Selected Judgment No.10 of 2017

IN THE SUPREME COURT OF ZAMBIA **SCZ/8/159/2016**

HOLDEN AT NDOLA **Appeal No. 176/2016**

(Civil Jurisdiction)

BETWEEN:

FINSBURY INVESTMENTS LIMITED	**APPELLANT**
AND	
ITAL TERRAZO LIMITED *(In Receivership)*	**FIRST RESPONDENT**
ANTONIO VENTRIGLIA	**SECOND RESPONDENT**
MANUELA VENTRIGLIA	**THIRD RESPONDENT**

Coram : Wood, Malila and Mutuna JJS

On 7th March 2017 and on 10th March 2017

For the Appellant	:	**Mr. J. Sangwa SC of Messrs Simeza Sangwa and Associates and Mr. D. Chakoleka of Messrs Mulenga Mundashi Kasonde Legal Practitioners**
For the Respondents	:	**Mr. S. Mambwe of Messrs Mambwe Siwila Lisimba Advocates and Mr. C. Sianondo of Messrs Malambo and Company**

J U D G M E N T

Mutuna JS, delivered the judgment of the court.

Cases referred to:

1) *Re-Garage Door Associates Ltd (1984) 1ALL ER 434*

2) *RJN2 Limited (1977) 3 ALL ER 1104*
3) *Asic v Active Sugar Pay Limited (No.2) (2013) FCA 234*
4) *Re New Cap re-insurance Corporation Holdings Ltd (1999) 32 ACSR 234*
5) *Gianpietro Milanese and others v Paolo Marandola and others appeal No.133 of 2011*
6) *The Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors (2011) EWCA civ 116*
7) *Olive v Litchfield Trading Co. PTY Limited and another (2015) NTSC*
8) *Re Highfield Commodities (1984) 3 ALL ER 201*

Other works referred to:

1) *Companies Act, Cap 388*
2) *Moson, Ryan and French on Company Law, 17th edn., Blackstone Press Limited*
3) *Palmers Company Law, 24th edn, vol 1*
4) *Companies (Winding up) Rules, 2004, Statutory Instrument No.86 of 2004*
5) *Black's Law Dictionary by Bryan A. Garner, Thomson West, USA, eighth edition*
6) *Mc Pherson's Law of Company Liquidation, by Andrew R. Keay, 2001, Sweet and Maxwell, London*

This appeal is a reaction to a ruling delivered by the Learned High Court Judge dismissing the Appellant's application for the appointment of a provisional liquidator, pending the determination of a petition to wind up Zambezi Portland Cement Limited (the company). It represents one of many fiery disputes the parties have before this and

other courts regarding the shareholding, management and control of the company.

The basis upon which the Learned High Court Judge dismissed the application is that the Appellant had not established that it had standing because there is a dispute raging in respect of ownership of the shares in the company. In arriving at this finding, she took judicial notice of the action before Chashi J (as he then was) under cause number 2008/HPC/0366, in which the Appellant's claim to 58.33% shares in the company is disputed and directed that once that dispute is determined and it is found that the Appellant is a shareholder in the company, it will then have the necessary standing to apply: to wind up the company; and, for the appointment of a provisional liquidator. The Learned High Court Judge placed reliance on the cases of ***Re-Garage Door Associates Ltd***[1] and ***RJN2 Limited***[2]**.**

The background to the appeal is that on 22nd May, 2015, the Appellant filed a petition to wind up the company pursuant to section 272 of the ***Companies Act*** which was supported by an affidavit verifying facts. Prior to the

commencement of the action, the Appellant and First Respondent entered into an agreement which culminated into the establishment of the company. The company then borrowed certain amounts of money from the PTA Bank for the establishment of a cement processing plant. These moneys were guaranteed by the Appellant and First Respondent.

Subsequently, a dispute arose which prompted the Appellant to file the petition and application for appointment of the provisional liquidator.

After the petition was filed, the Appellant applied *ex parte* for the appointment of a provisional liquidator pursuant to section 280 of the ***Companies Act***, as read with Rule 8 of the ***Companies (Winding-up) Rules, 2004***. This application was filed on 19th February 2016 along with an affidavit in support sworn by one Rajan Mahtani and skeleton arguments. The application was anchored on the ground that it is essential that the company's business and undertaking be maintained and protected from jeopardy, pending the hearing of the petition, so that its

valuable goodwill and assets are preserved and the possible sale of the undertaking as a whole is not prejudiced.

The Respondents opposed the application by way of an affidavit in opposition sworn by the Second Respondent and skeleton arguments. In doing so, it denied the contentions by the Appellant and refuted the claim that the Appellant is a shareholder in the company.

The Appellant contended in the evidence presented in the court below that the Second and Third Respondents were mismanaging the affairs of the company by dissipating its assets, as such, there is a threat that it would be a shell by the time the petition for winding-up is heard and determined. On the other hand the Respondents denied the allegations by the Appellant and questioned the legitimacy of the petition for winding-up.

When the *ex parte* application for the appointment of the provisional liquidated was presented to the Learned High Court Judge, she made it an *inter partes* application and gave a return day for hearing. On the return day, the Appellant relied on the affidavit evidence and heads of

argument. In doing so, it argued that the appointment of a provisional liquidator is governed by section 280 of the ***Companies Act*** and Rule 8(1) of the ***Companies (Winding-up) Rules, 2004***. The former states as follows:

> *"(1) The court may appoint the official receiver or any other person to be liquidator provisionally at any time after the presentation of a winding-up petition and before the making of a winding up order.*
>
> *(2) The Provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed, or as the court specifies in the order".*

While the latter states as follows:

> *"Where a petition for the winding-up of a company has been presented to a court, a creditor, petitioner contributory or a company may make an application ex parte supported by an affidavit stating sufficient grounds for the appointment of a Provisional Liquidator".*

The Appellant explained the foregoing provisions to mean that the primary criteria for the court to consider in determining whether to appoint a provisional liquidator is the existence of sufficient grounds to warrant such appointment. It made reference to the holding in the case of ***ASIC v Active Super Pay Limited (No.2)***[3] quoting from the case of ***Re New Cap Reinsurance Corporation Holdings Limited***[4] as follows:

> *"As was said in Re Mc Lennan Holdings Pty Ltd and affirmed by the court of appeal in Constatimidis, the power to appoint a Provisional Liquidator is by no means limited, the grounds on which a Provisional Liquidator may be appointed are infinite, and all that really has to be shown is that there is a bona fide application constituting sufficient ground for the making of the order".*

The Appellant went on to quote from the texts, ***Mayson, French and Ryan on Company Law*** and ***Palmers Company Law***. These texts set out the purpose for appointing a provisional liquidator as being to take charge of the company's affairs, maintain the status quo

and prevent one of the parties having an undue advantage over the other, pending the court's decision on the petition. In addition to highlighting the foregoing principle, the Appellant argued that the court must also consider the following: whether there is a valid and duly authorized winding up application; the degree of urgency and the balance of convenience; whether public interest dictates that a provisional liquidator be appointed such as where there is need for an independent examination of the state of the accounts of the corporation by someone other than the directors; and whether the affairs of the company have been carried out casually and without due regard to legal requirements so as to leave the court with no confidence that the company's affairs would be properly conducted bearing in mind the interests of shareholders.

The Appellant argued that it has satisfied all the tests set out in the preceding paragraph because the facts surrounding the matter show that the winding-up petition is premised on a deadlock reached by the shareholders regarding the membership and management of the company; which deadlock has raged on in the courts

without resolution for seven years; and, that the company is at risk of being left a shell.

In response to the Appellant's arguments, the Respondents initially argued that the application was misconceived because the company sought to be wound up was not a party to the proceedings. They sought solace in our decision in the case of ***Gianpietro Milanese and others v Paolo Marandola and others***[5] where we held, *inter alia*, as follows:

> *"As we have already said, the application for appointment of a provisional liquidator was made within the application to wind up the company while the application for joinder was filed five months later on 23rd July 2013. Undoubtedly at the time the ex parte order appointing the provisional liquidator was granted on 26th February 2013, the company was not party to the proceedings ... Even when prompted by the court as to whether the application could ride on the proceedings when the company was not a party, Mr. Haimbe did not make or refer to the application for joinder".*

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It was the Respondents' position that as a consequence of the aforesaid finding we upheld the decision of the court below refusing to confirm the appointment of a provisional liquidator on the ground that the company sought to be wound up was not a party to the proceedings.

The Respondents then explained the effect of section 280 of the ***Companies Act*** that the use of the word *"may"* in the section connotes that the powers vested in the court to order the appointment of a provisional liquidator are discretionary. As such, the court must apply the usual principles relating to the exercise of discretionary powers including reasonable justification for such appointment. The Respondents drew the court's attention to rule 8(1) of the ***Companies (Winding-up) Rules*** and the case of ***ASIC v Solomon***[3] in which Tamberlin J held as follows, by way of setting out the principles that govern the appointment of a provisional liquidator:

> *"The court should consider the degree of urgency, the need established by the applicant, creditor and the balance of convenience. The power is a broad one and*

circumstances will vary greatly. Commercial affairs are infinitely complex and various and it is inappropriate to limit the power by restricting its exercise to fixed categories or classes of circumstances of fact".

Further, that the court must have regard to the test laid down by the Court of Appeal in England in the case of ***The Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Limited***[6]. This decision: reaffirms the seriousness of the appointment of a provisional liquidator in relation to the affairs of `the company which may be terminal; the need for the court to give the decision the most anxious consideration; and need for the court to consider whether there is a good *prima facie* case for the grant of a winding-up order. The Appellant also relied on the case of ***Olive v Litchfield Trading Co. Pty Limited and another***[7] which in effect restates the principles in the case of ***The Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Limited***[6].

The Respondents concluded that the Appellant has not satisfied the test for the grant of an order for appointment

of a provisional liquidator because the Petition is not properly presented and neither is it likely to succeed. Further, that the dispute between the Appellant and Respondents is not one that warrants the dissolution of the company; and that the allegation of depletion of assets by the Respondents was also untenable in view of the total asset value of the company.

The Learned High Court Judge considered the foregoing evidence and arguments and referred to the provisions of section 280 of the ***Companies Act*** and rule 8(1) of the ***Companies (Winding-up) Rules, 2004***. She then found that the issue for determination was whether the Appellant had shown sufficient grounds to warrant the grant of the order for appointment of provisional liquidator? In considering this issue, she made reference to the arguments by counsel and summarized the relevant principles and considerations for the grant of an order of appointment of a provisional liquidator. These she stated thus:

1) *Whether the Applicant has established a prima facie case for the winding-up of the company;*

2) *Whether the Applicant has established a prima facie case that he, she or it has the necessary standing to bring the application to wind-up; and*

3) *Whether the assets of the company will be dissipated in the interim period between the filing of the application to wind-up and the winding-up order being made.*

She went on to state that a court has wide and complete discretion in such matters and that the grounds upon which an appointment of a provisional liquidator may be made are infinite. Further, that since it is obvious that such an appointment is an intrusion into the affairs of a company, there must be good reason for granting the order of appointment and preserving the status quo pending the determination of the winding-up petition. The Learned High Court Judge made reference to the holding in the case of ***Re Highfiled Commodities***[8] which explains how the court's discretion in such matters should be exercised.

She considered the three tests she had identified by first determining whether the winding-up petition was misconceived in view of the fact that the company is not a party to the action. This, she did by considering our

decision in the case of ***Gianpietro Milanese*** and found that the decision refusing to grant the order of appointment of a provisional liquidator in that case was based on the fact that the application was made by way of summons supported by an affidavit in an existing matter commenced by writ in which the company was not a party. On that basis, she found that the facts in this case and in the ***Gianpietro Milanese*** case are distinguishable and the decision does not, therefore, aid the Respondents' case. She went on to find that, in any event, in this case the company is mentioned in the heading of the originating process and as such the petition is not misconceived.

The Learned High Court Judge then considered the issue whether sufficient grounds had been advanced, that is, had the Appellant made out a good *prima facie* case for winding-up. She began by reminding herself that at that stage she was not called upon to determine the merits or demerits of the main matter but rather to make a cursory perusal of the process; and assessing whether a good *prima facie* case had been revealed in the petition, that is to say, a consideration of the chances of success by the Appellant

and whether it has the necessary standing. She considered this ground initially based on the argument by the Respondents that the petition was likely to fail because there is an application pending before another court for the dismissal of the petition. This argument was quickly dismissed and she proceeded to consider the evidence in the petition which she found revealed that: there is a dispute by the parties in relation to the shareholding in the company, which dispute is pending before another court; and that there is an impasse in the manner in which the affairs of the company are being run, that is to say, the shareholders are unable to work together. She then noted that the Respondents had not filed an answer to the petition and went on to find that the acrimony between the shareholders had a long history as was evident from the matter before Chashi J (as he then was) under cause number 2008/HPC/0366. In doing so, she concluded that the Appellant had established a *prima facie* case that the winding-up petition is likely to succeed.

The Learned High Court Judge then opined that notwithstanding her finding of a *prima facie* case, she still

required to consider whether the Appellant had established that it has the necessary standing to bring the application for winding-up of the company. In considering this issue she began by stating that a contributory may apply to court for a winding-up order. She took judicial notice of the dispute between the Appellant and Respondents in respect of the shareholding in the company under cause number 2008/HPC/0366. She then found that where a contributory has filed a petition and there is a dispute in terms of his ownership of shares in the company, such contributory does not have the necessary standing to present the petition and any other attendant application. In making the said finding, the Learned High Court Judge relied on the cases of ***RJN2 Limited*** and ***Re Garage Door Associates.*** She concluded that there is need for the parties to initially have their dispute under cause number 2008/HPC/0366 determined. According to her, if it is found that the Appellant is a shareholder in the company, then it will have the necessary standing to apply to wind up the company. She ended by reiterating that her findings did not mean that the application lacked merit nor that the

Appellant is not a shareholder. She accordingly dismissed the application.

The Appellant is riled and agitated by the decision of the Learned High Court Judge, prompting it to return to this court, once again, for redemption by way of this appeal launched on one ground that the court below misdirected itself on facts and a point of law by: holding that the appellant had no standing to apply for the appointment of a provisional liquidator for the company; and by refusing to appoint a provisional liquidator for the company.

Prior to the hearing of the appeal the parties filed heads of argument which they relied upon. They supplemented those heads of argument with *viva voce* argument.

The arguments advanced by Mr. J. Sangwa SC were twofold that: the Appellant had provided sufficient material and evidence before the court below for it to find that the Appellant is a shareholder in the company and, as such, has sufficient standing to commence the petition for the winding-up of the company; and, that the Appellant had

satisfied the test warranting the appointment of the provisional liquidator.

In articulating the first aspect of his arguments, Mr. J. Sangwa SC contended that the Learned High Court Judge misdirected herself by relying on the English cases of ***RJN2 Limited*** and ***Re Garage Door Associates*** because the issue before her was different from the issue in the two English cases. The case before her, it was argued, concerned the appointment of a provisional liquidator in accordance with section 280 of the ***Companies Act*** whilst the issue in the two English cases was the lawfulness of the petition to wind-up the company presented by contributories pursuant to section 221 of the ***Companies Act, 1948 (English Act).*** Further, the final results in the two cases are completely different and do not support the conclusion reached by the court below.

The Appellant explained that a petition for winding-up under the ***English Act*** is brought to court by way of section 221(1) whilst in Zambia it is by way of section 271 of the ***Companies Act***. That there is no provision under the ***Companies Act*** similar to section 221 of the ***English Act***

(iv) up, or have devolved on him through the death of a former holder; and

(b) *A winding up petition shall not, if the ground of the petition is default in delivering the statutory report to the registrar or in holding the statutory meeting be presented by any person except a shareholder, not before the expiration of fourteen days after the last day on which the meeting ought to have been held".*

On the other hand, section 271 of the ***Companies Act*** states as follows;

"271 subject to this section, a company may be wound-up by the court on the petition of -

(a) The company

(b) Any creditor, or prospective creditor, of the company;

(c) A member;

(d) Any person who is a personal representative of a deceased member;

(e) The trustee in bankruptcy of a bankrupt member;

(f) Any liquidator of the company appointed in a voluntary liquidation; or

(g) The Registrar

2) In the case of a public company or a private company limited by shares, a member shall not be entitled to present a winding-up petition unless his shares, or some of them-

(a) Were originally allotted to him

(b) Have been held by him, and registered in his name for at least six months; or

(c) Have devolved on him by operation of law

3) The court shall not hear a winding-up petition presented by a contingent or prospective creditor until-

a) Such security for costs has been given as the court thinks reasonable; and

b) A prima facie case for winding-up has been established to the satisfaction of the court

4) Where a company is being wound-up voluntarily, the court shall not make a winding-up order unless it is satisfied that the voluntary winding-up cannot be

5) continued with due respect to the interests of the creditors or members".

The view taken by Mr. J. Sangwa SC was that section 271 of the ***Companies Act*** is not the same as section 221 of the ***English Act*** and the former ***Act*** has no provision relating to contributories and neither is the word contributory defined. Further, the applications made in the two English cases that the Learned High Court Judge relied upon were applications made by contributories who under section 212 of the ***English Act*** are liable, in the event of a company being wound-up, to contribute to the assets of the company. It is for this reason, it was argued, that contributories have a right to petition for winding-up of a company under the ***English Act***, whilst under section 271 of the ***Companies Act*** the list of persons eligible to petition for the winding-up of a company does not include contributories.

Counsel proceeded to address us on the finding by the Learned High Court Judge that there is a dispute raging between the parties under cause number 2008/HPC/366 as to whether the Appellant is a shareholder in the

company. It was contended that the fact, in and of itself, that the Appellant is registered as a member of the company at PACRA and holds share certificates is sufficient to prove its membership to the company. Further, that this is in line with the provisions of section 55 of the ***Companies Act*** which sets out the effect of a register of members.

In concluding arguments, the Appellant urged us to allow the appeal.

The arguments advanced by Mr. C. Sianondo, counsel for the Respondent, can best be summarized as follows: the Learned High Court Judge was on firm ground when she refused to grant the order sought in view of the fact that the merits of the substantive matter of the winding-up petition are blemished by the action before Nkonde J which is a dispute in the shareholding; the issue of appointment of a provisional liquidator, as the authorities reveal, is a most serious matter in view of its consequences. The court's discretion must therefore, be exercised sparingly; that in our earlier decision under appeal No.141 of 2015, in which the parties are the same and emanating from a

ruling under cause number 2008/HPC/366 we confirmed an injunction by the lower court restraining the Appellant and others from holding out as shareholders in the company; that this justifies the finding of the court below that the appellant had no standing.

We were urged to dismiss the appeal.

In reply Mr. J. Sangwa SC urged us to reverse our decision in appeal number 141 of 2015 because it contravenes the provisions of section 55 of the ***Companies Act***. He also argued that, in any event, since the judgment was delivered after the Appellant had filed the petition for winding-up, it did not affect the Appellant's capacity as a shareholder to lodge the petition and continue with its prosecution.

We are indebted to counsel for the industry and thoroughness in the preparation and presentation of the arguments before us. These arguments have been taken into consideration along with the record and supplementary record of appeal in arriving at the decision in the latter part of this judgment

The one ground of appeal that falls for determination questions the holding by the Learned High Court Judge that the Appellant has no standing in relation to the application for appointment of a provisional liquidator and her refusal to order the appointment of the said provisional liquidator.

It is clear from the record of appeal that counsel for the parties articulated the principles relating to the appointment of a provisional liquidator very well both in this court and the court below. Reference was made to the provisions of section 280 of the ***Companies Act*** and Rule 8(1) of the ***Companies (Winding-up) Rules*** which set out the test to be considered by a court. This test, which was embraced by the Learned High Court Judge, is that the Applicant must show sufficient grounds or cause to warrant the appointment. Further, the English case law relied upon by counsel (which we are persuaded by) reveals that such sufficient grounds or cause are infinite and are purely in the discretion of the court which is in keeping with Rule 8(2) 1) of the ***Companies (Winding-up) Rules***. The grounds include an applicant demonstrating, *prima*

facie, that a case has been established for the winding-up of the company. In other words, the prospects of success of the winding-up petition are high. While, the exercise of the court's discretion must be with caution in view of the effect that the appointment of a provisional liquidator has on the conduct of the affairs of the company.

Having applied the test we have set out in the preceding paragraph, the Learned High Court Judge found that the Appellant had established a *prima facie* case for the winding-up of the company. She based her finding on the fact that there is a dispute raging in the company between the parties as shareholders, which has resulted in what she termed, *"a deadlock in the manner in which the affairs of the company are being managed"*.

The facts as presented both in support and opposition of the application for the appointment of a provisional liquidator, do indeed reveal that there is a dispute by the parties in the management of the affairs of the company. This, as the Respondents have argued, was also revealed to us in an earlier appeal number 141 of 2015. We cannot, therefore, fault the Learned High Court Judge for arriving

at that decision. The bone of contention however, lies in the fact that, she went ahead and applied a second test of determining whether the Appellant had established a *prima facie* case that it has the necessary standing to bring the application for winding-up. She referred to this test as the *"cardinal consideration"* which we understand to mean the *"fundamental"* or *"primary"* consideration. Her conclusion was that the Appellant had not satisfied the latter test because it had not proved to her satisfaction that it is a shareholder in the company. Once again she based her finding on the dispute between the parties with respect to the shareholding in the company and relied upon the cases of ***RJN2 Limited*** and ***Re-Garage Door Associates***. This has, of course, vexed the Appellant whose contention is that the circumstance in this case are different from the circumstances in those two cases and the court's equating the Appellant to a contributory was a misdirection. It has also been argued that there was sufficient evidence presented to the court to prove that the Appellant is a shareholder in the company.

We have had opportunity to revisit the two English cases of ***RJN2 Limited*** and ***Re Garage Door Associates*** in the light of the Learned High Court Judge's findings and forceful argument by Mr. J. Sangwa SC. In the case of ***RJN2 Limited*** the Petitioner was allocated shares by way of an allotment signed by a director of the company. At the time of the allotment she did not pay for the said shares and no share certificate was issued to her. When the company was incorporated it was agreed that the Petitioner would not be allotted any shares but was nontheless allotted shares erroneously. Subsequently, the Petitioner filed a petition to wind-up the company on the grounds that one of the shareholders was managing the company to the petitioner's detriment and that of the other shareholders. Prior to the hearing of the petition a preliminary issue was raised as to whether an allottee of shares who was not entered in the register of members has *locus standi* to present a petition. This is the question that fell for determination by the court and on whose holding the Learned High Court Judge based her decision.

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On the other hand, the case of ***Re Garage Door Associates Limited*** concerned an application for winding-up presented by a contributory for the determination, among other things, of a dispute concerning the ownership of shares in a company under the ***English Act***. The court held that the determination of a dispute concerning shares cannot of itself constitute sufficient ground to petition the winding-up of a company unless there is an alternative claim.

To the extent that the applications that were before the courts in the two cases demonstrated that the cases did not discuss the instances where an order for appointment of provisional liquidator may be made but rather determined *locus standi* of an allottee of shares in commencing a petition for winding-up and whether a dispute over shares in a company is sufficient ground upon which to present a petition, they were not relevant to the determination of the issue before the court below.

We are also in agreement with the argument advanced by counsel for the Appellant that the two English cases deal with presentation of petitions under ***English Act,*** and

English Companies Act 1980 which is different from section 271 of the ***Companies Act***. The distinction, as counsel argued, includes the fact that whereas under section 221 of the ***English Act,*** there is provision for a petition to be presented by a contributory, there is no such provision under section 271 of the ***Companies Act***. Counsel went as far as arguing that the word contributory has no place in our section 271 or indeed the ***Companies Act***.

Whilst it is true that section 271 of the ***Companies Act*** which sets out the category of persons and entities who can petition the winding-up of the company does not mention a contributory, the ***Companies (Winding-up) Rules*** under Rule 8(1) do refer to the word *"contributory"* and indeed lists a contributory as one of the persons eligible to petition for the dissolution of a company. Further, there is reference to the word *"contribution"* in sections 262, 265(2), 266(1) and (2) and 268(1) in the ***Companies Act*** which introduces the concept of a contributory in the ***Companies Act.*** To give but one

example, section 262 of the ***Companies Act*** states as follows:

> *"For the purposes of this part, a reference to a member of a company includes, unless the context otherwise requires, a reference to a person claiming or alleged to be liable to contribute to the assets of the company in winding-up, for purposes of any proceedings for determining, and of all proceedings prior to the final determination of, the persons who are so liable (including the presentation of a winding-up petition)".*

(The underlining is ours for emphasis only).

The foregoing provision and other provisions that make reference to the word contribute, clearly indicate that the concept of a contributory is not alien to the ***Companies Act***. We, therefore, do not accept the argument by counsel for the Appellant that the word contributory has no place in the ***Companies Act*** and the Learned High Court Judge did not, to this extent, misdirect herself when she relied on authorities which referred to contributories. It is also our position that she did not misdirect herself when she

referred to the Appellant as a contributory in view of the definition ascribed to the word by the learned author Andrew R. Keay in the text ***Mc Pherson's Law of Company Liquidation***. Andrew R. Keay states at pages 515 to 516 as follows:

> *"Considered in isolation, the definition in section 79 of a contributory as every person liable to contribute to the assets of a company in the event of its being wound up" is somewhat misleading: for it seems to suggest that persons are contributories if - and only if - they are, on winding up, actually bound to make payments into the funds of the company.*
>
> *But if this were the true criterion it would mean that a debtor to the company was, while a fully paid up shareholder was not, a contributory. Infact, the position is precisely the reverse: a holder of fully paid up shares is regarded as a contributory, and this was settled by law at an early date. Nor has there ever been any doubt about the position of a mere debtor of the company:*

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"He is bound to pay money, which moneys when paid, will be part of the assets of the company, and in that sense he is liable to contribute to the assets, but that does not make him a contributory within the meaning of the Act".

In short, the law recognizes a definite distinction between, on the one hand, the status of contributory, and on the other, liability to contribute to the assets. The former is virtually synonymous with membership of the company and may, it seems, exist prior to winding-up: whereas the latter, though incidental to that status, is a liability which becomes enforceable, if at all only when the winding-up commences".

Having clarified the position on what constitutes a contributory, we now return to the issue at hand. The Learned High Court Judge, as we have said, properly identified the issues for consideration in determining whether or not to appoint a provisional liquidator. Her findings in this regard have been accepted by the Appellant because they are not the subject of this appeal. What lies at the heart of the appeal is the Learned High Court

Judges' finding that the Appellant has no standing in view of the dispute in the matter before Chashi J, under cause number 2008/HPC/366 in which the Appellant's alleged shareholding in the company has been contested and her refusal to appoint the provisional liquidator.

We have carefully considered the Learned High Court Judges' decision and understand it to be a cautionary measure on her part that it is not safe at this point to grant the order for appointment of a provisional liquidator in view of the challenge raised against the Appellant's status as a shareholder. This was the correct decision to make in view of the evidence presented before her and the judicial notice she took of the dispute under cause number 2008/HPC/366 because the fate of the substantive matter before her, being the petition for winding-up, is heavily dependent upon the outcome of the matter under cause number 2008/HPC/366. That is to say, if under that cause, it is found that the Appellant is not a shareholder, the petition as a whole will collapse on account of want of *locus standi* by the Appellant.

The sound decision by the Learned High Court Judge, which was pursuant to the discretionary powers vested in her, is enhanced by the fact that it eliminates the real possibility of conflicting decisions from her court and that of Chashi J; and the peril that would have befallen the company, if she allowed the application and later Chashi J, found that the Appellant is not a shareholder. These are primary concerns that this and other court's guard against. Her decision is enhanced by the fact that this court in appeal number 141 of 2015, confirmed the order of injunction granted against the Appellant and others from, among other things, purporting to act as shareholders in the company. The wording of the order ends by restraining the Appellant and others from *"... taking any course of action of any nature whatsoever as shareholder of ZPC until final determination of the matter ..."*. This decision, in our considered view, essentially puts an end to the Appellant and others' asserting their rights as shareholders in the company until disposal of the matter in the court below. These rights include the Appellant's right to bring a petition

for winding-up of the company in its capacity as a shareholder.

In arriving at the decision we have made in the preceding paragraph we have considered Mr. J. Sangwa SC's request that we revisit our decision under appeal number 141 of 2015 on the grounds that it contravenes the provisions of section 55 of the ***Companies Act***. We find the request unacceptable because if it is acted upon it would undermine judicial precedent upon which the very foundation of our adjudicative functions are based. It also begs the question: how many times would this court revisit its decisions if it entertained such applications based primarily on the fact that the precedent sought to be overturned is not in keeping with arguments advanced by counsel on behalf of his client? Whilst we have in the past revisited our decisions and will, no doubt do so in future, this is not an appropriate case for us to revisit that particular decision.

We are also of the firm view that there was wisdom in the Learned High Court Judge staying clear of determining the issue of shareholding in the company because the issue

is before another court. For this reason we have also not determined the issue despite counsel urging us to do so by way of the arguments presented. There was, therefore, no misdirection on the part of the Learned High Court Judge.

In view of the findings we have made in the preceding paragraphs, the appeal fails and we dismiss it with costs, to be taxed in default of agreement. In doing so, we uphold the ruling of the Learned High Court Judge in its entirety.

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A.M.WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE