IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 07/2021
SCZ/08/09/2021

B E T W E E N :

FRED M'MEMBE	**1ST APPELLANT**
POST NEWSPAPERS LIMITED (in liquidation)	**2ND APPELLANT**
AND	
ABEL MBOOZI	**1ST RESPONDENT**
ROY HABAALU	**2ND RESPONDENT**
ANDREW CHIWENDA	**3RD RESPONDENT**
MWENDALUBI MWEENE	**4TH RESPONDENT**
BONAVENTURE BWALYA	**5TH RESPONDENT**
ZAMBIA REVENUE AUTHORITY	**6TH RESPONDENT**

Coram: **Malila CJ, Wood and Chinyama JJS, on 10th August, 2021 and 17th February 2022.**

For the 1st Appellant: Mr. Nchima Nchito SC, Mr. C. Hamwela and Ms. N. Chibuye of Messrs Nchito & Nchito

For the 2nd Appellant: No Appearance

For the Respondents: No Appearance

J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *Zambia Seed Company Limited v. Charterfield International (Pvt) Limited (SCZ No. 20 of 1999)*
2. *Avalon Motors Limited (in receivership) v. Bernard Leigh Gadsden and Motor City Limited (1998) SCJ 26*
3. *Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo Limited, Finance Bank (Z) Limited) and Ital Terrazo Limited (2018) ZR 97*
4. *Magnum (Zambia) Limited v. Quadri (Receiver/Manager) and Another (1981) ZR 141*
5. *Ash border BV v. Green Gas Power Limited (2005) EWHC 1031*
6. *Lusaka West Development Company BS K. Chiti (Receiver) Zambia State Insurance Company v. Turnkey Properties Limited (1990-92) ZR1*
7. *Huddesfield Banking Company Limited v. Henry Lister & Sons Limited (1895)*
8. *Arunachellam Chetty v. Sabapathy Chetty (1918) 1lr 41 Mad 213*
9. *Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172*
10. *HMRC v. Rochdale Drinks Distributors Limited (2012) 1 BCLC 748*
11. *HMRV v. Winning Networks Limited (2014) EWHC 1259 (Ch)*
12. *Re Union Accident Insurance (1972), ALLER 1105*
13. *Ex-Parte G. Pagan Enterprises (1983)3 ALLSA 400(n)*
14. *ABSA Bank v Rhebokskloof (Pty) Ltd (1993) 4SA 436(c)*
15. *John Sangwa v. Sunday Nkonde SC (Appeal No. 2 of 2021)*
16. *Houareau & Another v. Karunakaran & Others (Constitutional Appeal) SCA C P03/2017 [2017] SCCA 33*
17. *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v. Daisy Dear Investments (Pty) & Others (2009) 4 All SA 410*

Legislation and Other works referred to:

1. *The Companies (Winding up Rules) 2004, S.I. No. 86 of 2004*
2. *Companies Act, Chapter 388 of the Laws of Zambia*
3. *Corporate Insolvency Act, No. 9 of 2017*

1.0. INTRODUCTION AND SUMMARY OF THE DISPUTE

1.1. This appeal concerns the liquidation of the Post Newspapers Limited, a private company which, for several decades

published a newspaper, *The Post*, with a wide circulation in Zambia.

1.2. At the behest of the respondents, who alleged that they were creditors, a petition for the winding up of The Post Newspaper Limited was filed in the High Court. The liquidation was subsequently undertaken by a Mr. Lewis Chisanga Mosho, a legal practitioner.

1.3. The appeal to this court was inspired by the events sequel to the liquidation or otherwise closely linked to it. The appeal itself implicates both procedural and substantive justice. It is, to a remarkable and creditable extent, a complaint about the face of justice in the curial treatment of an insolvent company; treatment allegedly sullied by unfairness in the overall conduct of the dealing court and the liquidator.

1.4. More solemnly, the appeal raises deeply concerning questions regarding the rights of shareholders and directors in the context of liquidating a company on account of insolvency where the shareholders and directors believe that the liquidation itself is unjustified and the process of liquidation

is fraught with blatant disregard of the law or due process considerations.

1.5. The chief grievance of the appellants, as we are able to distill it from the documents in the record of appeal, is that between the High Court judge who handled the liquidation proceedings and the appointed liquidator, three factors which had preclusive effect were effectively used to gag the appellants, who claim to have had a proper interest in the liquidation, from being heard. The three elements were: (i) resort to *ex-parte* proceedings; (ii) inability or otherwise willful failure by the dealing judge to hear the appellant's protestations over the appointment of the liquidator in particular and the liquidation itself generally; and (iii) the use of an exclusionary consent judgment seemingly contrived by the provisional liquidator to ward off resistance to the liquidation.

1.6. The record reveals that upon the appointment of Mr. Mosho as provisional liquidator on 1st November 2016, a return date for the *inter-partes* hearing of the application for appointment of the liquidator was given for the 9th November 2016. No hearing

was, however, had on that date. Meanwhile, through their lawyers, Messrs Nchito and Nchito, the appellants applied to set aside the order appointing Mr. Mosho as provisional liquidator and to stay execution of the order of appointment. Return dates for the hearing of these applications were given but, for very unclear reasons, the applications were never heard by the learned High Court judge.

1.7. In the whole time from the filing of the winding up petition to the liquidation of the second appellant company, the appellants were never afforded an opportunity to put their concerns across despite their giving notice to the court within the provisions of the law.

1.8. It is this frustrating and somewhat bewildering experience that led the appellants to conclude, as we are able to discern from their grievance, that the judge that dealt with the liquidation behaved in an intemperate or unjudicial way by literally shutting the door to justice in their face.

2.0. BACKGROUND FACTS

2.1. The first to the fifth respondents filed a petition in the High Court in November, 2016 for the winding up of the second appellant company, The Post Newspaper Limited, their erstwhile employer. They alleged that the latter had failed to pay them salaries and emoluments in the aggregate sum of K815,000.

2.2. The sixth respondent, for its part, claimed that the company had failed to discharge its tax obligations. The matter, cause numbered 2016/HPC/0518, was allocated to Nkonde J, of the High Court.

2.3. By an *ex-parte* order issued by Nkonde J on 1st November 2016, Mr. Lewis Mosho was appointed as the provisional liquidator. A return date for the *inter-partes* hearing of the application for appointment of liquidator was set for the 9th November 2016.

2.4. Developments, deeply concerning to the appellants, then began to unfold. Mr. Mosho, as provisional liquidator, terminated the services of Messrs Nchito and Nchito as lawyers

for the Post Newspapers Limited. In their stead, he appointed Messrs Lewis Nathan Advocates, a firm in which he apparently has interest as a partner, and another firm, Messrs Palan & George, to represent the Post Newspapers (in liquidation).

2.5. The first and second appellants were, of course, not quiescent: they applied to set aside the removal of Messrs Nchito and Nchito from representing them. That application too was not heard by the judge.

2.6. Almost predictably, the respondents (who were petitioners in the High Court) and the second appellant, thenceforth represented by Messrs Lewis Nathan, entered a consent judgment in January 2018, in terms of which Mr. Mosho was confirmed as Liquidator of The Post Newspapers Limited (in liquidation).

2.7. With that confirmation as liquidators by consent, Mr. Mosho had the atypical comfort to discontinue the applications which had been filed on behalf of the appellants by Messrs Nchito and Nchito, seeking a stay of execution and to set aside the order of appointment of himself as provisional liquidator.

2.8. Undeterred by all these developments, the first appellant proceeded to file a notice in terms of Rule 10 of the Companies Winding Up Rules (2004) as an interested party (being a shareholder/director) in the company under liquidation, protesting the appointment of Mr. Mosho as liquidator. Not surprisingly, the dealing judge never head the first appellant.

2.9. Seemingly frustrated by all these developments and probably running out of options and patience, the appellants commenced a separate action (Cause No. 2018/HP/0064) seeking an order to set aside the consent judgment entered into between the respondents and the second appellant on the basis that the same was procured illegally and fraudulently. They also sought an order to stay the proceedings and all orders granted by Nkonde J in Cause No. 2016/HPC/0518.

2.10. In the freshly commenced action, the appellants grumbled that the consent judgment, declaring the second respondent insolvent and confirming Mr. Mosho as liquidator, was made without hearing the appellants; that the claims by the respondent (as creditors) in the winding up proceedings are

disputed by the appellants and that the dealing judge was rightly found wanting by the Judicial Complaints Authority in a complaint against him arising from what the appellants view as the judge's unacceptable conduct which undermined confidence in his ability to do justice in the winding up proceedings.

2.11. The new action was allocated to Newa J of the High Court. In her judgment of 25th June 2019, she held that the appellant's action was, in substance, intended to achieve a remedy against judge Nkonde who was not a party to the proceedings. She consequently held that the appellant's action was a wrong suit commenced to challenge a consent order and that she had no jurisdiction to deal with it. She thus dismissed the action.

3.0. APPELLANTS' APPEAL TO THE COURT OF APPEAL

3.1. The appellants appealed to the Court of Appeal on two grounds, namely that:

(1) The court erred in law and fact when it held that the appellant's action sought to litigate the alleged breaches of the liquidator when in fact the appellants were seeking to challenge the validity of the consent order confirming him; and

(2) **The court below erred in law and in fact when it held that the appellants commencing a new action was the wrong suit to challenge the consent order executed under Cause No. 2016/HPC/0518 contrary to the position in *Zambia Seed Company Limited v. Chartered International (Pvt) Limited*[1].**

3.2. In its judgment, now subject of the present appeal, the Court of Appeal framed the issue for determination as being whether a person or entity that was not a party to a consent judgment, can commence a fresh action to set the consent judgment aside.

3.3. The Court of Appeal held that although the first appellant had given notice of intention to be heard at the hearing of the petition in terms of rule 10 of the Companies Winding up Rules 2004, that intention did not make the party filing the notice a party to the proceedings. Such party ought, in addition to filing a notice, to apply to be joined to proceedings as an interested party.

3.4. Being a non-party to the proceedings, the first appellant could, according to the court, not commence a fresh action for the

purpose of setting aside the consent judgment entered into under Cause No. 2016/HPC/0518.

3.5. Put differently, the court reasoned that the only party that has *locus standi* to commence a new action for the purpose of challenging a consent judgment is one who executed the judgment or, generally a person who was a party to the action.

3.6. The appellants' appeal was thus dismissed by the Court of Appeal. The dismissal of that appeal so annoyed the appellants that they escalated their grievance to this court.

4.0. APPELLANTS' APPEAL TO THE SUPREME COURT

4.1. Having duly obtained leave to appeal from the Court of Appeal, the appellants launched the present appeal, fronting four grounds structured as follows:

1. **The court below erred in law and in fact when it held that the 1st appellant was not a party to the proceedings and commencing a new action was the wrong suit to challenge the consent order executed under Cause No. 2016/HPC/518 contrary to the position in *Zambia Seed Company Limited v. Chartered International (Pvt) Limited*[1] (SCZ No. 20 of 1999).**

2. **The court below erred in law and fact when it held that the 1st appellant was not joined to the proceedings when in fact, he was a shareholder and director in the 2nd appellant and still maintained residual power to be an interested party to the proceedings.**

3. **The court below erred in law and fact when it held that the mere filing of a Notice under Rule 10(1) Winding Up Rules 2004 does not automatically make a person a party to the proceedings.**

4. **The court below erred in law and fact when it only dealt with the 1st appellant's side of the appeal and failed to deal with the 2nd appellant's side of the appeal.**

4.2. We shall say more about these grounds of appeal later in this judgment.

5.0. THE HEARING OF THE APPEAL

5.1. At the hearing of the appeal, none of the respondents was represented. As indicated already, the appellants were represented by Mr. N. Nchito SC, Mr. C. Hamwela and Ms. N. Chibuye. We noted that Messrs Mosha & Company, who had been in the lower court reflected as advocates for the respondents had, a couple of days prior to the hearing, formally withdrawn from representing the respondents.

5.2. Having seen the affidavit of service filed by the appellants' advocates on the 9th of August, 2021, we were satisfied that the respondents had indeed been duly served with the notice of hearing. We were, in these circumstances, content to proceed to hear the appeal in the absence of the respondents or their legal representatives.

5.3. Regrettably there were no heads of argument filed by or on behalf of the respondents.

6.0. THE APPELLANTS' ARGUMENTS ON APPEAL

6.1. The appellants' learned counsel filed heads of argument in support of the grounds of appeal. Those arguments were prefaced by a rather long procedural history of this matter, aspects of which we have alluded to already or shall revert to later on in this judgment.

6.2. At the hearing of the appeal, Mr. Nchito SC intimated that the appellants placed reliance on the filed heads of argument with brief supplementation. The first three grounds were argued compositely while the last was argued distinctly.

6.3. In support of grounds one to three of the appeal, the learned counsel for the appellants contended that although the Court of Appeal was right to hold that the only way open to a party to set aside a consent judgement or order is by commencing a fresh action for that purpose as was held in **Zambia Seed Company Limited v. Chartered International (Pvt) Limited**[1], it erred when it held that the first appellant was not a party to the proceedings and the consent judgment could thus not be challenged in the manner the appellants sought to challenge it.

6.4. It was also submitted that the consent order of the 10th January, 2018 in Cause No. 2016/HPC/0518, instigated by Mr. Mosho as liquidator and entered into by the respondents and the second appellant, did in fact facilitate a *defacto ex-parte* liquidation of the second appellant without ever hearing or determining the actual winding up petition and any application challenging it.

6.5. More significantly, the appellants' counsel contended that the said consent order confirmed the provisional liquidator as the

liquidator without ever hearing the application *inter-partes* as required by Rule 8(3) and (4) of the Companies (Winding up Rules) 2004, S.I. No. 86 of 2004.

6.6. The learned counsel further submitted that shareholders and directors of a company in liquidation retain residual powers to defend the interests of the company in a winding up action. In support of the argument that the role of directors of companies in receivership and, by extension, in liquidation is clear, counsel quoted a passage from our judgment in **Avalon Motors Limited (in receivership) v. Bernard Leigh Gadsden and Motor City Limited**[2] in which we stated as follows:

> **Whenever a current receiver is the wrongdoer (as where he acts in breach of his fiduciary duty or with gross negligence) or where the directors wish to litigate the validity of the security under which the appointment has taken place or in any other case where the vital interests of the company are at risk from the receiver himself or from elsewhere but the receiver neglects or declines to act, the directors should be entitled to use the name of the company to litigate.**

6.7. Counsel also quoted a passage from another of our decisions in **Robert Mbonani Simeza (sued as Receiver/Manager of Ital Terrazo**

Limited, Finance Bank (Z) Limited) and Ital Terrazo Limited[3] where at page 105 to 106 we stated as follows:

> **In *Avalon Motors*, the question was, when can the directors and shareholders of the company under receivership be allowed to maintain an action in the name of the company? This court upheld the decision in *Magnum (Zambia) Limited v. Quadri (Receiver/Manager) and Another*[4]. It then held that directors and shareholders of a company under receivership as well as anybody who is properly interested who has beneficial interest to protect, can sue a wrongdoing receiver or former receiver, in their own names and in their own right... we do not accept the argument... that the directors should have first asked the Receiver to institute an action in the name of the company and only institute one themselves if he refuses to do so. The reason is simple: what this action challenges are the Deed of Appointment of the 1st defendant, as Receiver and the Mortgage Debenture Deed, under which he was appointed. It would not have been reasonable for the directors of the plaintiff, to ask the Receiver to institute an action in the name of the company to challenge his own appointment.**

6.8. From these authorities, counsel's conclusion was that directors maintain residual powers and can, in liquidation proceedings, sue in their own names as well as that of the company. The first appellant commenced the action in his own capacity and as a shareholder and director in the second appellant company on account of allegations of wrong doing in

the conduct of the liquidation of the second appellant through a consent order.

6.9. As regards the concept of residual power of directors to defend a company in winding up proceedings, the learned counsel quoted a passage from **Ashborder BV v. Green Gas Power Limited**[5] at p.62 as follows:

> **It is not a dispute that the directors of Green Gas and Cabot retain a residual power, notwithstanding the appointment of the provisional liquidators, to apply to dismiss or otherwise resist the petitions. An application to dismiss the petitions has, as I have said, been made on behalf of Green Gas and Cabot, and I am informed and understand that it is presently the intention of those companies to resist the petitions.**

6.10. The learned counsel quoted other passages from the judgment in the **Ashborder**[5] case to buttress his submission.

6.11. According to Mr. Nchito SC, the consent order entered into by the respondents was challenged for being illegal or fraudulent for the following reasons:

(i) The 1st to the 5th respondents had proposed and obtained an *ex-parte* appointment of a provisional liquidator who by law is disqualified.

(ii) **The order which appointed Mr. Mosho as provisional liquidator did not give him the right in any way to circumvent the rights of the appellants [then plaintiffs] to defend the winding up proceedings in their own behalf.**

(iii) **The *ex-parte* order of appointment has been used for purposes of illegality such as the removal of Messrs Nchito & Nchito and the appointment of the provisional liquidator's own law firm to defend the challenge of his own appointment.**

(iv) **Concluding the liquidation action *ex-parte* without ever hearing at least four (4) applications challenging the entire action and without the consent order being signed by the first appellant in his capacity as a party or the second appellant's lawyers of choice as opposed to those appointed by Mr. Mosho is to incestuously challenge his own appointment.**

6.12. To support his submission that a consent judgment can only be set aside by a fresh action brought out for that purpose, counsel cited and quoted from the case **Zambia Seed Company Limited v. Chartered International (Pvt) Limited**[1] and **Lusaka West Development Company BSK. Chiti (Receiver) Zambia State Insurance Company v. Turnkey Properties Limited**[6]. For the proposition that a consent agreement can be set aside on proper grounds upon which the validity of any contract could be impugned such as fraud or mistake, the case of **Huddesfield**

Banking Company Limited v. Henry Lister & Sons Limited[7] was cited by counsel.

6.13. It was also submitted that the first appellant had, in Cause No. 2016/HPC/0518, filed a notice under Rule 10 of the Winding Up Rules, 2004 which allows an interested party to be heard in a winding up petition, but was never in fact heard. Upon filing the notice, the first appellant had, according to counsel, joined the winding up proceedings and was thus to be considered as a party. As a party to those proceedings, commencing fresh proceedings to challenge the consent order was, according to counsel, the rightful thing to do.

6.14. The learned counsel for the appellants cited one more foreign case and quoted from its judgment. It was the Indian case of **Arunachellam Chetty v. Sabapathy Chetty**[8] which also speaks to the procedure in setting aside consent decrees and the remedies available to a plaintiff.

6.15. To conclude his submissions on the first three grounds, counsel posited that the court below should have considered the evidence on record that showed that the appellants had

the right to challenge the instrument appointing the liquidator and should have allowed the matter to proceed to trial.

6.16. Counsel thus prayed that we uphold grounds one, two and three of the appeal.

6.17. Under ground four, it was contended that the court below erred in law and in fact when it only dealt with the first appellant's side of the appeal and failed to deal with the second appellant's side of the appeal.

6.18. Counsel argued that a perusal of the judgment of the Court of Appeal shows that the position of the second appellant was not addressed. In particular, the issue of shareholders and directors having residual powers to challenge liquidation proceedings and the second appellant's right to oppose the winding up and to present its position, was never addressed. Counsel contended that such an approach was inherently repugnant to a balanced and complete consideration of issues in dispute. Our decision in **Wilson Masauso Zulu v. Avondale Housing Project**[9] was relied upon for that submission.

6.19. Counsel submitted that ground four had merit. He implored us to uphold the appeal.

7.0. THE RESPONDENTS POSITION

7.1. As we intimated earlier in this judgment, none of the respondents were represented at the hearing of the appeal, counsel who had been on record as representing them having withdrawn. We also regrettably noted that no heads of argument had been filed on behalf of the respondents.

7.2. In these circumstances, although we have not had the benefit of appreciating the respondents' perspective on the issues in the appeal, we are nonetheless obliged to consider the appellants' arguments on appeal on their merits. We need not stress the obvious point that the absence of the respondents or their arguments in opposition to the appeal does not *ipso facto* make the appeal meritorious.

8.0. OUR ANALYSIS AND DECISION

8.1. We have scrupulously considered the grounds of appeal and the heads of argument advanced by the learned counsel for the appellants. At first blush those grounds appear to raise a

point, not of law, but of fact related to the fact-based situation whether or not the first appellant was a party to the liquidation proceedings in the High Court in cause No HPC/0518. We say this appears to be a factual question because the answer to it seems, superficially at least, to lie in the physical identification of the parties to the relevant cause and not in the interpretation of the law.

8.2. On a proper view of the grounds, especially when considered alongside the submissions that support them as debated before us by the learned counsel for the appellants, it is reasonably clear that the issues of joinder and locus, both of which are points of law, assume a central position in the appeal.

8.3. The gravamen of the appellant's argument in the first place is that by virtue of having given notice under rule 10 of the Companies Winding Up Rules (2004), the first appellant became entitled to be heard in the winding up proceedings, and thus became a party to those winding up proceedings. In the second place, the point the appellants make is that the

first appellant, as director and shareholder, has residual power to litigate in opposition to the liquidation.

8.4. In our view, the critical issues in this appeal are: (i) whether a party who gives notice under rule 10 of the Companies Winding Up Rules to be heard in a winding up petition thereby becomes entitled to the same rights as an ordinary party to legal proceedings with the implied right to apply within and in relation to the proceedings, including the right to challenge any order of the court in those proceedings; (ii) whether a shareholder or director of a company could commence proceedings in his/her own names for alleged wrongs done to the company in liquidation.

8.5. Before turning to the issues for determination, which we have identified above, we believe that it is apposite to traverse the provisions of the law that were employed in the liquidation of the second appellant company. These are principally set out in the Companies Act, Chapter 388 of the Laws of Zambia, which has since been repealed and replaced by the Companies Act No. 10 of 2017. For good measure, we must state that the

corporate insolvency legal framework is now set out in a standalone law – the Corporate Insolvency Act, No. 9 of 2017. At the time of the relevant liquidation both these 2017 Acts had not come into force.

8.6. It must be borne in mind that the winding up of the second appellant company was instigated by the respondents who claimed to have been creditors of the second appellant company. This course accords with the provisions of section 271(1)(b) of the (then applicable now repealed) Companies Act, which provided that a company would be would up by the court on the petition of any creditor.

8.7. We must reiterate, however, that commencement of winding up proceedings against any company is a solemn undertaking as there are potentially dire consequences for the company concerned. The whole enterprise is likely to be fatal to the continued operation of the company as a going concern. It is for this reason that in the **HMRC v. Rockdale Drinks Distributors Limited**[10], Lord Justice Pinner acknowledged that the appointment of a liquidator is a very serious step for a court

to take as it is almost inevitable that as a result of such an appointment the underlying business of the company is bound to cease and the resultant damage is likely to be irremediable.

8.8. Our law as it stood at the time of the presentation of the petition for the winding up of the second appellant, set out very strict guidelines (as it still does now) for any winding up of a company. For the reasons we have captured in the forgoing paragraphs, those provisions require strict court supervision so as to avert resort to liquidation of companies in circumstances where winding up a company is otherwise imprudent.

8.9. Section 280 of the repealed Companies Act provided for the appointment by the court of a provisional liquidator after the presentation to it of a winding up petition and before the making of a winding up order. Under rule 9 of the Companies Winding Up Rules (2004), the appointment of a provisional liquidator may be made by the court on application made *ex-parte* supported by an affidavit stating sufficient grounds for appointment of the provisional liquidator.

8.10. Yet, the Companies Winding Up Rules (2004) also provide in rule 8(3) that where a provisional liquidator is appointed *ex-parte* by a court:

> **The court shall, not later than three days after the order granted *ex-parte*, appoint a return date for the *inter-parte* hearing.**

8.11. In our view, it is in recognition of the serious consequences that an appointment of a provisional liquidator brings forth that safeguards are inbuilt in the provisions of the law. Rule 8(4) directs that:

> **The court may, on the *inter-partes* hearing confirm, vary or discharge the order of appointment of a provisional liquidator granted *ex-parte* on such terms and conditions as the court may consider fit.**

8.12. And so it was, that the High Court, by order dated 1st November, 2016 – the very day the winding up petition was filed – appointed Mr. Lewis Mosho as provisional liquidator. A return date for the *inter-partes* hearing as per requirement of rule 8(3) of the Companies Winding Up Rules, was given for the 9th November, 2016.

8.13. For its part, section 276 of the Companies Act (repealed) provided that:

At any time after the presentation of a winding up petition and before a winding up order has been made, the company or the creditor or member may, where any action or proceeding against the company is pending, apply to the court to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

8.14. Within the intendment of the foregoing provision the appellants sought to stay proceedings as they sought to oppose the confirmation of Mr. Mosho as liquidator at the *inter-partes* hearing and thus on the 2nd November, 2016 filed an application to that effect. They also sought to oppose the petition altogether.

8.15. The reasons given for the appellants' opposition to the confirmation of Mr. Mosho as liquidator and to the liquidation itself were that:

(a) the predicate facts did not satisfy the precondition for petitioning to wind up as the requisite statutory demand was not made by the supposed creditors in terms of section 272(1)(c) and 272(3)(a) (i) and (ii) of the Companies Act;

(b) the action being essentially one between employer and employees should properly have been commenced in

the Industrial Relations Court as opposed to the High Court;

(c) the appointment of Mr. Mosho as provisional liquidator was wrong in principle because it was not demonstrated that if a provisional liquidator was not appointed, the second appellant's assets were likely to be dissipated. The affidavit evidence available before the court showed that the key assets of the second appellant had been occupied, albeit illegally, by the Zambia Revenue Authority and the Zambia Police;

(d) further, and additionally, the debts claimed by the respondents as owing and due were never claimed and were, therefore, in dispute and the appellants have never been given an opportunity to ascertain the propriety of the claim – in other words, the claimants did not establish a *prima facie* case for winding up of the company;

(e) additionally, that Mr. Mosho was not, by reason of section 332(3) of the Companies Act (as amended by Act No. 24 of 2011) as read together with section 111, qualified for appointment to the position. Section 111(3) of the Companies Act reads as follows:

> **(3) A person shall not be appointed, act or continue to act as a receiver of the property or undertaking of a company if the person is:-**

> **(k) a person who has been removed, within the previous five years, from an office of trust by order of a court of competent jurisdiction.**

Further, section 332(1) provides that a person shall not be eligible for appointment or competent to act or to continue to act as liquidator of a company if he is –

> **(l) a person who has contravened a provision of this Act in a manner which has or may materially affect creditors or contributors or persons dealing in good faith with the company.**

8.16. Mr. Mosho, according to the appellants, had been appointed Receiver of Platinum Gold Equity Limited, Kitwe Development Limited and Optima Consultants Limited on 13th September 2015. By an order of the High Court for Zambia dated 26th October 2016, Mr. Mosho was removed as Receiver of the companies. The office of the Receiver is an office of Trust and, therefore, having been removed as Receiver by the High Court twelve (12) months previously, Mr. Mosho was not qualified to be liquidator, provisional or otherwise.

8.17. It is clearly not our place to comment on the verity or otherwise of the appellants' reasons for objecting to the liquidation or the confirmation of Mr. Mosho as liquidator. The allegations were

neither opposed nor otherwise disproved. What we can say, however, is that these allegations are not insignificant and deserved careful reflection and assessment by the court to whose attention they there drawn, granted that they struck at the heart of the winding up proceedings. Such reflection and assessment by the court supervising the winding up ought to have been done before the confirmation of Mr. Mosho as liquidator.

8.18. We have already stated that Mr. Mosho was appointed as provisional liquidator *ex-parte* and later confirmed as the liquidator via a consent order to which the appellants were not party. There was no *inter-partes* hearing regarding his confirmation as liquidator.

8.19. Taken on the whole, we cannot lose sight of the fact that the appeal questions, in the first place, the appointment of Mr. Mosho as provisional liquidator and his confirmation as liquidator, and in the second, the activities of Mr. Mosho as the liquidator. Legally, these matters are too serious to be ignored.

8.20. As was aptly observed by Lewison LJ in **HMRC v. Rochdale Drinks Distributors Limited**[10] to which we have earlier made reference, the appointment of a provisional liquidator is 'one of the most intrusive interim remedies in the court's armory.' The court considering an application for appointment of a provisional liquidator must do so with utmost vigilance and fairness to all the parties concerned.

8.21. Likewise, in **HMRV v. Winning Networks Limited**[11] the court held that the appointment of a provisional liquidator is a most serious step and should be subject to anxious consideration. To justify such appointment, there must be a risk to assets or a potential loss or destruction of the company's books and records or alternatively, such appointment must be in public interest.

8.22. Our understanding is that the provisional liquidator's primary responsibility is to preserve the assets of the company pending the making of a winding up order. Although in rule 8(2) of the Winding Up Rules it is stated that the court appoints a provisional liquidator if it thinks fit, available case authorities

suggest two grounds upon which such appointment may be made. Thus, in the case of **HMRC v. Rochdale Drinks Distributors Limited**[10], the court identified the two considerations for the court to take into account; as:(i) satisfaction that on the hearing of the winding up petition, an order for winding up is likely to be made; and (ii) (assuming the first condition is met) that it is right, in all the circumstances, that a provisional liquidator is appointed.

8.23. In this particular case, and as we have stated already, there was no *inter-partes* hearing as required by rule 8(4) over the confirmation of Mr. Mosho as liquidator. He was instead confirmed via a consent judgment to which the parties objecting to his appointment were technically excluded.

8.24. By reason of the dealing judge's willful failure to hear the appellants' position alongside that of the petitioners at what should have been the confirmation hearing of the provisional liquidator, the appellants' right to due process guarantees to be heard, which right is donated by statutory provisions as set

out in rule 8 of the Companies Winding Up Rules, was impaired. This, cannot, in our view, be without consequence.

8.25. We revert to the issue whether a person who, in winding up proceedings files a notice of intention to be heard at the hearing of the winding up petition, becomes a party to the winding up proceedings.

8.26. Rule 10 of the Companies (Winding Up) Rules S.I. No. 86 of 2004 states that:

> **(1) A person who intends to appear on the hearing of a petition shall file into court a notice of that person's intention in Form 3 set out in the Schedule.**
>
> **(2) A notice filed under subrule (1) shall contain the address of the person intending to be heard on the petition and be signed by the person filing it or that person's advocate and shall be served on a petitioner or the petitioner's advocate at least two days before the hearing of the petition.**

8.27. Rule 6 of the Companies (Winding Up) Rules provides the rationale for persons desiring to be heard, filing a notice. This rule directs the petitioner to advertise the petition. Under Rule 6(2)(c) the advertisement should:

> **Contain a note at the foot thereof, stating that any person who intends to appear at the hearing of the petition, either to**

support or oppose the petition, must send notice of that person's intention to the petitioner or the petitioner's advocates.

8.28. Our understanding is that supporting or opposing the winding up petition would have to be on stated grounds. The process of supporting or opposing would thus entail filing evidence and making submissions at the hearing so as to bring to the attention of the court relevant matters to which the court should have regard and of which the court might not otherwise have been appraised. All these matters may well be challenged by countering facts or submissions in opposition. They may equally raise objectionable issues or procedurally unacceptable questions which would necessitate application to the court.

8.29. Viewed in this context therefore, we believe that the purpose of rule 10 and rule 6 is to give *locus standi* to interested parties to protect their interests in the winding up of a company. This would include the taking of any necessary steps to challenge anything that is detrimental to their interests.

8.30. The filing of a notice pursuant to rule 10 of the (Winding Up) Rules, is thus sufficient notice to the court that such a person will, if necessary, file documents or give oral evidence, to protect his/her position. Such party is henceforth designated as an interested party.

8.31. While the position in the repealed Companies Act was vague as regards the actual position of a notice giving party, the position has been clarified by the Corporate Insolvency Act, No. 9 of 2017. Section 60(3) provides that:

> **(3) The court may, on hearing of a petition or at any other times on the application of the petitioner, a company or a person who has given notice of intention to appear on the hearing of the petition:**
>
> **(a) direct that any notice be given or steps taken before or after the hearing of the petition;**
>
> **(b) dispense with any notice being given or steps being taken which are required by any prior order of the court;**
>
> **(c) direct that oral evidence be taken on the petition or any matter relating to it;**
>
> **(d) direct a speedy hearing or trial of the petition or any issue or matter;**
>
> **(e) allow the petition to be amended or withdrawn; and**

(f) give such directions as to the proceeding as the court considers appropriate in the case.

8.32. We have earlier in this judgment indicated that the liquidation began before the Corporate Insolvency Act was passed and, therefore, that the governing legal regime of the liquidation of companies was the repealed Companies Act. From our understanding of the position of the law before the Corporate Insolvency Act, No. 9 of 2017, it seems to us that what the Act did was to codify the legal position rather than amend it.

8.33. 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.

8.34. 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.

8.35. Such a party, however, has a special statutory interest in the proceedings. That special interest if for such party to be heard at the winding up petition, to present his or her support or objection to the winding up petition. This may entail much more than merely giving the notice.

8.36. It is from the hearing of such a party that the court is assisted in determining whether to give full faith and credit to the petition and grant it or otherwise. The hearing of such a party at the winding up proceedings helps the court to discharge, in a guided way, its statutory supervisory obligations relative to insolvent companies.

8.37. When a creditor, or as in this case, creditors, petition to wind up a company, they thereby embark upon a very serious undertaking. The formalities and legal procedures set out in the law must be complied with precisely as the court hears the petition. This includes the requirements that those to be heard

at an *inter-partes* hearing regarding the liquidation are so heard.

8.38. Following a creditors' petition to wind up a company, the law directs that a hearing should be arranged to allow both parties to the petition as well as those who present a notice to be heard to put their case to the court; to present evidence so that the court assesses the situation and decides what happens next. The court will, where as here the basis of the petition is inability to pay debts, look for the unquestionable existence of the debt and will expect the creditors to have made attempts to recover the money owed.

8.39. What is beyond argument is that in terms of section 275 of the Companies Act (repealed) a court hearing a winding up petition may (a) dismiss the petition (b) make a winding up order or (c) make any other order as it may think fit. Doubtlessly, the court does not have to grant a winding up petition in any event. It will most certainly dismiss the petition where the debt has been repaid, or where there is agreement made to repay the debt, or where the petition is an abuse of

process by the petitioner, as for example, where the petition is being used to settle personal scores or disputes; or is designed to give the alleged creditor commercial or other advantage, or where it is shown that the company is capable of repaying its debts, or indeed where the debt is unproved.

8.40. The point we make is that provisions of the law regarding winding up of 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.

8.41. In our considered view, by allowing the parties to enter into a consent judgment on legally contestable positions as far as interested third parties are concerned, the High Court

abdicated its supervisory responsibility over the winding up. So serious was such abdication that it adversely affected third party rights and effectively rendered the liquidation a sham.

8.42. There is a different though related question. It is one of *locus* to commence proceedings on behalf of a company in liquidation. It was strenuously argued on behalf of the appellants that under the residual authority doctrine, the appellants had authority to commence proceedings to challenge the liquidation.

8.43. Although, as we have pointed out earlier in this judgment, the learned judge handling the winding up petition was aware of the appellants' protestations and in fact did set some hearing dates, he ultimately did not hear any of the applications before he confirmed the provisional liquidator, much worse before granting the order for winding up of the second appellant. As we have stated already, upon his confirmation as the liquidator, Mr. Mosho took precipitate action that effectively forestored, the hearing of any of the appellants' applications.

8.44. Assuming, arguendo, that the appellants were not parties to the original winding up petition which resulted in a consent judgement, would they nonetheless be able to commence proceedings to set aside the consent judgement? This question, in our reverential view, exposes in general terms the problem that arises when a consent judgement affects the rights of those who were not involved in its formation and thus did not consent to its terms.

8.45. We have in preceding paragraphs explained why we agree with the appellants that though they were not initially parties in the conversional sense to the winding up proceedings, they were parties properly interested in those proceedings and, were bound to be affected as they in fact were by any decision, let alone a consent one, reached in the proceedings.

8.46. We are in the present case confronted with the gigantic responsibility of balancing on one hand the rights of third parties challenging a consent judgment to which they are not party but which allegedly impairs their own rights, and on the other, the need for consent judgements to offer some degree of

finality and certainty to the parties who use them as a means of settlement.

8.47. We have in the present case, a consent judgement that was concluded in the wake of clear intimation that the appellants opposed the confirmation of the provisional liquidator and the liquidation itself on multiple grounds as we have itemised them earlier in this judgement. The first appellant had property rights (as in shareholding) that were adversely affected by the consent judgement. The court chose to proceed without regard to his objection.

8.48. We know of no rule of law that sanctions, by consent or otherwise, the deprivation of a person's legal rights in a proceeding to which he is not originally a party. The inequities of such an eventuality are in the present case very clear.

8.49. Unless third parties such as the appellants, whose interest are likely to be affected by a consent judgment to which they are not parties, are duly summoned to appear in the legal proceedings resulting in such a judgement, they are entitled to rest assured that the consent judgement concluded will not

affect their legal rights adversely. This was, however, not the case here.

8.50. It is, in our view, elementary fairness and justice that a person whose property rights (shareholding) is to be adversely affected, should know before hand and be afforded an early opportunity, if he so wishes, to make representation to dissuade the decision makers.

8.51. The bottom-line, in our considered view, is that the first appellant was an interested party and in the peculiar circumstances of this case, was competent to challenge a consent judgment that adversely affected his rights. Such challenge could be by whatever means lawfully available, including commencement of a fresh action.

8.52. Turning to the liquidation itself, liquidators owe fiduciary duties to the company and its creditors and contributors. Those duties include the duty to avoid conflict of interest; to act impartially and to properly exercise discretion and discernment. A liquidator who breaches any of these duties is liable to make good.

8.53. In the present case, aside the notorious fact of Mr. Mosho, being related to the law firm which he appointed to represent the company in liquidation, was as liquidator, engaged in hazardous proceedings, paying little regard to fairness and good judgment. It must have been apparent to him as liquidator that this was an unusual case and that issues of fact and credibility of allegations would loom large, and above all that the success of the petition, all relevant factors remaining equal, would depend on a number of difficult issues of fact and law which would have required proper judicial guidance by the dealing court.

8.54. It is unclear from the record whether the liquidator in this case did submit to the court a report in accordance with section 288 of the Companies Act (repealed); whether there was any committee of inspection appointed; whether the liquidator acted with the authority of such committee of inspection; and whether he applied to court to be released at the purported conclusion of the winding up.

8.55. Turning specifically to ground one of the appeal, we are quite settled in our view that the law as debated by counsel for the appellant on how to set aside a consent judgement is correct. The list of cases that confirm the position that a consent judgement, order or decree can only be set aside by a fresh action commenced for that purpose, does include **Zambia Seed Company Limited v. Charterfield International (Pvt) Limited**[1] and **Lusaka West Development Company Ltd. BSK Chiti (Receiver), Zambia State Insurance Company v. Turnkey Properties Limited**[6].

8.56. It is the aspect of who is entitled to commence such action that presents a challenge in the present case. The question is whether the appellants, as non-parties to the cause, but interested in the proceedings, in the manner and to the extent we have explained it, can commence proceedings for setting aside the consent judgement.

8.57. We must be quick to observe that there are no express provisions in the Companies Act which allow for setting aside or variation of a winding up order once given. We, however, think the door is open for the exercise by a court of inherent jurisdiction to set aside a winding up order under certain

circumstances such as where there was an action or omission that defied a substantive statutory prohibition or prescription so as to render the winding up null and void on grounds of illegality, procedural impropriety or lack of jurisdiction.

8.58. In the present appeal, it has been demonstrated that although it is to the court that is vouchsafed by law the duty to judiciously assess the appropriateness of the liquidation, there was in this case no assessment of the competing interests of the creditors, contributories, shareholders and the liquidator before the confirmation of the provisional liquidator as liquidator and before the granting of the winding up order. In particular the propriety of the winding up, in view of the reasons given for the resistance by the appellants, were never interrogated as the court is obliged to do under the Act.

8.59. The appointment of the provisional liquidator and his subsequent confirmation were all done outside the prescription of the winding up rules and without affording parties whose interests were to be adversely affected, the

opportunity to be heard even after they gave clear intimation of their wish to do so.

8.60. And so, we ask the question how else could the appellants have dealt with the consent order that violated their rights if they could not directly assault that consent order? The alternative, we suppose, would have been to join the main winding up proceedings. Was that option practically viable granted the conduct of the court and the liquidator? We think not. Our considered opinion is that as interested parties, the appellants have every right to impeach the judgment that undermined or subdued their rights.

8.61. Taken in the round, it is our considered view that the circumstances of this case present a real need to set aside the winding up order given by the High Court without affording the objecting parties an opportunity to be heard. To the extent indicated, ground one of the appeal is upheld.

8.62. Turning to ground two regarding the residual power of directors to sue for wrongs done to the company and for joinder to proceedings, it is indeed beyond doubt that once a

company is placed under liquidation directors of a company are divested of their power. Control of the company is then transferred to the liquidator. The theory is that the liquidator steps into the shoes of the former directors and the powers of the directors are paralysed.

8.63. We, however, accept the arguments put forth by the appellants' learned counsel as regards residual powers of the directors to litigate in respect of wrongs done to the company especially by the liquidator. We also find the authorities cited by counsel for the appellants to be significantly persuasive to us. We must add though that in testing the extent of the director's residuary powers, we are inclined to adopt the question used in the English case of **Re Union Accident Insurance**[12] namely, whether a power sought to be exercised under the residual power doctrine has been assumed by the liquidator. If not, then the board retains it as a residuary power.

8.64. In other words, the directors of a liquidated company retain all powers not expressly removed by law or not conferred on the liquidator by the court.

8.65. The powers of the liquidators are listed in section 289 of the Companies Act (repealed). There are clearly gaps that appear between those specified powers and the capacity of the company to act as a juristic person which powers are normally exercised through the company's board.

8.66. A very important power which the directors retain in liquidated companies is the power to oppose, on behalf of the company, the making of a provisional liquidation order final.

8.67. Our view, which is in consonance with the position taken by South African Courts in **Ex-Parte G. Pagan Enterprises**[13] and in **ABSA Bank v. Rhebokskloof (Pty) Ltd**[14] is that where there is a conflict between a provisional liquidator and a director as regards residuary power, it is the directors that speak for the company, being empowered to instruct legal counsel on its behalf, and not the provisional liquidator.

8.68. We thus do accept the contention by the appellants that the first appellant did have residual power to oppose the appointment of Mr. Mosho as provisional liquidator which he in fact did, and ought to have been heard on his application. We are on this basis inclined to uphold ground two of the appeal.

8.69. Turning to ground three of the appeal, it will be clear from what we have stated earlier in this judgement that the mere giving of a notice under rule 10(1) of the Companies (Winding Up) Rules 2004 does not of itself and in itself alone give the notice giving party on automatic right to be a party in the conventional sense to the proceedings. It confers on such party, a special status to be heard at the hearing of the winding up petition with all the ancillary rights to that eventuality. Yet, the learned judge decided to dispense with that hearing and in the process ignored altogether, due process requirements. This conduct, coming after the sanctioning of the confirmation of the liquidator by consent, is rather curious and we disavow it.

8.70. We think there is much to be said about the conduct of the dealing judge and the liquidator in this case. By sheer coincidence or otherwise, the judge that dealt with the liquidation of the second appellant in this case is the same judge that was the subject of our counsel in the case of **John Sangwa v. Sunday Nkonde SC**[15] (the silver lining judgment).

8.71. In the silver lining judgment, we disapproved judicial conduct which has little or no resemblance to justice. We observed at paragraphs 81 and 82 as follows:

> **81. In the earlier part of this judgment, we have deliberately referred to the office of judge as being one of wisdom and veneration among others. Wisdom is defined as the quality of, *inter alia*, having good judgment while veneration, endearing great respect and reverence. We have no doubt that the actions and judgment of the judge in the manner he dealt with the parties, fell short of the tenets of wisdom, leaving the parties to doubt his reverence.**
>
> **82. To say that the conduct is unacceptable is an understatement, it is at the very least to be frowned upon...**

8.72. We can only reiterate those sentiments for here as the dealing judge literally abdicated his responsibly to supervise the

liquidation according to applicable legal provisions. Given what we have stated above, we are inclined to uphold ground three of the appeal.

8.73. As regards ground four of the appeal, it must be obvious from what we have stated that the Court of Appeal did not give due attention and reflection to the second appellant's grievances but opted to narrow the issue it considered determinative of the appeal. In fact, the Court of Appeal does not even appear to have addressed ground one of the appeal before it.

8.74. Our reading of the judgment of the Court of Appeal shows that the court did not deal with the issue of residuary powers of directors of a company in winding up proceedings, nor did it consciously address the arguments brought to it by the appellant. To that extent ground four of the appeal must succeed.

8.75. For the avoidance of doubt, we hold that the actions of the liquidator prior to and post the purported liquidation of the Post Newspapers Limited, are of no legal effect whatsoever.

8.76. The net result is that this appeal has merit and must succeed. In light of all the anomalies we have pointed out, the liquidation of the Post Newspaper Limited in the manner undertaken by the liquidator, was a faux.

8.77. We note that much time has passed since the purported liquidation. We do not believe, however, that such passage of time has sanitized the wrongful manner in which the liquidation was conducted.

8.78. We likewise note that the liquidator, Mr. Mosho may have concluded with the liquidation and seemingly fallen off the picture. Furthermore, he was not a party to the winding up petition. This, however, matters not for purposes of rendering an account for accountability under the relevant law. For this purpose, we are entirely within our power to order him to be joined to the winding up proceedings. As the Court of Appeal of the Seychelles observed in **Houareau & Another v. Karunakaran & Others**[16] :

> **...it is an age old and well-established principle that every court has power to act *ex debito justitae* [as of right] to ensure that it exists for real and substantial administration of justice.**

8.79. In confirming its inherent power to join non-parties to litigation the South African Supreme Court pertinently observed in **Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v. Daisy Dear Investments (Pty) & Others**[17]:

> **At common law out courts have an inherent power to order joinder of parties where it is necessary to do so. Ordinarily such an order is issued pursuant to an application by one of the parties, in a court of first instance, which would have been served upon the party whose joinder is sought. A court could, however, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder has been effected.**

8.80. We refer the matter to the High Court before a different judge to re-open the liquidation proceedings with a view to ensuring compliance with the relevant legal provisions. The action shall be between the original parties as they were when the petition was filed. However, for purposes of receiving all the necessary reports from the liquidator and considering his possible personal liability, we order joinder of the liquidator.

8.81. For the avoidance of doubt, we direct that the liquidator, Mr. Lewis Mosho, shall appear as a third party to the proceedings in the High Court.

8.82. The appellants shall have their costs to be taxed if not agreed.

.....
M. Malila
CHIEF JUSTICE

.....
A. M. Wood
SUPREME COURT JUDGE

.....
J. Chinyama
SUPREME COURT JUDGE