

BENNY HLATSHWAYO & 14 OTHERS

Versus

GEOZING PAWNBROKERS (PVT) LTD

And

PHILIP NDLOVU N.O.

And

MATSHOBANA NCUBE N.O.

And

THE ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 26 FEBRUARY & 12 MAY 2016

Opposed Matter

R. Ndlovu for the applicants

S Collier for 2nd & 3rd respondents

TAKUVA J: The 1st respondent was placed under provisional liquidation on the 13th of June 2013 which was confirmed on the 11th of July 2013. The 2nd and 3rd respondents were then appointed provisional liquidators.

Subsequently, on 19 December 2013 the creditors held a meeting before the 4th respondent where they passed a resolution that the 1st respondent be placed under judicial management. At this meeting over 200 creditors voted that the company be placed under judicial management while 4 creditors were for liquidation. The applicants then filed an application seeking an order removing the 1st respondent from liquidation and placing it under provisional judicial management. This court per KAMOCHA J granted an interim order on the 14th day of March 2014 in the following terms:

“Interim relief granted

Pending the finalisation of this matter, applicants be and are hereby granted the following relief:

1. The 1st respondent be and is hereby removed from provisional liquidation and placed under provisional judicial management.
2. Pending the return date, this order shall operate as a provisional Order of Judicial Management.
3. The Assistant Master be and is hereby ordered to appoint Thabani Lihle Siziba of Waterbuck Trust (Pvt) Ltd as the Judicial Manager of the applicant with powers conferred by section 221 (2) (a) to (h) as read with section 303 of the Companies Act [Chapter 24:03].
4. A copy of this order shall be served on the Assistant Master.
5. This order shall be published once in the Government Gazette and in one Friday edition of the Chronicle newspaper.
6. All court actions and proceedings and the execution of all writs, summons and other court processes against the company be and are hereby stayed and must not be proceeded with without the leave of the court.
7. Whilst the Provisional Judicial Management Order is in force, all actions, executions of writs, summons and other proceedings against the 1st respondent shall not be proceeded with without leave of this honourable court. Any goods attached or removed shall forthwith be released from such attachment and placed in the custody of the Provisional Judicial Manager.
8. Any existing directors of the company be and are hereby divested of their power and authority as directors and managers of the 1st respondent.
9. Any interested party may inspect a copy of the application at the office of the Assistant Registrar of the High Court, Bulawayo or at the office of the Assistant Master of the High Court, Bulawayo.
10. Any interested party may appear before this court sitting at Bulawayo on the 17th day of April 2014 to show cause why a final order should not be made placing the respondent's company in Judicial Management.
11. Any person (including creditors) intending to oppose or support the application on the return date of this order shall:-
Give due notice to the applicant c/o Cheda and Partners Legal Practitioners, 6th Floor LAPF House, 8th Ave/Jason Moyo Street, Bulawayo within twelve (12) days of date of publication of this order.”

The terms of the final order sought by the applicants are as follows:

“That you show cause why a final order should not be made in the following terms:-

1. The 1st respondent Geozing Pawnbrokers (Pvt) Ltd be and is hereby placed under final judicial management.

2. The Assistant Master be and is hereby ordered to appoint Thabani Lihle Siziba of Waterbuck of the 1st respondent with powers conferred by section 221 (2) (a) to (h) as read with section 303 of the Companies Act (Chapter 24:03)."

The applicants are now seeking confirmation of the provisional order referred to above. The application is opposed by the 2nd and 3rd respondents.

The relevant facts that are either common cause or not seriously disputed are that:-

1. Geozing Pawnbrokers (Pvt) Ltd, a duly incorporated private limited company was in the business of money lending and investment.
2. The applicants who are the creditors of Geozing invested various sums of money into the company with the investments bearing interest at the rate of 30% per month.\
3. Around March 2013, the company failed to pay the investments which were due and its various schemes collapsed leaving a vast number of creditors exposed.
4. The applicants applied and obtained the orders cited above.

The applicants have relied on section 305 of the Companies Act (Chapter 24:03) (the Act) which sets out the grounds which the court must consider in deciding whether or not to confirm the provisional order. These grounds are encapsulated in section 305 (1) as follows:

“305 Return day of judicial management order

- (1) On the return day filed 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 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, it may discharge the provisional judicial management order or make any other order that it thinks just.” (emphasis added)

Reliance was also placed on *Zimbabwe Textile Workers Union v David Whitehead Textiles Ltd & Ors* HH-170-14.

In casu, the creditors and members of the company’s opinion and wishes are contained on page 5 of the minutes of a meeting held on the 19th of December 2013. The relevant portion states: “Over 200 creditors voted that the company be placed under Judicial Management while 4 present were for liquidation.”

The report of the provisional judicial manager supports the confirmation of the order. In his report, the provisional judicial manager states:

“It is my considered opinion that Geozing Pawnbrokers (Pvt) Ltd should be nursed back into financial health and must be given another chance in life to resume its course as a successful entity based on the following reasons:

- (a) The protection of the judicial management order enables all creditors to their money in an orderly manner as opposed to who gets the writ first and those who move in later get nothing. The current graph at the pawn broking shop shows a positive result.
- (b) The rock sampling at the mine shows an output of 30 grammes per tonne and once the mine runs at 100% capacity we are assured of not less than 2kg a month which amounts to about \$95 000,00 gross. I wish to stress that this could not have been done in the past as we were operating at 30% since the matter was opposed. The 30% was done as a trial to assess the mine’s viability and the results were impressive.
- (c) Our marketing staff at the pawn shop are doing a sterling job in securing clients and at present they have widened their customer base as everyone is in need of money.
- (d) Payments of some creditors in full shows that if the company is given another chance then it will definitely pay all the creditors.
- (e) The current projects that are running are long term and if allowed to mature they will reach out to more clients and bring in more income to pay off creditors.

It is therefore my humble opinion that if Geozing Pawnbrokers (Pvt) Ltd is given another chance it will recover from this financial set-back but most importantly it will manage to pay all its creditors. It is also pertinent to note that the Geozing Pawnbrokers (Pvt) Ltd assets are now in

the form of running businesses and if the company is liquidated creditors will not receive anything.

The report also covered the following areas:

1. An account of the general state of affairs of Geozing Pawnbrokers (Pvt) Ltd.
2. Reasons why Geozing Pawnbrokers is unable to pay its debts at the moment.
3. A statement of Geozing assets.
4. A complete list of Geozing creditors and
5. Particulars of sources of funding to resuscitate Geozing.

As regards the number of creditors who did not prove claims at the 1st meeting of creditors, the provisional judicial manager provided the following data.

“(a) The approved creditors are now at 1 846 from 1873 with a claim value of \$3 605 921,67 compared to the previous amount of \$3 625 540,67.

(b) The unapproved creditors are 1 791 with a claim value of \$2 838 366,58.”

The Master in his report dated 25 February 2016 believes that it will be to the best interest of the company if an order for final judicial management is granted. His opinion is based on the fact that the company has kick started the following business operations:

- (a) Pawn shop business
- (b) Poultry project
- (c) Bottle store and
- (d) Mining of gold

Finally, the Master recommended that the creditors’ wish be taken into consideration and the final judicial manager be given at least a year to try to trade and pay creditors.

The applicants argued that the 2nd and 3rd respondents have no *locus standi in judicio* since they have absolutely no interest in the affairs of this company in that their mandate expired when the order for provisional judicial management was granted. It is common cause that the 2nd and 3rd respondents are ex co-liquidators. Their opposition is solely based on their views of the company. The two respondents however argued that they had a “judiciary duty to protect the interests of the creditors by liquidating the company.” While I have my doubts over the validity of this submission, this point is moot for the simple reason that lack of opposition does not entitle the court to dispense with the requirements set out in section 305 (1) of the Act.

Respondents have set out two broad grounds for opposing this application namely;

- (a) that the applicants have failed to discharge the onus to prove that the winding up proceedings of Geozing Pawnbrokers (Pvt) Ltd should be set aside in terms of section 227 of the Companies Act and
- (b) that the applicants have failed to prove that Geozing Pawnbrokers (Pvt) Ltd can be enabled as a successful concern through the process of judicial management.

Section 227 of the Act states:

“227 The court may at any time after the making of an order for winding up, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings on such terms and conditions as the court deems fit.”

Respondents’ argument is that section 227 applies where some new factor has rendered the order of winding up unnecessary, thereby justifying its setting aside. See *Storti v Nugent & Ors* 2001 (3) SA 783 (W) where GAUTSCHI AJ commenting on section 354 of the South African 1976 Companies Act (now repealed) which is similar to section 227 of the Zimbabwean Act said;

“A moment’s reflection reveals that an application to set aside or stay winding up proceedings may arise in two broad situations. On the one hand, the winding up order may be attacked on the basis that it should never have been granted by reason of some defect in the procedure or the merits of the application; on the other hand, the winding up order may be unassailable in itself but later events may render a stay or a setting aside of the winding up proceedings necessary or desirable. In my view, the section is intended to cover the latter situation not the former. My reason for this is the following: firstly the winding up order is assailable and it may be rescinded under the common law and there is no need for a section in the Companies Act to provide for such a situation.” (emphasis added)

See also *Ward & Another v Smit & Others: In Re Gura v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) where it was held that “exceptional circumstances” had to be disclosed in order to grant a discharge of a winding up order which was in effect a rescission. It was contended for the respondents that *in casu* the applicants have not led any evidence to prove that the order winding up the company should be set aside, now have they led any evidence to suggest that the circumstances have changed since the granting of the original winding up order.

In my view, this submission has no merit in that the applicants filed minutes of a creditors meeting attended by Mr M. Ncube, (one of the liquidators) where a compromise was reached and a resolution passed to apply for the setting aside of the final liquidation order. At this meeting, Mr Zingane, the former director was asked to present a statement of the company’s affairs which he did. These developments in my view can be classified as ‘later events’ or exceptional circumstances justifying a setting aside of the winding up proceedings – see R. H. Christie *Business Law in Zimbabwe* 2nd ED 1998 at p 433 where the learned author states:

“If the liquidator, authorized by a joint meeting of creditors and contributories (s 221(4)) is able to arrive at a compromise with creditors, it may be possible to apply for the cancellation of the winding up order, reinstatement of the company and discharge of the liquidator: *Ex parte Osmond and Shacklock* 1944 SR 181; *Ex part Beretta & Sons (Pvt) Ltd* 1963 R & N 66 1963 (2) SA 146.”

On that basis therefore and on the basis of the evidence relating to the company’s state of affairs the provisions of section 227 of the Act were satisfied.

The 2nd and 3rd respondents also submitted that the company cannot be enabled as a successful concern through the process of judicial management because of the following reasons:

- (1) judicial management *in casu* is an improper vehicle in that the company owes its creditors over US\$5 000 000,00 while its assets total approximately US\$1 000 000,00. Consequently, less the costs of liquidation, the creditors can expect to be paid approximately seventeen cents on the dollar.
- (2) The business of Geozing Pawnbrokers is illegal and therefore the appointment of a judicial manager would be of no purpose as there is no legitimate business to manage.

I take the view that the fact that there is a huge gap between the amount of debt and the value of the company's assets, does not render the vehicle of judicial management improper. The test is whether or not there is a reasonable probability that the company 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. I am satisfied from the evidence on record that the company can operate profitably. It is common cause that liquidation will result in creditors earning six cents for every dollar invested. While it is accepted that it would take the company a considerable period to pay off all the debt, this cannot be the basis for denying the creditors their wish to have the company placed under judicial management. It has not been denied that Geozing owns mining claims in Turk Mine which although ill equipped, have the potential to produce profits. Also, the 2nd and 3rd respondents have not challenged the existence of various businesses or projects being run by the company. What they have simply said is that they will generate very little over the years.

Finally, the argument over the illegality of Geozing's operations is untenable in that it was not disputed that whatever charges had been preferred against the company were withdrawn and preferred against Mr Zingane in his personal capacity. The articles of association of Geozing were not produced. Therefore the unlawful operations remain a bold and unsubstantiated allegation.

In the final analysis, I find that the applicants have satisfied the requirements for the confirmation of the Judicial Management Order. Put differently, I find that the proposed business rescue constitutes a better option than the liquidation of Geozing Pawnbrokers (Pvt) Ltd.

Accordingly, it is ordered that:-

1. The 1st respondent, Geozing Pawnbrokers (Pvt) Ltd be and is hereby placed under final judicial management.
2. The Assistant Master be and is hereby ordered to appoint Thabani Lihle Siziba of Waterbuck Trust (Pvt) Ltd as the Judicial Manager of the 1st respondent with powers conferred by section 221 (2) (a) to (h) as read with section 303 of the Companies Act (Chapter 24:03).

R. Ndlovu & Company, applicant's legal practitioners
Webb, Low & Barry, 2nd & 3rd respondent's legal practitioners