

MACQUIRE FARMING (PVT) LTD
versus
TWAIROB INVESTMENTS (PVT) LTD
(Under Provisional Judicial Management)

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 JUNE 2018 AND 14 JUNE 2018

Opposed Application

M Dodzo for the applicant
T Zhuwarara for the respondent

MATHONSI J: The applicant seeks a final judicial management order in respect of the respondent company which was placed under provisional judicial management by a provisional order granted by this court on 17 March 2015. Winsley Evans Militala of Petwin Executor and trust Company Limited was appointed as the provisional judicial manager. On 4 June 2018 the applicant and the provisional judicial manager signed a consent order which they would want this court to grant placing the respondent under final judicial management on certain terms and conditions.

The consent order sought completely ignores that, upon being notified of the provisional judicial management order, certain interested parties had intervened by filing opposition to the application and the confirmation of the provisional order. This was in compliance with clause 4 of the interim relief granted in the provisional order of 17 March 2015 which reads:

- “4. 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 Mlothswa & Company, care of Majoko & Majoko, 1st Floor, Triumphant House, 111A Josiah Tongogara Street, between 11th & 12th Avenue, Bulawayo.”

After a false start of having filed opposition in the name of the respondent company which was already under provisional judicial management and as such could only be represented

by the provisional judicial manager by operation of law, Benard Mahara Mutanga filed opposition on 8 September 2015. He did so on his own behalf and on behalf of one Takesure Magoronga and Mai Kai Real Estate Development Trust, who I shall hereafter refer to as the respondents. It was suggested on behalf of the applicant that the respondents have no *locus standi* to oppose the confirmation of the provisional judicial management order and that even if they did, they did so out of time.

Mr Zhuwarara for the respondents submitted that the application and the provisional order were served at an unknown address even though the applicant was well aware of the correct address of the respondents and that they had an interest in the matter. They filed opposition the moment they became aware of the provisional order. He submitted further that, in any event, clause 4 of the order allows any interested party to appear in court on the return date and oppose confirmation. According to the certificate of service filed on 15 July 2015 the applicant served both the provisional order and the urgent application upon S Madzivanzire on behalf of the respondent at Makomo Farm, Crowhill Road, Borrowdale Harare.

The problem with that is that there is an ownership wrangle between the applicant and Mutanga over the control of the respondent. The applicant could not satisfy the requirements of service by delivering the process at any address. It should have located the respondent's at their address. I however do not agree with *Mr Zhuwarara* that when the respondents filed their valid opposition on 8 September 2015 they had only become aware of the existence of the application and the order. They became aware of them much earlier because Mutanga had purported to file opposition on behalf of the company on 29 July 2015 which turned out to be irregular.

I agree however that the provisional order accorded any person intending to oppose it to appear on the return date and do so. Even if it did not, it is trite that in cases of this nature all interested parties are entitled to appear before the court on the return date and oppose confirmation. This appears to accord with the provisions of rule 247 (3) of the High Court Rules, 1971 that:

“Where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall—

(a) be in Form 29D; and

- (b) specify the date and place at which the court will hear argument on the confirmation of the provisional order; and
- (c) specify the manner in which the provisional order is to be published and where appropriate, the person on whom copies of the provisional order, together with all supporting documents, are to be served.”

See *In re: Stand Five Four Nought (Pvt) Ltd* HH 767-15. It is unfortunate that the provisional judicial management order sought to be confirmed and which is challenged by the respondents did not specify that it had to be served on the respondents, in particular Mutanga, which then created challenges with service. To the knowledge of the applicant, Mutanga has an interest in the company which is sought to be placed under final judicial management. I say so because the basis of the application for judicial management, as set out in the founding affidavit of Phillip Michael Bathorp Macquire, is that there are underlying shareholder disputes pertaining to the ownership and management of the company. The deponent does mention that there has been worrisome allegations and counter allegations between those fighting for control of the company. It is in fact common cause that the fight has pitted the Macquire brothers and Mutanga.

Under those circumstances, when seeking to place the company under judicial management, the applicant should have directed both the application and the provisional order to Mutanga. It did not. The applicant can therefore not be seen to be trying to bar Mutanga from opposing the confirmation when his interest is known and it is the applicant which deliberately withheld the order from him. It was upon a realization that such an approach was untenable that *Mr Dodzo* for the applicant abandoned that stance.

Mr Dodzo also conceded that confirmation of the provisional judicial management order was sought prematurely. In fact he submitted that it is not the applicant which applied for the set down of the matter as they were only served with the notice of set down. There has been no compliance whatsoever with section 305 (1) of the Companies Act [Chapter 24:03] dealing with what the court has to consider on the return day of the provisional judicial management order. It provides:

- “(1) On the return day fixed in the provisional judicial management order, or on the day to which the court or a judge may have extended it, the court, after considering—

- (a) the opinion and wishes of the creditors and members of the company; and
- (b) the report of the provisional judicial manager prepared in terms of section three hundred and three; and
- (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims; and
- (d) the report of the Master; and
- (e) the report of the Registrar;

may grant a final judicial management order if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order, or it may discharge the provisional judicial management order or make any other order that it thinks just.”

This court is not equipped at all to consider whether to confirm or discharge the provisional judicial management. Apart from the contestation contained in the affidavits of the parties and the provisional judicial manager’s report which was to be presented at a creditors’ meeting set for 19 August 2015, no other report has been submitted. None of the statutory reports and documents required by s305 (1) have been filed. It is therefore not possible to determine whether to confirm or discharge the order. There is need for full compliance before the return day.

Mr Dodzo for the applicant was then forced to seek an extension of the provisional judicial management order to allow for compliance. *Mr Zhuwarara* for the respondents opposed the application submitting instead that the order ought to be discharged for failure to comply with s305 (1) of the Act. He relied on the authority of *Feigenbaum and Another v Germanis N O & Others* 1998 (1) ZLR 286 (H) to make the point that the provisional judicial management order was not sought for the statutorily prescribed purposes, namely to enable the company to pay its debts, to meet its full obligations and become a successful concern. It was sought in order to manage a shareholding dispute and should be discharged.

The order was granted by another judge who must have exercised judicial discretion in granting it having regard to what was placed before him. Indeed in terms of section 300 (a) (iii) of the Act the court may grant a provisional judicial management order in respect of a company if it would be just and equitable to do so. At this stage, in the absence of compliance with s305 (1) I cannot even begin to determine the propriety or otherwise of judicial management.

Accordingly, it is ordered that:

1. The provisional judicial management order is extended to 9 August 2018.
2. The applicant is directed to ensure compliance with the provisions of s305 (1) of the Companies Act [Chapter 24:03].
3. The costs shall be in the cause.

GN Mlotshwa & Company C/o Majoko & Majoko, applicant's legal practitioners
Rubaya & Chatambudza C/o Dube-Banda, Nzarayapenga & Partners, respondents' legal practitioners