

COMMERCIAL FARMERS UNION  
versus  
NELMAH HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MATHONSI J  
HARARE, 17 July 2013 and 25 July 2013

### **Opposed Application**

*D Ochieng*, for the applicant  
*T E Mudambanuki*, for the respondent

MATHONSI J: On 20 June 2012, this court granted an order placing the respondent under provisional liquidation following an application by the applicant, one of the respondent's creditors, which is owed a sum of US\$935 796-33 in terms of yet another order of this court issued by consent on 12 January 2012.

The applicant had attempted to execute the latter order without success because each time an attachment of property was made, the goods were claimed by third parties including the wife of one of the respondent's directors Nelson Mahupete, the brother of the said Nelson Mahupete and his father. Bereft of any other solution as the debt remained unpaid, the applicant made an application in terms of s 206 (f) of the Companies Act [*Cap 24:03*] ("the Act) on the basis that the respondent was unable to pay its debts.

It is the grant of the final order of liquidation which has been opposed by the respondent. In its opposing affidavit sworn to by its director Nelson Mahupete on 19 June 2012 and filed on the same date, the respondent insisted that it has capacity to pay its debts although it admitted being in what it called "financial doldrums." The respondent stated that its saving grace was a loan of US\$12 million which it had applied for and was "soon to be disbursed" into its account. It also claimed that it was owed "over a million" dollars by its business debtors and that once those debts were liquidated it would settle its indebtedness. It however admitted that its business has been low but had "gained momentum."

All these claims of reaching the land of milk and honey were not substantiated as not a single document pointing to an improvement in the respondent's fortunes was produced. The claims of a better future therefore remained the forlorn cries of an optimistic and

determined director with nothing to show for it. Significantly, it is now more than a year since the respondent promised a better life and its financial tribulations remain completely unchanged, it having failed to pay anything towards its indebtedness to the applicant.

The law relating to the winding up of a company by the court is contained in Part V of the Act. Section 206 provides:

“A company may be wound up by the court-

- (a) if the company has by special resolution resolved that the company be wound up by the court;
- (b) if default is made in lodging the statutory report or in holding the statutory meeting;
- (c) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
- (d) if the company ceases to have any members;
- (e) if seventy-five per centum of the paid-up share capital of the company has been lost or has become useless for the business of the company;
- (f) if the company is unable to pay its debts;
- (g) if the court is of opinion that it is just and equitable that the company should be wound up.” (The underlining is mine)

In terms of s 205 of the Act;

“A company shall be deemed to be unable to pay its debts-

- (a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred United States dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) if the execution or other process issued, on a judgment, decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or Messenger with the endorsement that no assets could be found to satisfy the debt or that the assets were insufficient to do so; or
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.”

In *casu*, we have a debt of close to \$1 million which has remained unpaid since the judgment of this court was granted by consent on 12 January 2012, one and a half years ago. An attempt to execute against the respondent’s property has yielded negativity against the backdrop of all the goods associated with the respondent having been claimed by the close

relatives of its director. The respondent admits owing another \$5 million or so to other creditors, which debts it claimed were not yet due more than a year ago.

Although the respondent claimed an upturn in its business and an improvement in its debt recovery effort, nothing has come up to assist it settle its debt more than a year after it made those claims. We are therefore left with the only other source of income the respondent is banking on, a loan of \$12 million which was awaited more than a year ago, a real case of “borrowing from Peter to pay Paul;” Nkala and Nyapadi, *Company Law in Zimbabwe*, p 406.

I have no doubt in my mind that the respondent is unable to pay its debts and that opposition to this application is just one of other means, in view of property being claimed by a director’s relatives under dubious circumstances, employed by the respondent to avoid paying its debts while remaining in operation putting more innocent business people at risk if they are to engage the respondent in business. In the interest of the transacting public and of justice, it is necessary to wind up such companies who can only add to the economic problems of this country.

It has been argued on behalf of the respondent that I should exercise the limited discretion reposed in me to refuse confirmation of the provisional order of liquidation. *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H) 414 G-415 A. The limited discretion exists by virtue of the use of the word “may” in s 206 of the Act and the inherent jurisdiction of the court to prevent abuse of its process.

I do not agree that the respondent’s inability to pay is temporary in nature, it has subsisted for a long time. I am unable to find any other basis for refusing confirmation of the provisional liquidation order.

In the result, I grant a final order of liquidation of the respondent company.

*Kelvin John Arnott* applicant’s legal practitioners  
*Mudambanuki & Associates*, respondent’s legal practitioners