order of judicial management to be different from the consequences of a winding up order, certainly in so far as protection from litigation is concerned. If it had been intended otherwise, the provisions of section 301 would have been couched in identical or similar language as the provisions of section 213 and vice versa.

My attention has been drawn to the case of *Argee and Sons (Pvt) Ltd* v *Lever Brothers (Pvt) Ltd* 1981 ZLR 537 in which SMITH J held that the provision under consideration, despite its wording, refers to future as well as pending proceedings. In arriving at that decision SMITH J was persuaded by the decision in three South African cases, namely: *Samuel Osborne SA (Ltd)* v *United Stone Crushing Company (Pvt) Ltd* (Under Judicial Management) 1938 W.L.D. 229, *Ross v Northern Machinery and Irrigation (Pty) Ltd* 1940 TPD 119 and *Western Bank v Laurie Fossat (Pvt) Ltd* (Under Judicial Management) 1974 (4) SA 607 E. With respect, for the reasons given above, I disagree.

In the result the special plea must be dismissed with costs. It is so ordered.

Costa & Madzonga, plaintiff's legal practitioners
*Mawere Sibanda,*1st defendant's legal practitioners