ZFC LIMITED
versus
KM FINANCIAL SOLUTIONS (PRIVATE) LIMITED for a provisional order
For its winding up and for appointment of a provisional liquidator
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 15 & 20 January 2015

Opposed Application

T. Mpofu, for the applicant
C. Nhemwa, for the first respondent

ZHOU J: This is an application for an order for the provisional winding up of the first respondent and for the appointment of a provisional liquidator. The application is being made on the grounds set out in s 206 (f) and (g) that the respondent is unable to pay its debts and, further, that it is just and equitable that the respondent company be wound up. The first respondent is a company which was placed under provisional judicial management by an order of this court granted in Case No. HC 8479/13. The application is opposed by the provisional judicial manager of the first respondent. At the hearing of the application Mr *Mpofu* for the applicant applied for this application to be heard together with Case No. HC 8479/13 which is now due for the confirmation or discharge of the provisional order of judicial management. The second respondent objected to the request and insisted on determination of the point *in limine* taken in its opposing papers viz. that the application is invalid as it was instituted without obtaining the leave of this court. I therefore heard argument on the question of the validity or otherwise of the instant application and indicated that my conclusion on that point would inform the decision on whether or not to direct that this matter be set down for argument together with Case No. HC 8479/13.

The brief background facts to the dispute between the parties are as follows:

The first respondent applied for and was granted an order placing it under provisional judicial management in Case No. HC 8479/13. The order was granted on 12 March 2014. According to the order the return date was 30 July 2014. The applicant is one of the creditors of the first respondent. The applicant filed opposing papers in Case No. HC 8479/13 in which it contested the placement of the respondent under judicial management. Case No. HC 8479/13 is still pending. On 17 July 2014 the applicant instituted the instant application for an order for the provisional winding up of the respondent on the grounds referred to above.

The provisional judicial manager's contention is that the instant application is null and void as it was instituted without first obtaining the leave of this court. *Mr Nhemwa* who appeared for the second respondent submitted that the application is invalid for want of compliance with the provisions of s 301(1) of the Companies Act [*Cap 24:03*] as read with para 1(e) of the provisional judicial management order given in Case No. HC 8479/13.

Section 301(1) of the Companies Act provides as follows:

> "A provisional judicial management order shall contain –
>
> (a) The date of the return day, which shall not be less than sixty days from the date of the grant of the provisional judicial management order; and
>
> (b) Directions that the company named therein shall be under the management, subject to the supervision of the court, of a provisional judicial manager appointed in terms of section *three hundred and two*, and that any other person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and
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> (c) Such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;
>
> and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court."

Paragraph 1(e) of the order granted in HC 8479/13 reads:

> "All actions and applications and the execution of all writs, summons (*sic*) and other process against the applicant company shall be stayed and not proceeded with without the leave of this Honourable Court."

This matter turns on whether the provisions of s 301(1) and the relief granted in the order quoted above invalidate any proceedings which are instituted after a company has been placed under provisional judicial management.

The first point to be made is that the staying of actions, applications and execution of writs and summonses in terms of s 301(1) is not an automatic or inevitable consequence of an order of provisional judicial management. Rather, it is relief which the court in its discretion may grant. See *Samuel Osborn (SA) Ltd* v *United Stone Crushing Co (Pty) Ltd* 1938 WLD 229; *Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231(E) at 237. That the court has a discretion whether or not to grant that relief is evident from the use of the word "may" in the section. Put in other words, the court is not enjoined to grant an order staying actions, proceedings and execution of writs in all circumstances when it grants an order for provisional judicial management. Only the contents set out in paras (a), (b) and (c) of s 301(1) are peremptorily provided for as required in any provisional judicial management order. The consequences which ensue automatically upon the granting of a provisional judicial management order are those set out in s 301(2) of the Companies Act, namely, that all the property of the company is upon the granting of the order deemed to be in the custody of the Master, but as soon as the provisional judicial manager assumes office the property will be in his custody. Put differently, the effect of a judicial management order is to take away management and control of a company from the directors and place it in the hands of the judicial manager or his nominees. H. S. Cilliers *et* al, *Cilliers & Benade Corporate Law 3rd Ed.* p. 483; N. Chadwick & P. L. Volpe, *Zimbabwe Company Law 2nd Ed.* p. 172.

The second aspect is that the use of the words "be stayed and be not proceeded with" in s 301(1) means to me that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provisional order is granted. In the *Longman Dictionary of Contemporary English* the word "stay" is explained as follows: "to stop from going on, moving or having effect; hold back." Put in other words, it is only an action, proceeding, writ e.t.c which is already in existence which can be stayed. If it is not yet in existence then there would be nothing to stay. If the legislature had intended that once an order of provisional judicial management has been granted the instituting of proceedings against the affected company should be prohibited then it would have expressed the provision in the appropriate language. The language used in ss 209 and 213 of the Companies Act which relate to the winding up of a company illustrates the distinction between "staying" of

proceedings and prohibition of commencement of proceedings against a company. In s 213(a) the words used are: "no action or proceeding shall be *proceeded with* or *commenced against* the company except by leave of the court…" (my emphasis). In that section the expression "proceeded with" would apply to actions or proceedings already in motion at the time that the winding up process is instituted, while the term "commenced" would apply to actions and proceedings which have not yet been instituted. In the light of the above analysis of the meaning of s 301(1) of the Act and para 1(e) of the order given in HC 8479/13, the application *in casu* is not invalid. The application is not defective. The point *in limine* taken on behalf of the second respondent is therefore dismissed.

The other two objections *in limine* taken by the second respondent in its heads of argument were not argued. I therefore make no determination on them, and will leave them for argument when there is full argument on the matter.

In view of the conclusion which I have reached that the instant application is not invalid by reason of the fact that no leave of this court was granted before it was instituted, I consider it appropriate that it be dealt with together with Case No. HC 8479/13. That course is appropriate to avoid the potentiality of having two inconsistent orders relating to the same company. Such an undesirable scenario could arise if the court grants a final order for judicial management or discharges the provisional order in Case No. HC 8479/13 and an order for the provisional winding up of the first respondent is granted in the instant application. I consider, too, that if the two matters are heard together the court will be in a position to dispose of both of them one way or the other given that in terms of s 305(1) of the Companies Act on the return day of a provisional judicial management order the court has the power to grant a final judicial management order or discharge the provisional judicial management order or "make any order that it thinks just". The moratorium granted to the second respondent to prevent attachment of its goods by creditors is not in any way prejudiced by having the two matters heard together.

Both counsel argued that their clients be awarded costs in the event that they succeeded. I prefer to leave the question of costs to be dealt with by the court when it determines the two applications. Accordingly, I will make no order as to costs in this matter.

In the result, it is ordered as follows:

1. Case No. HC 8479/13 shall be set down for hearing together with Case No. HC 5984/14.

2. The question of costs shall be considered at the time that the two matters are heard together.

Gill Godlonton & Gerrans, applicant's legal practitioners
C. Nhemwa & Associates, first respondent's legal practitioners