NIGEL KALUMBU
and
SHYAMOLAE THAKRAR KALSI
versus
NORTH WEST RESOURCES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 1 August 2019 & 24 June 2020

Opposed application

T. Mpofu, for the applicants
C. T. Kathemba, for the respondent

ZHOU J: This is an application for the confirmation of the provisional order for the winding up of the respondent which was granted on 28 November 2018. The applicants are shareholders of the respondent. The winding up is sought on two grounds, namely, (1) that the respondent is unable to pay its debts and/or (2) that it is just and equitable that the respondent should be wound up. The application is opposed by two shareholders of the respondent – Correct Dube and Bekithemba Dube (hereinafter referred to as "the Dubes").

The background to the application is as follows: The applicants are shareholders and directors of the respondent. The respondent is a company established primarily for the business of prospecting for minerals, exploration for, mining and marketing of minerals. The applicants allege that they are creditors of the respondent. Their case, which is disputed by the Dubes, is that they lent to the respondent sums of money totaling US$1 125 103.82. Of this amount US$565 286.82 is said to have been lent by the first applicant while US$559 817.00 came from the second applicant. By letter dated 13 July 2018 the applicants demanded repayment of the money. In the same letter the applicants intimated that if payment was not received proceedings for the winding up of the respondent would be instituted. It is common cause that no payment was made in response to that demand. The applicants state that the respondent has failed even to pay its employees' salaries since December 2017 during which month it also ceased operating. They

allege that the respondent is commercially insolvent. The applicants further allege that relations between the respondent's shareholders have deteriorated to such an extent that they can no longer work together. Complaints of a criminal nature have been made against one of the shareholders and the mine manager.

The Dubes dispute that the applicants are creditors of the respondent. They state that the amounts referred to in the applicants' papers were not given as loans to the respondent. The money was funding which the applicants raised to enable them to each acquire a 20% equity in the issued share capital of the respondent. They aver that the respondent's board has not met to decide "whether the respondent should repay the loan and if so to prescribe conditions of such repayment as required in para 14.2 of the agreement". They also suggest that the loan facility raised by the applicants was to be repaid by the shareholders and not by the respondent. They aver that the respondent is in a position to pay its debts. They dispute the allegation that the respondent owes salaries to its employees and state that the failure to pay Golden Chitsiga's salary was caused by the first applicant who refused to sign the necessary bank documents. The inability of the respondent to carry on operations is attributable to the failure by the directors to meet to discuss ways of raising additional working capital for it. Golden Chitsiga deposed to an affidavit in which he blames the first applicant for the non-payment of his salary.

It is settled law that a creditor who is unable to obtain payment of his or her debt is entitled *ex debito justitiae* to an order for the winding up of the company which is unable to pay that debt unless there is evidence that the winding-up will not benefit the other creditors, see s 205 of the Companies Act [*Chapter 24:03*]; also *Rosenbach & Co (Pty) Ltd* v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593(D); *F & C Building Construction Co (Pty) Ltd* v *Macsheil Investments (Pty) Ltd* 1959 (3) SA 841(D). It has been held that an application for liquidation should not be employed to recover a debt which is *bona fide* disputed, *Badenhorst* v *Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T); *Meyer* v *Bree Holdings (Pty) Ltd* 1972 (3) SA 353(T). *In casu* the respondent has not disputed the debt. Instead, some of its shareholders are the ones contesting the claim.

That the amounts advanced by the applicants were loans is not disputable. The share subscription and shareholders agreement deals with the loan in question in clause 14. It records that the applicants are to make arrangements for the loan facility. Clause 14.2 states that the "loan

shall be payable by the company as prescribed by the Board". This shows that the obligation to repay the loan was on the respondent. The question of how the payment was to be made does not affect the issue of who had the obligation to pay the debt. Demand for the payment of the debt has been made. When the letter of demand was served the respondent never argued that the debt was not yet due. In any event, the Dubes have not stated when the debt would be payable if their case is that it has not become due.

The two grounds upon which the application to have the respondent wound up is based are provided for in s 206 of the Companies Act [*Chapter 24:03*], as follows:

> "A company may be wound up by the court –
>
> (a) – (e) . . .
>
> (f) if the company is unable to pay its debts;
>
> (g) if the court is of the opinion that it is just and equitable that the company should be wound up."

Section 205 of the Companies Act provides that a company shall be considered to be unable to pay its debts: "if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company." According to Visser *et al*, *Gibson South African Mercantile & Company Law* 8th ed (Juta, Cape Town, 1963), p. 398: "A 'contingent creditor' is a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date." Thus a contingent liability would be a liability arising out of an existing obligation which liability is dependent upon the occurrence of some future event. In the present case the requirement for the respondent's board of directors to prescribe at some future date how the loan is to be repaid does not make the debt non-existent. The court does not have to regard contingent liabilities as if they were due and payable, see *Barclays Bank (DG & O) Ltd & Another* v *Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937(C); *Reserve Bank of Zimbabwe* v *Royal Bank of Zimbabwe Ltd & Anor* 2014 (2) ZLR 716(H) at 722B-D. It is sufficient that the existence of the debt is proved by evidence, even if its payment is dependent upon the happening of some future event.

The Dubes make bare denials and in some instances inconsistent statements. In para 9 of the opposing affidavit there is a bare denial that the amounts stated were advanced, followed by a

demand that the applicants must "prove what payments were made in foreign currency US dollars and what amount was paid in the form of the Real Time Gross Settlement (RTGS) and other local payments". Yet in the next paragraph, para 10, they assert not just that the respondent is able to repay its loans but also that the facility was indeed advanced save that it was not "an ordinary business loan". The shareholders' agreement clearly refers to that loan as shown above. Whether the amount was given in the currency of the United States or as RTGS is irrelevant. What is clear is that the amount involved was considerable. It is settled law that where it is evident that the company is heavily indebted to the applicant the fact that there is some dispute as to the precise amount of the debt is not an answer to an application for its winding up, *In re Tweeds Garage Ltd* [1962] 1 All ER 121(Ch). The agreement also shows that the obligation to repay the loan is on the respondent.

The Dubes have submitted that the respondent has mining claims and equipment which in their value exceed the amount being claimed by the applicants. The mere fact of assets whose value exceed the value of the claim does not excuse the company from being wound up for inability to pay its debts if it is shown that the company is in a situation of commercial insolvency, see *Reserve Bank of Zimbabwe* v *Royal Bank of Zimbabwe Ltd & Anor, supra,* at 722D-E. The notion of commercial insolvency and its relevance to the winding up of a company on the ground of inability to pay its debts is explained in the case of *ABSA Bank Ltd* v *Rhebokskloof (Pty) Ltd* 1993 (4) SA 436(C) at 440 where BERMAN J said:

> "The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realizable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts. . ."

Demand for payment of the debt was duly made. The respondent failed to settle the debt after that demand had been made. Even the Dubes admit that the company has not been operating because the directors have not been able to meet to devise means to mobilise working capital for it. This is a company which has not only stopped operating but does not even have the capital to carry on its business.

Clearly, therefore, the respondent is unable to pay its debts.

The alternative ground on which the winding up of the respondent is sought is that it is just and equitable that it be placed in liquidation. This ground reposes in the court a wide discretion to consider all the circumstances in determining whether it is 'just and equitable' that the company should be wound up. What is critical is that the discretion has to be exercised judicially with due regard to the justice and equity of the competing interests of all the interested parties. The circumstances in which the just and equitable principle has been invoked vary, see *Ebrahimi* v *Westbourne Gallaries Ltd* [1973] AC 360; [1972] All ER 492(HL). They include, but are not limited to,(a) "justifiable lack of confidence in the conduct and management of the company's affairs . . . grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business (*Loch* v *John Blackwood Ltd* [1924] AC 783 at 788); (b) the "absence of any hope of reconciliation and friendly co-operation between the members in the future" (*In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426(CA); (c) the existence of a deadlock (so-called the 'deadlock' principle) between or amongst the directors who are also the shareholders of the company (*In re Yenidje Tobacco Co Ltd, supra.*); (d) the disappearance of the company's substratum (*Reserve Bank of Zimbabwe* v *Royal Bank of Zimbabwe Ltd & Anor, supra,* at 723F-724B); (e) "illegality of the objects of the company and fraud committed in connection therewith"; (f) oppression of minority shareholders by the controlling shareholders in that capacity or in some other capacity (*Rand Air (Pty) Ltd* v *Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345(W) at 350). It is impossible and, indeed, undesirable to come up with an exhaustive list of such circumstances. Each case must depend upon its own facts and circumstances. What is fundamental is that this is not a "catch-all" ground (*Rand Air (Pty) Ltd* v *Ray Bester Investments (Pty) Ltd* 1985 (2) 345(W) at 349), for the mere existence of one or the other of the circumstances given above is not *per se* a ground for a company to be wound up. The circumstance relied upon must prove the justice and equity of bringing to an end the life of a company, see *Emphy* v *Pacer Properties (Pty) Ltd* 1979 (3) SA 363(D) at 368.

In this case the applicants and the other shareholders established the company for the purpose of carrying on the business which, as stated above, the company is presently unable to carry on. They are all shareholders and directors of the company. Confidence between the applicants and the Dubes has been completely lost. This loss of confidence is directly connected

to the affairs of the company as shown by the allegations of theft which gave rise to a police report against the other Dube who is contesting this application. There is a deadlock at both the shareholders' level and at the level of the board of directors which has rendered it impossible for the company to function. The company, as shown above, is commercially insolvent with no prospect of the directors finding a solution to recapitalize it because of the failure of their relationship. The applicants are demanding payment of the money which they gave as a loan for the capitalization of the company which clearly the company is unable to pay. The Dubes are not prepared to pay back that money out of their own resources, which means that it is virtually impossible for the company to function now. When the above factors are considered cumulatively, it seems to me that it is only just and equitable that an order for the winding up of the respondent be confirmed.

In the result, IT IS ORDERED THAT:

1. The provisional order granted by this court on 28 November 2018 be and is hereby confirmed.

Matizanadzo & Warhurst, applicant's legal practitioners
Mtombeni Mukwesha Muzawazi & Associates, legal practitioners for Correct Dube and Bekithemba Dube