TAMIRA OVERSEAS S.A

Versus

AQUIRIUM TRADING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 11 DECEMBER 2014 & 19 FEBRUARY 2015

B. Masamvu for the applicant
A. Muchadehama for the respondent

Opposed Application

TAKUVA J: The applicant applied for an order placing the respondent under provisional liquidation in terms of sections 207, 206 (f) (g) ad read with section 205 (c) of the Companies Act [Chapter 24:03]. This Court, per MAKONESE J on 18 September 2014 issued the following provisional order:

> "1. The respondent, Aquirium Trading (Pvt) ltd is provisionally wound up, pending the grant of an order in terms of paragraph 3 or the discharge of this order.
> 2. Subject to subsection (1) of section 274 of the Companies Act [Chapter 24:02], Mr Knowledge Hofisi of Aurifin Capital (Pvt) Ltd is appointed as provisional liquidator of the respondent company with the powers set out in section 221 (2) (a) to (g) of the Act.
> 3. Any interested party may appear before the court sitting at Bulawayo on 11th December, 2014, to show cause why a final order should not be made placing respondent company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.
> 4. This order shall be published once in the Zimbabwe Government Gazette and once in the Herald newspaper. Publication shall be in the short form annexed to this order.
> 5. Any person intending to oppose or support the application on the return day of this order shall:-
> (a) Give due notice to the applicant at care of its legal practitioners, Messrs G. N. Mlotshwa & Company c/o Majoko and Majoko Legal Practitioners, 1st Floor, Triumphant House, 111a Josiah Tongogara Street, between 11th and 12th Avenue Bulawayo.
> (b) Serve on the applicant a copy of an affidavit which he files with the Registrar of the High Court."

Respondent filed a notice of opposition on 18 October 2014. It also filed its heads of argument on 28 November 2014 and its legal representative appeared in court on 11 December 2014 and opposed the confirmation of the provisional order.

Initially Mr *Masamvu* applied for a postponement of the matter on the grounds that he was a correspondent legal practitioner who was not versed with the facts of the matter. He later withdrew the application adopting the stance that the matter should proceed and he will stand by the papers filed of record. This concession was proper in my view because the record does not contain any explanation why the principal legal practitioners did not avail themselves. Further, no heads of argument were filed despite the fact that the provisional order had the 11th of December as the return date. Quite clearly an application for a postponement was illogical and prejudicial to the respondent.

Respondent's opposition is based on a number of grounds. Perhaps it would be instructive to state the brief background facts before I consider the respondent's grounds for opposing the matter. The respondent company was incorporated in 2004 by one Taleb Mohamad and Sandra Van Rooyen to among other things pursue mining interests in the Midlands Province.

Sometime in 2012, applicant company Tamira Overseas SA sought to invest in Acquirium Trading (Pvt) Ltd. In pursuant of that quest, various tentative agreements were entered into subject to the fulfillment of certain conditions. On or about the 28th of August 2014, applicant filed for respondent's liquidation alleging that the respondent was heavily indebted to applicant. On 18 September 2014, applicant obtained the order referred to earlier in this judgment.

Let me come back to the notice of opposition and the grounds thereof. They are as follows:

1. The order for provisional liquidation was improperly prayed for and granted and must be set aside. The respondent submitted that it was not served in terms of the rules before this provisional order was granted.

2. That Messrs G.N. Mlotshwa and Company Legal Practitioners are conflicted out in this matter.
3. That the application has not been properly brought before the court;
4. That on the facts respondent company should not be placed under liquidation as there are no proper grounds for the placement of respondent company under liquidation;
5. That at the very least respondent should be placed under judicial management.

In respect of the first ground, it was submitted on respondent's behalf that before the provisional order was granted the application for the provisional order was not served on the respondent at its registered address. The application was purportedly served on Heena Joshi who is not a director of respondent. The notice of set down was not served on anyone. Further, there was no affidavit of service filed with the court before the order was obtained. Respondent also contended that the manner in which applicant proceeded under the circumstances is in breach of section 5 (2) of the Companies (Winding up) Rules, 1972 which provides,

> "Except where the petition is presented by the company itself a copy of the petition and the notice of set down for hearing shall be served upon the company by delivering of such copy at its registered office or to a responsible person at its place of business, failing such service, to a director or secretary of the company or, if the company is in voluntary liquidation, to the liquidator. An affidavit of service shall be filed with the petition."

Reliance was placed on the principle set out in *African Gold (Zimbabwe) (Pvt) Ltd* v *Modest (Pvt) Ltd* 1999 (2) ZLR 61 (SC) at 63A-B where the court observed as follows:

> "A respondent company must not be deprived of the opportunity to put forward its opposition to the grant of an order which will have the effect of causing it to suffer an immediate diminution in personal status and a removal of control over all its assets. The manifestly serious consequences flow from the issue of a provisional winding up order. The provisional liquidator is almost invariably vested by the court with the wide powers set out in paragraphs (a) to (h) of s 221 (2) of the Companies Act [Chapter 24:03]. See the remarks of HOFMEYER J in *Mackay* v *Cahi* 1962 (4) SA 193 (O) at 203G-H, which, though referring to sequestration proceedings, are nonetheless apposite and *Walsh* v *Kugar* 1965 (2) SA 756 (E) at 760 B. A *fortiori*, so it seems to me, the present appellant, being the victim of an inexcusable breach of procedure, the High Court ought to have afforded it the opportunity to oppose the application for the provisional order by the only means available, namely, by setting aside of the order that had been improperly obtained." (my emphasis)

See also *Reserve Bank of Zimbabwe* v *Trust Bank Corporation Ltd* HC 1070/13

For this reason, respondent prayed for the discharge of the provisional order with costs without even considering any other issues.

As pointed out above, applicant did not file any heads of argument despite having been served with respondent's heads. Also, applicant's principal legal practitioners did not attend and no explanation for their absence was proffered. Mr *Masamvu* submitted that he was a mere corresponding legal practitioner who was not versed with the facts of the matter. He indicated that he would stand by the papers filed of record. There is no proof of service of the application for a provisional order in the record. Consequently, the only inference is that it was granted on an *ex parte* basis. This is irregular and I would discharge the provisional order for this reason. Had the respondent not prayed for an order that respondent be placed under judicial management the matter would have ended here.

It was submitted on behalf of the respondent that one way of protecting the interests of both parties is to place the respondent under judicial management. The court has a discretion in ordering that a company be placed under judicial management. Generally, where a court has been required to place a company under liquidation it may, using its discretion or if requested to do so, place the company under judicial management if it is of the opinion that the company will be able during the period of judicial management to recover from the difficulties and that it has reasonable opportunity to do so.

In *Lief N.O.* v *Western Credit (Africa) (Pvt) Ltd* 1966 (3) SA 344 and 348, SUYMAN J stated the following:

"A winding up order, in its nature is intended to bring about the dissolution of the company whereas the purpose of a judicial management order is to save the company from dissolution. An important feature of a winding up order is that upon such an order being granted there is a *concursus creditorium.* A judicial management order on the other hand usually provides for a moratorium in respect of the company's debts in the hope that it will lead ultimately to the payment of all its creditors and the resumption by it of normal trading. Furthermore, it is true that for judicial management orders provision is made in the section of the order in which payments to creditors are to be effected, and that preference is given to older creditors over later ones. But this is the result of equitable consideration because of the moratorium. It is clear from all authority that it is not a form of *concursus creditorium* as in winding up orders. A winding up order is usually granted where a company is in fact insolvent, whereas judicial management order is granted where a solvent company has run into financial difficulties because of mismanagement and because there is hope that with better management it will overcome its difficulties." (my emphasis)

Section 299 of the Companies Act [Chapter24:03] stipulates circumstances in which provisional judicial management order may be obtained. It states:

"(1) Subject to section three hundred, the court may –

(a) …

(b) On an application being made to it for the winding up of the company, grant a provisional judicial management order."

Section 300 of the same Act sets out the requirements for provisional judicial management order. It states:

"(1) The court may grant a provisional judicial management order in respect of a company –

(a) …

Or

(b) on an application referred to in paragraph (b) of subsection (1) of section two hundred and ninety-nine, if it appears to the court that –

(i) if the company is placed under judicial management the grounds for its winding up may be removed and that it will become a successful concern; and

(ii) that it would be just and equitable to do so."

In casu, the respondent's submissions show that there are no good and sufficient reasons for the court to grant a winding up order. From a reading of the founding affidavit, it is not clear on which ground the applicant seeks to rely. Also, the grounds are raised without substantiation. What comes up from the deponent of the founding affidavit is that applicant advanced money which was invested in the respondent. However, it was not disputed that respondent's mineral deposits are enormous. Further, it has also not been disputed that investors are on hand to chip in and put funds for the continued operations of the respondent. Quite clearly applicant wants its money repaid and for that reason, it would not be in its interests that the respondent wound up.

In my view, one way of protecting the interests of all parties is to allow respondent to continue operating under judicial management.

Accordingly, it is ordered that:

1. The provisional order placing respondent under provisional liquidation granted by this honourable court on 24th of September 2014 be and is hereby discharged.
2. The respondent company Aquirium Trading (Pvt) Ltd be and is hereby placed under provisional judicial management.
3. The master of the High Court, Bulawayo be and is hereby directed to appoint a provisional judicial manager within ten (10) days of the service of this order upon him.
4. The provisional liquidator Mr Knowledge Hofisi of Aurifin Capital (Pvt) Ltd be and is hereby discharged from being the respondent's provisional liquidator.
5. The applicant is to pay the costs of Taleb Mohamad and Sandra Van Rooyen on an ordinary scale.

G.N.Mlotshwa & Company c/o Majoko & Majoko applicant's legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners