HOMAGE FUNERAL SERVICES (PVT) LIMITED
for its winding up
and
ASMON KOROMORA
and
MODDY DZENGA
and
FAUSTINA KANYEREZA
and
NICHOLAS KOPO
and
ONISIMO DZAMA
and
JOSEPH MUSHARA
and
LAZARUS PIRIMO
and
ERNEST NAMBORO
and
DAVID GUBUDU
and
PROSPER MURIRO
and
INNOCENT ITAYI
and
TONDERAI GWARA
and
PARADZAI KASEKE

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 4 April, 14 May 2013 and 18 August 2014

Opposed Application

V. Muza, for the applicant
Chimwamombe, for the respondents

BERE J: After hearing submission by both counsels I made the following order on 14 May 2013.

"IT IS ORDERED:

1. That Homage Funeral Services (Private) Limited, be and is hereby placed in liquidation.

2. That Fremus Executor be and is hereby confirmed as liquidator of the company.

3. That the liquidator of the company shall have the powers set out in s 221 (2) (a) – (h) of the Companies Act [Cap 24:03].

4. That the costs of these proceedings shall be costs in liquidation."

After pronouncing this order I did indicate that my reasons would follow. Here they are.

By special resolution of 7 March 2012 the petitioner authorised one of its directors Tendai Merilyn Evans to initiate the winding up of the applicant by the court owing to various viability challenges outlined by the deponent in the founding affidavit.

It will be noted that this court had on 13 June 2012 granted the applicant the provisional order for liquidation.

On 14 May 2012 I was then seized with an application for the confirmation of the provisional order already in force.

Confirmation of the provisional order was strenuously opposed by 13 out of 42 employees of the applicant as per the uncontroversial averment by the applicant in its answering affidavit filed in this court on 20 August 2012.

Two contentious issues have arisen in this application. The first issue is the allegation by the respondent that the petitioner has not fully complied with the procedure set out under s 243 of the Companies Act[1] This point was raised as a point *in limine*.

Secondly, it was argued by the respondents that substantively placing the petitioner under judicial management is a better option than granting it an order for liquidation.

I now deal with the two issues in the order in which they were raised.

ALLEGED WRONG PROCEDURE

In raising this as a point *in limine* the respondents contended that in bringing this application the applicant was supposed to fully comply with the provisions of s 243 of the Companies Act.

[1] Chapter 24:31

It does seem to me that the need to fully comply with the provisions of s 243 of the Companies Act need only be followed where the company has made a conscious decision to voluntarily wind up in terms of s 242 of the same Act. The act is self-explanatory in this regard.

However, where a company seeks to be wound up by inviting the court to exercise its discretion in terms of s 206 of the Companies Act, the need to comply with s 243 of the same Act does not arise.

In terms of s 206(f) and (g) a company may be wound up by the court if the company is unable to pay its debts provided the court in its wide discretion is of the opinion that it is just and equitable that the company should be wound up.

It is clear to me that where voluntary wind up is sought under s 242 *(supra)* the narrow issue for determination by the court is whether there has been compliance with s 243 and there is no question on the part of the court to use its discretion as to whether or not winding up should be granted. Once compliance is satisfied, winding up becomes automatic.

In the instant case, it is clear as argued by the petitioner's counsel that the resolution made by the directors of the petitioner and the subsequent founding affidavit filed in support of the desired winding up speaks to asking the court to exercise its discretion in granting the order sought.

This explains why the deponent of the petitioner went out of his way to demonstrate the challenges faced by the petitioner, all pointing to the effect that the petitioner's total debts now exceed its assets. There can therefore be no question of the applicant having used the wrong procedure.

In my overall assessment of the point *in limine*, I entirely agree with the position adopted by Mr *Muza*, for the applicant, and proceed to dismiss it.

GRANTING OF LIQUIDATION OR JUDICIAL MANAGEMENT

As already indicated it is significant to note that the applicant in its quest to have itself wound up by this court has sought to rely on the provisions of s 206 (f) and (9) of the Companies Act[2] which authorises this court to grant the desired order if the conditions outlined therein are satisfied.

[2] The Companies Act [Cap 24:03]

The applicant explained in great detail in both its founding and answering affidavit that it is staring serious viability challenges which make its continued existence impossible.

Of particular concern to this court is the unchallenged and categoric position by the applicant in its founding affidavit that:

> "6.3 Throughout its life time, the petitioner was struggling to stay afloat until it has come to its current state of having liabilities that exceeds its assets.
>
> 6.4 The petitioner's denise was also compounded by the strong competition in the market that has seen the rising of well capitalised new corners who have grabbed a large chunk of the business. The petitioner has failed to attract new clients or source more funds to reinvent or rebrand itself. In fact, the petitioner has no prospects of recovery.
>
> 7. The petitioner's employees have unpaid arrear salaries as have the Directors. In November 2011, the petitioner was criminally charged in the Gweru Magistrates Court for contravening s 82(3) of the Labour Act (28:01) as read with Statutory Instrument 45 of 1993 s (1) being failure to pay wages. I attach hereto a copy of the charge sheet marked as Annexure "D". I also attach hereto a schedule outlining arrear wages and salaries marked as Annexure "E".
>
> 7.1 Petitioner owes NSSA amongst other creditors which has since issued summons with this Honourable Court to recover the amount of forty two thousand four hundred and forty United States Dollars (US42 440-00) being contributions. I attach hereto a copy of the summons marked as Annexure "F". In the same way, petitioner owes ZIMRA to the tune of sixteen thousand United States Dollars (USD 16 000-00) in unpaid P.A.Y.E taxes owing to its failure to pay salaries and wages to its employees."

The founding affidavit went on to give further details which included financial statements all of which were meant to show that its continued operations were under serious threats from its creditors as well as its ever increasing statutory obligations.

A perusal of the respondents' notices of opposition confirm the viability challenges and generally the financial challenges that the petitioner is facing. The only difference is that the notices of opposition try to speculate on the causes of the challenges faced by the petitioner.

It is also noteworthy that whilst all the respondents acknowledge that the petitioner is practically insolvent, they all advocate for the applicant to be placed under judicial management without properly laying a basis for such an alternative.

It occurs to me to be imperative that where judicial management is proposed as a viable alternative to the desired winding up, there should be a proper basis for that. That proposition must not be hinged on pure conjective or speculation.

I find it to be equally perturbing that the lead voice in the opposition of this application ironically comes from an Accounting Officer of the applicant who from the look of it has been watching the operations of the applicant getting worse and drifting out of control and suddenly he wants to claim that placing the applicant under judicial management could be viable. The deponent does not explain in his notice of opposition how this would extricate the applicant from its insolvency let alone how the proposed judicial management would be structured to improve the fortunes of the petitioner.

The situation in the instant case is difference from what the court had to deal with in the case of *SAA Distributors (Pvt) Ltd* v *Sport en spel (Edms)* Bpk[3] a case referred to me by the respondent's counsel.

In that case the court had to deal with a situation where the majority of the creditors were against the liquidation of the respondent and it was also sufficiently demonstrated that if the company was allowed to enjoy the peak trading period caused by Christmas, the company could be able to meet its debts.

In the instant case there are so many creditors the majority of which have not opposed the proposed liquidation by the petitioner.

The firm view that I take after hearing both counsels is that the applicant has sufficiently laid the ground upon which it seeks liquidation. There is overwhelming evidence which incidentally is largely supported by the respondents which clearly demonstrate that the applicant is overwhelmed by its debts.

I am of the view that the applicant's continued operation will result in further mounting of its debts much to the detriment of its marauding creditors who incidentally include the respondents themselves. There is need to ensure that the few remaining assets of the company be distributed in a more rational manner among the creditors.

[3] 1973 (3) SA 371

Accordingly, the provisional order granted by my brother judge, MTSHIYA J is hereby confirmed.

Muza and Nyapadi, Applicant's Legal Practitioners
Danziger and Partners, Respondent's Legal Practitioners