

ADELE COLETTE FARQUHAR
versus
BANKNOTE ENTERPRISES (PVT) LTD
t/a BANKABLE REAL ESTATE
and
RODWELL MBIRIMI
and
BETTY NOMSA MBIRIMI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 27 MAY 2016 AND 9 JUNE 2016

Opposed Application

N. Mazibuko for the applicant
N. Mashayamombe for the 2nd & 3rd respondents

MATHONSI J: The applicant must be regretting tying her retirement and indeed the twilight of her career to an estate agency business that had the second respondent in it. After what may have been an illustrious career as a Commercial Letting Manager of a well-known estate agency in Bulawayo, John Pocock and Company Limited the applicant decided to resign from that respectable company and start her own real estate business. Not being a registered estate agent herself, she is a property manager and a trained lawyer, she badly needed a partner registered as an estate agent with the Estate Agents Council and the Real Estate Institute Zimbabwe in order to start that business. That is where the second respondent came in, a registered estate agent and a fellow of the Real Estate Institute. If the facts of this matter are anything to go by, perhaps that is all that the second respondent had.

I say so because he had purchased a shelf company in 2006 which had absolutely nothing but a single issued share and had never traded. He did not have the means to set it in motion. He had just left formal employment armed with his qualifications and certificates of registration but without the wherewithal to commence trading. It is that shelf-company which was chosen as a vehicle for business. When the parties came together as they certainly needed each other, and agreed to start an estate agency, under the banner of the first respondent which existed in name

only, they had to take a soft loan of \$1350-00 from the applicant's husband to find their feet. This was in January 2014.

From then the company progressed in leaps and bounds. The applicant and the second respondent were allotted 500 shares each reflecting their equal standing in the company. The company started trading in May 2014. No sooner had the new kid in town hit the ground running than differences between the members started emerging. They traded accusations and the inevitable happened on 13 October 2014 when, at the instance of the applicant, this court, per MOYO J, granted an order placing the first respondent company under provisional liquidation. A provisional liquidator was appointed but is said to have quickly resigned after the second respondent took issue with his appointment.

It is the granting of the final order of liquidation which has been strenuously opposed by the second respondent and his loving wife, the third respondent, who has dutifully deposed to a three line affidavit supporting every word uttered by the second respondent.

The applicant has approached the court seeking the winding up of the first respondent in terms of s206 (g) of the Companies Act [Chapter 24:03] on the ground that it is just and equitable that the company be wound up. This is because the applicant and the second respondent who are the only members of the company holding an equal shareholding and the only directors of it, are incompatible and unable to work together. They are unable to agree on anything resulting in them reaching a deadlock each time there is a meeting or there is need to make a decision.

The applicant paints a picture of the precincts of the company having been turned into a war zone. Intrigue and trickery are the order of the day as the second respondent desperately tries to elbow the applicant out of the business using every trick in the book. She accuses the second respondent of delinquency and poor time-keeping regularly failing to keep office hours, mismanagement of the company's accounts and contributing very little in the furtherance of the company's affairs. In addition, the second respondent is accused of deliberately keeping the applicant in the dark about the finances of the company.

As if that was not bad enough the second respondent is accused of having convened a shareholders meeting in October 2014 for the sole reason of removing the applicant as a director. To achieve that, he has suddenly claimed that the applicant was never a shareholder despite the

issuance of a share certificate to her. Instead he now claims that his wife, the third respondent, who, according to the applicant has never held shares in the company was allotted 122 000 shares with the second respondent being allotted 127500 shares, much to the chagrin of the applicant.

To justify that shareholding the second respondent has pulled out an dusted a shareholders agreement allegedly signed by himself and his wife on 20 December 2012 long before the applicant came into the picture and at a time when, by his own admission, the first respondent company was not trading but a mere shelf-company. To cap it all the second respondent has suddenly produced share certificates issued in favour of himself and his wife on 31 December 2012.

In opposing the application and the confirmation of the provisional order of liquidation, the second respondent has submitted that the applicant lacks *locus standi in judicio* to make such an application because she “indicated her intention to sell her shares and withdraw her capital she had injected from the company.” After she collected \$1230-00 being the capital she injected in the company, the applicant ceased to be a shareholder and remained only a director. Unfortunately the second respondent did not indicate who bought the shares of the applicant and did not produce proof of such a sale. To make a bad situation worse, he did not explain how in law, the withdrawal of \$1230-00 from the company (and not from a potential buyer of the 500 issued shares of the applicant) could equate to a sale of shares when there was no buyer of those shares and no price for the shares. Quite to the contrary the sum of \$1230-00 was paid by the company itself, buttressing the applicant’s point that it was a loan repayment and nothing more.

The second respondent insisted that although himself and his wife had received an allotment of shares in December 2012 pursuant to an agreement the two had signed on 20 December 2012 he had not prepared any returns for the allotment as he “had no money and [---] was not using the company.” He has since rectified the anomaly by filing them belatedly and paying late allotment filing costs. All this is to justify the argument that it is him, out of the goodness of his heart, who allowed the applicant to join his company before he against allowed her to “withdraw her shareholding” leaving him and his wife in the driving seat. Never mind that when the parties came together in January 2014 there was no company to join as it was not trading and he “was not using the company” and that no returns adverting to the allotment were

submitted to the registrar of companies “as [he] had no money.” Alice in wonderland. With those facts, *Mr Mazibuko* who appeared for the applicant had a point when he called the whole episode an elaborate fabrication.

In terms of s206 of the Companies Act [Chapter 24:03];

“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 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)

The court has a discretion to grant or withhold an order for winding up of a company in terms of s206 (g) of the Act. As stated by CHATIKOBO J in *Sultan v Fryfern Enterprises (Pvt) Ltd and Another* 2000(1) ZLR 188 (H) 192 A-B:

“Section 206(g) of the Act has been said to postulate not facts, but only a broad conclusion of law, justice and equity as a ground for winding up.

‘In its terms and effect (the section) confers upon the court a very wide discretionary power the only limitation originally being that it had to be exercised judicially with due regard to the justice and equity of the competing interests of all concerned.’

Per TROLLIP J in *Moosa NO v Manjee Bhawan (Pvt) Ltd and Another* 1967 (3) SA 131 (T) 136H.”

The discretion of the court arises out of the use of the word “may” in section 206 and the inherent jurisdiction of the court to prevent abuse of its process. See *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H) 414G; 415 A. These two sources, namely the use of the word “may” and the inherent jurisdiction of the court provide a judicial discretion, based on all the relevant circumstances of any case, to withhold an order of

winding up even if grounds for it have technically been established. That discretion is however very narrow. See *Dominion Trading FZ – LLC v Victoria Foods (Pvt) Ltd* 2013 (2) ZLR 332(H) 339 D – F.

Mr Mashayamombe for the second and third respondents has not asked me to exercise that narrow discretion and withhold the grant of a final order of liquidation. Instead he has commenced his onslaught on the application by asserting that the applicant lacks *locus standi* to bring this application because she is not a member of the company she having withdrawn her capital injection from the first respondent company.

In terms of s207 (1):

“An application to the court for the winding up of a company shall be by petition presented, subject to this section, by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties together or separately or, in a case falling within subsection (2) of section one hundred and sixty two, by the Minister accompanied, save in the case of a petition by the Minister, by a certificate of the Master, Assistant Master or a magistrate that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator.

Provided that—

- (i) a contributory shall not be entitled to present a petition for winding up a company unless—
 - (a) the number of members of the company is reduced below two; or
 - (b) the shares in respect of which he is a contributory, or some of them, were originally allotted to him or have been held by him and registered in his name for at least six months during the eighteen months before the commencement of the winding up or have devolved upon him through the death of a former holder.”

Section 202 defines a contributory as every person liable to contribute to the assets of accompany in the event of its being wound up and in terms of s201 every present or past member of the company is liable to contribute to the assets of the company to the extent of his unpaid up shares in the case of a limited liability company. Clearly therefore a shareholder is a contributory or member.

The applicant was allotted 500 shares and issued with a share certificate on 14 January 2014 before the company commenced business in May 2014. At that time the second respondent was also issued with the same amount of shares and without paying for them and the third

respondent had none. The applicant was therefore a shareholder and a contributory to the first respondent company. It is a fact that cannot be wished away because some months down the line merely because it then suited one member an attempt was made to disengage her for him to remain with the whole company for himself.

It must be appreciated that the moment the parties elected to conduct their business through the medium of an incorporation they were making the conscious decision to be governed by company law and could not, when it suited them, run away from its tentacles in preference to customary law or some other obscure and indeterminable law as would entitle the second respondent to fob off the applicant from the company for no other reason than that he is the one who bought it as a shelf company in 2006. For the applicant to lose her shareholding something had to happen to her 500 shares. She had to alienate them in one way or the other.

The second respondent has argued that the applicant lost her shareholding when she accepted payment of the sum of \$1230-00 from the company which is the amount she had injected into the business as capital. It begs the question: What amount was injected by the second and third respondents for them to claim a shareholding in the company? There has been a studious failure to allude to anything suggesting any capital injection done by that couple although in their myopic view they own the company.

Which then brings me to the issue of the shareholding agreement allegedly signed on 20 December 2012 between husband and wife and their share certificates bearing the date 31 December 2012 which *Mr Mazibuko* has called “an elaborate hoax.” The respondents cannot rely on those documents without burning their fingers. They have not disputed that at the time of engagement with the applicant in January 2014 the company only had one issued share which was held by Tevison Makuwe, as so often happens with self-companies. If the company had one issued share in January 2014 it is not possible that the shareholding agreement relied upon could have been signed two years earlier on 20 December 2014 neither is it possible that the share certificates for 127500 and 122000 in favour of the second and third respondents respectively could have existed then especially as the applicant was issued with share certificate number two. Of course they claim that they held certificates 1(a) and 1(b) respectively. If one believes that they would believe anything.

Even if I be wrong in drawing that conclusion, I would still find those documents invalid for other reasons. *Mr Mazibuko* has drawn my attention to the annual return lodged by the company through none other than the second respondent on 14 January 2014 which shows that as at that date only one ordinary share had been issued. If indeed the couple held the massive shares they claim to have allotted in December 2012, surely that would have appeared on the return.

The inescapable conclusion is that the shareholding agreement and the share certificates in favour of the couple are demonstrably a most recent and extremely shameless fabrication by individuals prepared to pull all the stops in order to divest a benefactor of everything that she has put into the company, a company that has enabled a down and out estate agent unable to find his radius to take off the ground.

In any event, in terms of s136(1) of the Act:

“Within one month after the passing of any special resolution a copy of that resolution shall be transmitted to the Registrar who shall, subject to subsection (2) register that resolution and that resolution shall be of no force or effect until it is so registered.”

That provision has been relied upon by the applicant in seeking to nullify the shareholders agreement of 20 December 2012, and the share allotment made under it. One would have expected the second and third respondents to address that issue but *Mr Mashayamombe* was unable to respond to that content to rely on the issue of lack *locus standi* only. What is not disputed can only be taken as admitted.

It is unimaginable that the second and third respondents would have entered into such a shareholding agreement and allotted to each other shares in December 2012 and fail to submit the resolution and/or return to the Registrar recording such allotment. Thereafter the second respondent commenced trading with the applicant in the name of the company after they joined forces in January 2014 all the way until they hit turbulence in October 2014. Only then did the second respondent see the wisdom of lodging the resolution and the returns. He says he has since paid late allotment filing costs, an exercise in futility in my view.

I am satisfied that what the second respondent has done clearly demonstrates that he cannot be trusted at all. He has cunningly tried to elbow the applicant out of the company in the most despicable way. He has dishonestly tried to bring his wife into a company she has not

interest in as a way of diluting the interest of the applicant and has exhibited the uncanny readiness to fabricate company documents at will in the pursuit of ill-gotten gain. Nothing can illustrate the pressing need, in the name of equity, to liquidate the company more than what the second respondent has done.

This is a person who, even as this application was pending and a provisional liquidation order had been issued, did not hesitate to register another company, Bankable Real Estates (Pvt) Ltd on 23 October 2014 exactly 10 days after the grant of the provisional liquidation order. It would be recalled that the first respondent's trading name is Bankable Real Estate. What the second respondent has done is to appropriate that trading name, register it as an incorporation and then continue trading in that name on his own as if nothing has happened. A breach of the duty of utmost good faith between directors and indeed members of a company has never been so crass. Such conduct shows a disdain of all that a provisional liquidation order stands for and a complete disregard of all principles of fairness. To cap it all, the second respondent has continued to contest the winding up proceedings all the way. This development also points to the fact that equity demands that the company be wound up.

In addition it also goes to the question of costs because by registering another company in the trading name of the company whose liquidation is sought, the second respondent not only displayed a contemptuous regard of the process of the court, but a readiness to circumvent the due process for his personal aggrandizement. While the court will not lightly resort to an award for punitive costs, which is a drastic remedy, such an award will be made against a litigant who is dishonest in his conduct. As stated by CHEDA J in *Mahembe v Matambo* 2003 (1) ZLR 148 (H) 150 B-D:

“It is, therefore essential that the courts only award such costs in situations where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process. Rubin, L *Law of Costs in South Africa, Juta and Co.* (1949) 190, classified the grounds upon which (the court would) be justified in awarding the costs as between attorney and client:

1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings.
2. Malicious conduct
3. Vexatious proceedings
4. Reckless proceedings.

5. Frivolous proceedings.”

In this case the entire opposition to the application for liquidation was anchored on dishonesty. The second respondent sought to deprive the applicant *locus standi* by fabricating documents, a fabrication as amateurish as it is disrespectful. But then there was method in all this madness because even the opposing affidavit lacked nothing in wounded pride and dignity but contained nothing of substance. Yet pending consideration of all that, the second respondent did not waste time to incorporate a business in the trading name of the first respondent and continued trading. For that there must be consequences to his pocket as the only antidote in the hands of the court is an award for punitive costs to register the court's disenchantment at dishonest conduct and an abuse of the process of the court.

In the result, it is ordered that:

1. The provisional order granted by the Honourable Mrs Justice Moyo in this matter on 13 October 2014 be and is hereby confirmed as a final order save that Antony Morris-Davies is not confirmed as the final liquidator.
2. The final liquidator shall be appointed in terms of the Chamber Application in case number HC 3005/2014 or in terms of s218 as read with s219 of the Companies Act [Chapter 24:03].
3. The costs shall be borne by the second and third respondents jointly and severally, the one paying the other to be absolved on a legal practitioner and client scale.

Calderwood, Bryce-Hendrie & Partners, applicant's legal practitioners
Messrs Dube-Tachiona & Tsvangirai, 2nd & 3rd respondents' legal practitioners