

ZIMBABWE TEXTILE WORKERS UNION
versus
DAVID WHITEHEAD TEXTILES LIMITED
and
DWT HOLDINGS (PVT) LTD
and
DWT SPINNING (PVT) LTD
and
DWT COTTON WOOLS (PVT) LTD
and
DWT FABRICS (PVT) LTD
and
DWT HOSEIRY (PVT) LTD
and
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 27 February and 19 March 2014

Opposed application

N. Ruzengwe , for the applicant
G. Mlotshwa , for the respondents

MAKONI J: This is an application for the confirmation of a provisional order granted on 1 December 2010 for the placement of the respondent companies under judicial management. Between that date and the 17th of July 2013 a lot happened which culminated in an order by consent of all the parties involved, extending the return date for confirmation or discharge of the provisional order to 17 July 2013. A notice to that effect was advertised in The Government Gazette and The Herald, the relevant part of which read as follows:

“Any interested person who wishes to oppose the confirmation of the provisional judicial management order of the companies shall file a notice of opposition with the Registrar of the High Court within ten days from the date of this advert..... and shall serve a copy of the notice on the applicant. He shall then appear before the High Court at Harare at the hearing of the matter on the 17th day of July 2013 to show cause why the companies should not be placed under judicial management”

On the return date the matter was postponed to 24 July 2013 on which date it was referred to the opposed roll to be set down for hearing in terms of the rules of this Honourable Court. The parties are not agreed as to exactly what happened on the return date.

The matter was set down for hearing on 23 January 2014 on the opposed roll. On that date Mr *Ruzengwe* appeared for applicant whilst Messrs C. Nhemwa and Associates and Messrs C.N. Mlotswa and Company appeared both purporting to represent the companies. The legal practitioners appeared before me in chambers and two issues arose;

- a) Whether C. Nhemwa and associates have any authority to represent the companies on the return date.
- b) Whether this Honourable Court can exercise its jurisdiction in the absence of a return date.

I directed that the parties file heads of argument addressing the above two issues.

Issue number 1

Mr *Nhemwa* submitted that the directors of the companies have the *locus standi* instead of the Provisional Judicial Manager (PGM) to represent the companies on the return date. He further submitted that on the granting of a provisional judicial management order, directors of a company are stripped of their power and the PGM assumes all the powers of a company. However the directors retain some residual powers to prosecute the matter placing their company under final provisional judicial management. He referred to a number of South African and English cases one of which is *ABSA Bank limited v Rhebokskloof (Pvt) limited and Ors* 1993 (4) SA 436 (C). In that matter it was held that the South African *law position* was stated in the matter of *Wolhurter Steel (Welkom)Pvt v Jatu Construction (Private) limited* (in provisional liquidation) 1983 (3) SA 815 (O) were the court held that ,

“ To hold that after the granting of a provisional liquidation order the directors of a company which has been provisionally liquidated by virtue of such order have lost their *locus standi in judicio* to oppose the granting of a final order would fly in the face of the very object and purpose of the *rule nisi* and it would therefore be quite wrong to emasculate such object and purpose by a finding that the directors have lost their residual power to show cause why the company should not be wound up or for that matter to anticipate the return date of the *rule nisi*. It would be quite ludicrous to hold that a director of a company or a company acting through its directors, is not an interested party, when it comes to deciding whether it or they have the right to be heard on the return day of the *rule nisi*. ”

Mr *Nhemwa* also referred to some cases in our jurisdiction that of *Mzwimbi and Ors v Reserve Bank of Zimbabwe and Ors* 2005 (1) ZLR 132 p 139 and *Ex parte Lion Transport Company (Private) Limited* 1954 SRLR 135. He submitted that the position of our law is exactly the same with the English and South African law. He concluded by saying that the directors of a company under provisional judicial management have an interest in the affairs of the company. The placement of a company under final judicial management may affect their personal status especially their personal liabilities in terms of company law. To deny them an opportunity to be heard is contrary to the tenets of the principal of natural justice especially the *audi alterum paten* rule.

On the other hand Mr *Mlotshwa* submitted that the authorities cited by Mr *Nhemwa* relate only to those instances where the directors of a company wish to oppose the confirmation of a provisional liquidation order. No single authority was cited relating to the position in relation to provisional judicial management. He referred to the case of *Alpha Bank BPK & Anor v Registrar of banks & Anor* 1996 (1) SA 330(A); which is authority for the contrary proposition to the effect that the directors of a company under provisional judicial management have no residual powers whatsoever.

He further submitted that there are separate provisions in the Companies Act (The Act) dealing with provisional liquidation, provisional judicial management and final judicial management. Provisional liquidation and provisional judicial management are two distinct processes. In terms of s 303 (a) of the Act a PGM assumes the management of the company. There is no such corresponding provision in relation to provisional liquidation. Further the matters and reports to which a Court shall have consideration to on the return date in terms of s 305 (1) of the Act do not include anything required from the directors of the company. He conclude by submitting that there is no legal or logical basis upon which Messrs C. *Nhemwa* and Company can claim any right or insist to represent the respondent companies.

In reply Mr *Nhemwa* conceded that the cases he cited related to provisional liquidation but argued that the same principles apply to judicial management. He further submitted that the question of residual powers is not provided for statutorily but is a common law position.

In *Boka Investments Pvt Ltd v Third Line Trading (Pvt) Ltd and Ors* HH 104/13 PATEL J (as he then was) made a very pertinent observation when he stated

“Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives.”

This is borne out by the Companies Act where there are separate provisions relating to judicial management and liquidation. The provisions relating to liquidation do not provide for a return date as is the position with provisional judicial management in terms of s 305 (1). The PGM, in terms of s 303 (a) assumes the management of the company upon the granting of the judicial management order. There is no such corresponding provision in relation to liquidation.

I would agree with the submissions by Mr *Mlothwa* that it would be misleading to cite cases relating to liquidation in relating to the process of judicial management. There is no authority that has been cited by Mr *Nhemwa* to support the contention that directors of a company under provisional judicial management have residual powers which enable them to oppose or consent to the placement of a company under judicial management or otherwise.

There is clear authority to the contrary in *Alpha bank BPK and Anor v Registrar of Banks and Anor* 1996 (1) SA 330 A where it was held that

“the question whether the board of directors had retained residual powers of control after the placement under curatorship could best be answered by asking whether the board of directors had such powers before placement under curatorship. This question had to be answered in the negative; shareholders control a company; the board manages, it. What the placement under curatorship brought about was to transfer the management of the bank to the curator, so that no residual powers of control could thereafter have vested in the board ----.”

Analogous to this position are the provisions of s 303 of the Act which provide that upon a company being placed under provisional judicial management, the provisional judicial management assumes management of the company.

In my view s 305 (1) is the determining provision. It clearly spells out matters and reports to which the court shall give consideration to on the return date of the provisional judicial management order. It does not include anything required from the directors of the company.

From the above, it is, clear that the directors as represented by Mr *Nhemwa* have no *locus standi* to appear in court at this stage of the process of provisional judicial management.

In terms of s 305 (1), (b) of the Act the court shall inter alia, consider the report of the provisional judicial management made in terms of s 303. Therefore the provisional judicial management, as represented by Mr *Mlotshwa* has *locus standi* to appear on the return date.

Issue No. 2

Mr *Mlotshwa* submitted that it was not competent for this court to deal with any of the matters set out in s 305 of the Act, in particular the confirmation of a provisional order, in the absence of a valid and existing return date. The return date lapsed on 14 July 2013 and was not extended. Such an extension can be effected in terms of s 305 (2) of the Act. Such proceedings would be irregular particularly in those instances where those creditors who have not proved their claims are not afforded the opportunity to do so in terms of s 305 (1) (c) of the Act on the return date.

Mr *Ruzengwe* and Mr *Nhemwa*'s common position is that the setting down of sequestration or winding up of companies is done in terms of Companies Act and Order 32 r 247 (3). They submitted that the return date was advertised and all interested parties given an opportunity to present their positions. No party can file papers after the return date other than those already before the court.

As I have already stated, the parties, are not agreed on exactly what transpired on the return date, which resulted in the matter being returned to the opposed roll. The return date was not specifically extended.

I believe the starting point is the Companies Act itself. Section 305 provides:

“Return day of provisional judicial management order

- (1) On the return day fixed in the provisional judicial management order, or on the day 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 the 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 possibility 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 that it thinks just.” (my own underlining)

In terms of the underlined part, the court, on the return date, may make any other order it thinks just. *In casu* the court, seeing that the matter was now opposed, referred the matter to the opposed roll where it would be properly ventilated and determined. Thereafter, order 32 r 247 (3) (4) comes into operation. Subrule 4 provides

“Rules 238 and 240 shall apply, *mutantis mutandis*, to the hearing of a matter consequence upon the issue of a provisional order referred to in subrule (3).”

Mr *Mlotshwa's* concerns are addressed by the provisions of order 247 (3). The provisional order issued by the court must specify the date and place at which the court will hear argument on confirmation of the order. It must also specify the manner in which it will be published and the persons on whom the copies of the order are to be served. *In casu*, the provisional order was advertised and it had a clause which invited persons who wished to oppose the confirmation of the provisional judicial management order to file notices of opposition with the Registrar and to appear before the court on the return date. Those who filed their papers by or appeared in court on 17 September 2013 will be notified of the set down dates. As a result, there will be no prejudice to any of the interested parties.

The other approach to the issue is that adopted by PATEL J (as he then was) in the *Boka's supra*. He considered the circumstances of the matter before him and concluded;

“to take the view that the failure to extend the return date of the provisional order should not be regarded as being fatal to its continuing validity. Accordingly, to deem it appropriate to exercise my discretion under rule 4 C to condone that failure and to proceed with this matter on the basis that the provisional order remains in full force until it is confirmed or discharged.”

In casu I have considered that the companies have remained under provisional judicial management for 36 months now. The provisional judicial manager has issued his reports, and the members and creditors have held their meetings and expressed their wishes. The Master has also compiled his report. As was stated in the *Boka case supra* this court should be less inclined to interfere, at a late stage, in the judicial management of the respondent companies and hold that the general balance of convenience is overwhelmingly in favour of treating the provisional order as having remained operational up to the time of hearing. It is in the interests of all parties concerned to know where they stand. I will therefore deem that the provisional order remain in full force.

Whether the provisional order should be confirmed or discharged.

The requirements for confirmation or discharge of a provisional judicial order are set out in s 305 of the Act. For a court to arrive at a decision it must consider.

- (i) The opinion and wishes of the creditors and members of the company
- (ii) The report of the provisional judicial manager
- (iii) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and the nature of their claims;

- (iv) the report of the Master;
- (v) the report of the Registrar of Companies

After considering the above, the court may confirm the 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 equitable to grant such an order----.”

The purpose of judicial management was clearly spelt out in *International Capital Corporation (Pvt) Ltd v Clarison (Pvt) Ltd* 2000 (1) ZLR 585 H at 570 B-F.

“Generally, a company should not be permitted to be dissipated by winding up and dissolution because it has suffered a set back with regard to the repayment of its debts or the performance of its obligations, which if it were to be given time, it would be able to surmount and become successful.

“The procedure of judicial management is intended to be a means for affording it such time. Judicial management should not be instituted or continued merely on the basis that while it subsists the company’s assets maybe sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation: see *Millman NO v Swartland Huis Meubileerders* (Edms) Bpk 1972 (1) SA 741 (C0 at 744-45 and *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) at 684 and *Henochsberg on the Companies Act* vol. 1,5 ed by PM Meskin, p 923.

Judicial management is a special dispensation which can be granted to a company only in exceptional cases – see *Silverman v Doorhoek Mines Ltd* 1935 TPD 349 at 353; *Bahnenn v Fritzmores Exploration (Pvt) Ltd* 1963 (2) SA 249 (T) at 250 – 251; *Ladybrand Hotel (Pty) Ltd* 1963 (2) SA 249 (T) at 250-251; *Ladybrand Hotel (Pty) Ltd v Seal & Nor* 1975 (2) SA 357 (O) at 359. Judicial management implies that there be a temporary reconciliation of conflicting interests – those of the company in being unable despite its difficulties to continue its operations in the ordinary course and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability were that there to be judicial management the company would be able to achieve the goals envisaged by s 300 (a) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company’s management or increase the profitability of its operation – see *Henochsberg on the Company Act supra* at p 924 and *Makuvha & Ors v Lukoto Bus Service (PTY) Ltd and Ors* 1987 SA 376 (VSC) at 397.”

The issue therefore is whether if the company is placed under final judicial management it will be enabled to become a successful concern and whether it will be just and equitable to do so. The arrive at the appropriate decision I considered the reports by PMJ, the Master and the submissions made by the applicant who is one of the creditors

The P.J.M report

The companies have been in difficulties since 2001. In 2006 they were placed under provisional judicial management and later final judicial management until June 2008, when an investor Elgate (Pvt) Ltd offered to invest US 5.4 million. 18 months later, the companies were placed under provisional judicial management again.

The PJM's opinion is that the respondent companies are hopelessly insolvent. His basis for saying so is that the Master had provisionally accepted claims worth US13 871 678.56. To this amount is to be added a recent claim by Agribank, secured by a mortgage bond, in the amount of US5.8 million. The total liabilities of the company will amount to \$19 671 678.56. The debt might rise to US20 million when costs of judicial management are factored in including those of the Master.

The huge debt figure always the combined assets valued at \$5 979 219. 00

The biggest creditor to the companies is Parrogate Zimbabwe Pvt Ltd whose claim is for \$3 000 000.00. Although the amount is subject of pending liquidation, the amount is secured by a bond of US3 million over the assets of the companies i.e. their immovable property.

The companies do not therefore have free immovable assets.

There is no single shareholder who is prepared to support the judicial management by proposing injection of capital into the companies. There is no indication, in the turn around proposed by Aurifin, of an investor or financial institution ready or willing to provide the working capital. In any event such capital will not be forthcoming because the companies assets are encumbered and in some the instances to financial institutions.

He also commented on the unfavourable conditions in the textile industries due to competition from cheaper imports ageing equipment which requires replacement and. He concluded by saying that the only prospect for creditors getting paid is for the companies to be placed under provisional liquidation, where outside of the secured creditors, a potential investor might be willing to make a palatable offer to the unsecured creditors.

Master's report

Various creditors and members meetings were held where the PJM would present reports. The final meeting was held on 17 April 2013 where the PJM's reports were discussed to conclusion. The PJM presented his position per his report above. The issue was put to vote. A total of 13 creditors whose total claims amount to US6 million voted for final judicial management. Their reasons for doing so were

- i) Workers wanted to save their jobs and the communities they lived in.
- ii) Unsecured creditors felt that they might not get anything upon liquidation due to ranking of creditors.
- iii) They had hope in the turn around strategy presented by Aulin Pvt Ltd.

Creditors whose total claims were \$5 536 758.00 voted for liquidation their reasons were

- i) There was no hope that an investor will be found.
- ii) The ageing equipment which needed replacement
- iii) They had waited for too long for payment and they could accept whatever comes from liquidation.

The members who were present voted for final judicial management.

Their reasons were that

- i) There were prospects of a turn around contained in the Aurifin report.
- ii) There will be proper management.
- iii) There would be a conducive environment for investors after the 2013 harmonised elections.

According to the PJM's report, a total of 135 creditors claims amounting to \$13 871 078 were provisionally accepted.

The Applicant's Position.

After the meeting of the 17 March 2013 where the PJM had recommended liquidation the members and the creditors sought an independent opinion from Aurifin.

The members and some of the creditors also believed that the PJM had grossly undervalued the companies immovable properties to paint a picture of insolvency and cause liquidation of the companies. They filed an evaluation report of the Chegutu property which was done before the placement of the companies under the provisional Judicial Management. The value was placed at \$13. 2 million.

It was the applicant's opinion that the companies can be turned around as illustrated by the following.

- (i) The PJM was able to enter into a toll manufacturing contract with Kithra Enterprises (Pvt) Ltd which was producing army wear.
- (ii) The respondent companies supplied uniforms to the police and prison services.
- (iii) The respondent were major producers of hosiery material especially school socks which were imported.

The applicant commended that the companies were the major producers of yarn both for the local and export market. Their demise affects not only the shareholders and creditors but the collapse of all downstream and upstream industries such as cotton production, ginning, textile and clothing industries.

The towns of Kadoma and Chegutu have borne the brunt of the closure of the companies. All aspects of development have been affected since revenues from the companies, their workforce and downstream industries have dried up.

The Aurifin report was of the view that it is possible to revive the fortunes of companies. It puts forward the following measures

- (i) Shareholding restructuring
- (ii) Implementation of scheme of arrangements.
- (iii) Capital raising
- (iv) Production.

Long term, the companies can then consider identifying institutional investors and re-listing on the Zimbabwe Stock Exchange.

It concluded by saying that on a balance of probabilities, the continuation of judicial management could result in the restoration of normalcy as opposed to liquidation

Analysis

The PJM report paints a dim picture about the respondent companies situation. According to his report the companies have debts of just under \$20 million against assets valued at US \$979 219.00 the immovable properties are encumbered. The biggest creditor is Parrogate (Pvt) Ltd with a claim for \$3 million.

The Masters report reflects that creditors who are owed the larger amount voted for final judicial management. Amongst these creditors are the workers of the companies who are owed about 42% of the total creditors claim, in respect of salary arrears and proposed retrenchment packages. These workers are members of the applicant. They are prepared to enter into payment arrangements with the companies if the companies are placed under Judicial Management.

Of those creditors who voted for liquidation, the bulk of the amount is claimed by Parrogate Pvt Ltd. This amount is the subject of court proceedings as it is disputed. If this amount is subtracted from the total of those who voted for liquidation, only an amount of \$2 536 755 will remain as claims of those who voted against judicial management compared to total claiming of about US 6 500.00 who voted in favour of final judicial management.

There is an amount of 5.4 million which is owned to Agribank. The claim had not been accepted at the time the Master's report was filed. From the papers filed on record, it appears an amicable solution is likely to be revealed in respect of this amount.

There is also the issue of Elgate Investments (Pvt) Ltd. This entity was meant to inject an amount of \$5,4 million as investment in the companies. The PJM was still investigating whether this amount was injected, It affects only 1 million was injected. There is litigation to compel Elgate to produce proof that it paid the amount in full.

The PJM in his report date 2 February 2011 he put the value of the respondent's companies immovable properties in Harare, Kadoma, Chegutu and Gweru at \$.2million dollars. The applicant puts this value in issue. They described it as undervaluation. In support of their contention, they produced a valuation report on the Chegutu property which put the value 13,2 million dollars. What comes out from all the above is that the Provisional judicial manager's report contains some discrepancies which are not explained. I will deal with them here under

1. If a property was valued at 13.2 million dollars just before the placement of the companies under judicial management how can all the immovable properties, with one located in Harare be valued at 4.2million dollars
2. If one were to subtract the amount being claimed by Parrogate and that is owed to the workers in sum of \$4 816187, 25 it would leave an amount of \$3 787 259. The total remaining amount includes amount owed to such institutions as ZESA, NSSA and ZIMRA. Could the companies not be able to be turned around and pay this amount?
3. The issue of Agribank's claim was not properly ventilated. It appears from the papers that the debt to Agribank is owed by FSI and the respondent's companies guaranteed the date. There are indications from FSI that it is in some discussions with the bank which might result in the security being released.

On the other hand there are some sound turn around strategies put forward by Aurifin. These will prevent the company from being dissipated by winding up and dissolution. My view is that the respondent's companies should be given time to pursue the proposals put forward by Aurifin and the applicants. They will be able to surmount the current difficulties and become a successful concern again.

The creditors who voted for the placement of the companies under judicial management, proposed that Knowledge Hofisi of Aurifin Capital (Pvt) Ltd be appointed the judicial manager. I would agree with their proposal since he is the one who came up with the turn

around strategy. The provisional judicial manager does not believe in final judicial management but in liquidation. It is therefore in the best interest of all concerned that Knowledge Hofisi be appointed the final judicial manager.

In the result I make the following order;

- 1) 1st, 2nd, 3rd, 4th, 5th and 6th respondents are hereby placed under Final Judicial Management.
- 2) Subject to the provisions of s 305 of the Companies Act [*Cap 24:03*] the master shall appoint Knowledge Hofisi of Aurifin Capital Private Limited as final judicial manager with the powers and duties set out in s 306 and s 307 of the court and subject to the supervision of this court.
- 3) From the date of that appointment and upon completion of the Bond of Security in accordance with s 274 of the Companies Act [*Cap 24:03*], the Final Judicial Manager shall forthwith take over the management of the 1st, 2nd, 3rd, 4th, 5th and 6th respondent companies and shall prepare and submit reports in accordance with s 306 (i) of the Act.
- 4) The Final Judicial Manager shall have the powers set out in sub paragraph (a) to (m) of s 306 of the Companies Act [*Cap 24:03*] and, without the consent of the creditors or the shareholders, may raise money on the security of the 1st, 2nd, 3rd, 4th, 5th and 6th respondent companies assets, or with the consent of the creditors and shareholders dispose off part of the assets of the respondent companies to raise working capital or to enter into a scheme of arrangement of resuscitate the respondent companies.
- 5) All actions and applications and the execution of all Writs, Summons and other process against the 1st, 2nd, 3rd, 4th, 5th and 6th respondent companies shall be stayed and not proceed without the leave of this court.
- 6) The Final Judicial Manager shall, in terms of s 308 of the Companies Act [*Cap 24:03*], be entitled, from the assets of the respondent companies, to the payment of remuneration at a rate to be determined by the Master of the High court and to reimbursements for all out of pocket expenses incurred in the course of his duties.
- 7) The Provisional Judicial Manager, Winsley Militala of Petwin Executor and Trust Company (Private) Limited, shall handover all matters and shall account to the Final Judicial Manager and is hereby discharged in terms of s 305 (2) (a) of the Companies act [*Cap 24:03*].

- 8) The Final Judicial Manager shall pay both applicants and respondents costs of these proceedings out of the assets of the companies.

Mapombere, Musakana and Ruzengwe, applicants' legal practitioners
G.N. Mlotshwa and Associates, respondents' legal practitioners