IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.: 1360/2013

In the matter between

Consolidated Aone Trade & Invest 6 (Proprietary) Limited — **1st Appellant**
(Registration Number: 2008/004924/07)

Eugene Delaney Jackson — **2nd Appellant**
(United States of America Passport Number: 0……..)
(Identity Number: 4……..)

And

FirstRand Bank (Rand Merchant Bank Division) — **1st Respondent**
(Registration Number: 1929/001225/06)

Guardrisk Insurance Company Limited — **2nd Respondent/ Intervening Party**

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

MARKS AJ

[1] The appellants, Consolidated Aone Trade & Invest 6 (Pty) Ltd (AONE), and Eugene Delaney Jackson (JACKSON), were the first and sixth respondents in the application brought by the first and second respondents, (RMB) and (Guardrisk), for a final order of liquidation. They have filed an

application for leave to appeal against the order made placing AONE in final liquidation on 20 March 2014 and the order relating to the refusal of a postponement delivered in the Pietermaritzburg High Court under case no. 1360/2013.

[2] The application for leave to appeal is against the whole judgment. For the sake of clarity the appellants will be referred to as the first and sixth respondents (Aone) and (Jackson) as they were referred to when the final order was granted on 20 March 2014.

[3] The notice of the application for leave to appeal was signed by Mr Jackson and filed at the office of the Registrar, Pietermaritzburg, on 17 April 2014, and received by the first applicant's legal representative, Mr Lombard, on 22 April 2014. The legal representatives of the interested parties were informed by the Registrar of the presiding Judge that the application had been set down for hearing at 09h30 on 9 July 2014 at the Durban High Court.

[4] On 9 July 2014 there were no legal representatives present in court for either Aone or Jackson. However, Mr Jackson appeared in chambers to introduce himself, together with Mr Harcourt SC for the first applicant (RMB) and Ms Dippenaar SC for the second applicant (Guardrisk). Mr Jackson indicated he would be seeking an adjournment of the hearing as there was a

dispute between the two legal representatives, Mr Nicholson, and Mr Townsend. I advised the parties that any applications would need to be heard in open court and placed on record.

[5] Mr Jackson appeared in person and sought an adjournment of the hearing. He produced an email letter addressed to Mr Townsend (attorney for Aone) from Mr Nicholson (attorney for Jackson). The letter informed the former that Mr Jackson owes legal fees in excess of R500 000,00 and unless this amount was settled in full on or before 9 July 2014, he would object to Mr Jackson making use of any legal representation on 9 July 2014. This email was dated 19 June 2014 at 09:34:25 after the notice of set down was received on 18 June 2014.

[6] I hasten to mention that besides from this correspondence handed in by Mr Jackson, there had been no correspondence to either of the applicants or the Registrar that an adjournment would be sought. Neither Mr Nicholson nor Mr Townsend, who, according to the record, were the instructing attorneys for Aone and Jackson respectively when the final order was made, made any appearance in court on 9 July 2014. The notice of application for leave to appeal which was filed on 17 April 2014 at the Registrar's office, Pietermaritzburg, cites Aone as first plaintiff and Jackson as second plaintiff. It is signed by Mr Jackson on behalf of the first plaintiff and in his capacity as

the sole shareholder of the first (sic) plaintiff. There are no letters of withdrawal of attorneys in the file either.

[7] Turning to the application by Mr Jackson for an adjournment of this hearing which was strenuously opposed by both counsel for RMB and Guardrisk, a postponement is an indulgence and not a right. The Courts cannot allow feuding legal representatives to hold the Court to ransom. I find it most unprofessional that both attorneys who act or acted for the two respondents did not appear in court on 9 July 2014. In the circumstances, I will direct that a copy of this judgment be forwarded to the Kwazulu-Natal Law Society for investigation. Furthermore, this matter has a long history, characterised by repeated and lengthy delays brought about by Aone and Jackson. I hasten to add that once the application for leave to appeal had been filed and served upon the legal representative of the first applicant, Mr Lombard was most helpful in circulating all notices to the other interested parties which the legal representatives of Aone and Jackson had failed to do. The appellants had more than two months to sort out legal representation, which they failed to do. The application for a further adjournment was refused.

[8] The general rule is that a director of a company may NOT appear in court to represent his company himself. Both Mr Harcourt and Ms Dippenaar graciously were willing to grant the concession that Mr Jackson be allowed to

argue the application for leave to appeal in person on behalf of the first appellant. In considering this concession it was noted that Mr Jackson is a citizen of the United States of America. He had been granted this concession in June 2013 before the Honourable Mr Justice Koen. Furthermore, Mr Jackson had cited himself as the second appellant in his personal capacity as well. In the interests of justice Mr Jackson was granted leave to argue the application for leave to appeal which he did.

[9] Turning to the application, Aone and Jackon, the first and sixth respondents, have set out nine grounds in the application for leave to appeal. Most of these grounds are essentially a restatement of the basis on which the respondents sought a postponement in the initial proceedings which was refused when the matter came before me on the unopposed roll on 20 March 2014. I do not wish to rehearse those reasons and believe those aspects were sufficiently canvassed in my Reasons for Judgment dated 27 March 2014. There are however, two aspects to be addressed.

[10] The first aspect to be addressed is the respondents' contention that Aone's second business rescue application that had been filed on 19 March 2014 (one day prior) to the final liquidation order, had the legal effect of suspending any final winding up order until the second business rescue application was finally dealt with.

[11] A business rescue application only “commences” when there has been service on all the interested parties and the application has been lodged with the Companies and Intellectual Property Commission[1]. This had not occurred when the application for an adjournment was refused on 20 March 2014 and the final order for liquidation had been granted.

[12] The second “business rescue application” is to my mind nothing more than an attempt to delay the inevitable, prejudice creditors and prolong the current disorder and irregularities that prevailed in the management of Aone. The first business rescue application had failed and the winding up of Aone was at the instance of the business rescue manager as the rescue of the business had failed.

[13] Moreover, the filing of a business rescue application does not have the legal effect of suspending a final winding up order as mentioned in the respondents’ grounds for leave to appeal. To my mind it has the effect of suspending the “liquidation proceedings” until

13.1 The Court has adjudicated upon the application, or

13.2 The business rescue proceedings end.

[14] Liquidation proceedings as envisaged in sec 131 (6) of the Companies Act 71 of 2008 only commence on a court granting a liquidation order and

[1] TABOO TRADING 232 (PTY) LTD v PRO WRECK SCRAP METAL CC 2013 (6) 141 (KZP)

does not include a creditor's application to wind up a company. In other words, liquidation proceedings are thus the liquidator and master's process to wind up a company.

[15] In **ABSA BANK LTD v SUMMER LODGE (PTY) LTD**[2] MAKGOBA J issued a declaratory to the following effect:

> The meaning of the words liquidation proceedings in s 131(6) of the Companies Act 71 of 2008 is confined to the actual process of winding-up a company consequent upon an order of winding-up having been issued by a court, and is the actual process followed in winding-up and overseen by the liquidators and the masters. The words liquidation proceedings do not include the legal proceedings taken by a creditor for purposes of obtaining an order that a company be wound up.

[16] The second aspect to be addressed is the respondents' contention that the Court erred in granting a final order of liquidation in the absence of a resolution from Aone. This contention is also misplaced. This was not a voluntary surrender but an application by RMB and Guardrisk who had intervened in the proceedings. Guardrisk had been granted leave to intervene by the Honourable Mr Justice Vahed in an endeavour to curtail costs and limit prejudice to the creditors of Aone. A thorough investigation of all the affidavits filed, to my mind, determined that Aone was unable to pay its debts and was therefore insolvent.

[17] Finally, an application for leave to appeal can succeed only if the Court is of the opinion that the proposed appeal would have a reasonable prospect

[2] 2013 (5) SA 444 (GNP) para 18.1

of success. Mr Jackson, on behalf of the second appellant (himself), then described how he came about to invest in South Africa and made serious unsubstantiated allegations against the two respondents, RMB and Guardrisk. The application for leave to appeal does not address the reasons given in my judgment dated 27 March 2014, nor does it identify any of those reasons as being incorrect. The argument tendered by Mr Jackson in court did not address this either. Instead, his argument boiled down to an earnest plea to court to grant leave to appeal in order to allow for an extension of time for Aone to get its financial affairs in order. In my opinion the proposed appeal does not have a reasonable prospect of success.

[18] With regard to the costs order, both Mr Harcourt and Ms Dippenaar have requested that the Court order Mr Jackson personally to pay the costs of this application including that of two senior counsel. Their contention is that the application, together with the many other applications brought by Mr Jackson, have resulted in the creditors of Aone being prejudiced as the costs of the two senior counsel will fall to be costs in the administration of Aone in liquidation. However, Mr Jackson had launched this application in his representative capacity for the first appellant (first plaintiff), as well as in his personal capacity as second appellant (second plaintiff).

[19] The general rule as to costs orders is that the costs normally follow the result. There is nothing to suggest a deviation from the rule. There is no

evidence to suggest that the prosecution of the appeal was vexacious for a punitive cost order to be granted.

[20] In the circumstances the following order is made:

20.1 The application for leave to appeal is dismissed with costs including the costs of two senior counsel.

20.2 The costs to be shared jointly and severally between the two appellants.

20.3 The Registrar is directed to forward a copy of this judgment to the Director of the Kwazulu-Natal Law Society with reference to paragraphs [3] to [7] above.

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S MARKS AJ

Date of hearing:	9 July 2014
Judgment delivered on:	11 July 2014
For 1st and 2nd Appellants:	Mr E D Jackson (in person)
Counsel for the 1st Respondent:	Adv A Harcourt SC
(Instructed by: Edward Nathan Sonnebergs 23RD Floor Durban Bay House 333 Anton Lembede Street DURBAN. C/o Austin Smith Attorneys 191 Pietermaritz Street PIETERMARITZBURG)	
Counsel for the 2nd Respondent: (Intervening Party)	Adv F Dippenaar SC
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