

BURCO ZIMBABWE (PRIVATE) LIMITED
(Under Provisional Liquidation)
versus
RAPHAEL MHEREMHERE & 23 ORS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 24 May & 13 September 2017

Opposed application

D Ochieng with *Chakauta*, for the applicant
D Mwonzora, for the respondents

TAGU J: This is an application for the confirmation of a Provisional Order granted by this Honourable Court on the 16th May 2016 whose order read as follows-

“IT IS ORDERED THAT:

1. The Applicant, BURCO ZIMBABWE (PRIVATE) LIMITED is provisionally wound up, pending the grant of an order in terms of paragraph 3 or the discharge of this order.
2. Subject to subsection (1) of section 274 of the Companies Act (Chapter 24.03), THERESA GRIMMEL is appointed as provisional liquidator of the above company with the powers set out in section 221(2) (a)-(g) of the Act.
3. Any interested party may appear before the court sitting at Harare on Wednesday the 20th of April 2016, to show cause why a final order should not be made placing the Applicant company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.
4. The order shall be published once in the Government Gazette and once in The Herald newspaper in a Friday edition. Publication shall be in the short form annexed to this order.
5. Any person intending to oppose or support the application on the return day of this order shall:
 - 6.1. Give due notice to the Applicant on or before the 8th of April 2016 at Coghlan Welsh & Guest, Legal Practitioners, Cecil House, 2 Central Avenue, Harare, ref Zanudeen Makorie.
 - 6.2. Serve on the Applicant a copy of any Notice of Opposition which he files with the Registrar of the High Court on or before the 8th of April 2016.”

On the 20th April 2016 the respondent duly opposed the confirmation of the above order. In his opposing affidavit the respondent one Raphael Mheremhere indicated that he was representing 23 other former employees of the applicant. To that extent he attached a hand written list of other respondents.

At the commencement of the hearing counsel for the applicant Advocate *D Ochieng* assisted by one Chakauta submitted that there was only one respondent before the court. They said the first respondent did not attach a single supporting affidavit from any of the other 23 respondents to the effect that he was authorised by other 23 former employees of the applicant in this opposition neither did he establish the basis on which he is representing them other than his bare allegation. He doubted if the other 23 respondents were aware that they had been joined in these proceedings. For example the 17th respondent one Dadirayi Mangocho is deceased and there is no authority from the executor of her estate to justify her being made a party to these proceedings. The applicant therefore put in issue the first respondent's authority to represent other 23 employees in these proceedings.

Counsel for the respondents Mr *D Mwonzora* did not address the court in respect of the preliminary point taken by Mr *Ochieng* either in his oral submissions or in his heads of argument since the issue was raised in the answering affidavit of David Osmond Robinson the director of the applicant. The first respondent therefore failed to justify his inclusion of the other 23 respondents and the court upheld the preliminary point and proceeded on the basis that that there was only one respondent before the court.

The issues to be determined in this case as perceived by the first respondent were whether or not applicant gave the notice as is required in terms of the Labour Act [*Chapter 28.01*], whether or not applicant is solvent and linked to that whether or not a subsidiary company of a holding company can be declared insolvent when the holding company is viable. Lastly, whether or not there was impropriety on the appointment of the liquidator.

The first respondent's contention was that the applicant should have first complied with s 25A (5) (c) of the Labour Act [*Chapter 28.01*] as well as s 243 (2) of the Companies Act [*Chapter 24.03*] as well as s 243 (2) of the Companies Act since this is a voluntary winding up of a company. Section 25A (c) of the Labour Act provides that-

“(5) Without prejudice to the provisions of any collective bargaining agreement that may be applicable to the establishment concerned, a works council shall be entitled to be consulted by the employer about proposals relating to any of the following matters-

- (a) ...
- (b) ...
- (c) partial or total plant closures and mergers and transfers of ownership;” and

section 243 (2) of the Companies Act provides that-

“(2) A resolution for the voluntary winding up of a company shall not be deemed to have been passed unless the company has given less than four weeks’ notice of the resolution-

- (a) to the Registrar of Labour Relations referred to in section 121 of the Labour Relations Act [*Chapter 28.01*]; and
- (b) to the company’s workers committee or, where the company has no workers committee, to the company’s employees.”

In this case the first respondent submitted that the above provisions were not complied with. Secondly the first respondent submitted that the company is not insolvent since its holding company Seraph Holdings is still solvent. Lastly the first respondent took issue with the appointment of the liquidator who has a relationship with some of the directors of the applicant hence alleged some impropriety. The following authorities were relied on- *Radiator and Tinning (Pvt) Ltd v Radiator and Tinning (Pvt) Ltd Workers Committee and Others* HH-278-10, *Absa Bank Ltd v Rhebokskloof (Pvt) Ltd and Others* 1993 (4) SA 436 (c) and *Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H).

On the other hand the applicant submitted on the first point that the applicant did what it was required by the Companies Act [*Chapter 24.03*] and the Companies (Winding Up) Rules, 1972 S.I.841 of 1972). It submitted that there was nothing in either enactment that requires the applicant to give notice to its employees before presenting the petition. It said whatever resolution the company passed was merely to provide a basis for the court to exercise its discretion to grant such an order. Applicant therefore submitted that the first respondent fell into the error of mistaking a resolution that the company should apply to be **wound up by the court** for a resolution that the company should **voluntarily wind itself up**. It said this Honourable Court fell into the same regrettable error in *Radiator & Tinning (Pvt) Ltd v Radiator & Tinning (Pvt) Ltd Workers’ Committee* 2011 (1) ZLR 67 (H) quoted by the first respondent the erroneous decision of which was corrected on appeal in Case No. SC-19-11.

As regards the second point the applicant submitted that it provided its financial statements for 2014 and an income statement for 2015 which revealed that the applicant ended the year 2014 with current liabilities that exceeded its current assets by \$ 58 432.00

and it recorded a loss of \$ 291 063.00 for that year. The company then recorded a further loss of \$ 244 684.10 for the year 2015 and by then the company owed creditors \$351 119.12 against debts owed to it of just \$33 681.65. This showed that the company was unable to meet these debts and is insolvent since its liabilities exceed its assets and must be wound up. See *RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (SC)* at 206B.

The applicant said it is a debtor of the Holding company, and to expect it to get funding from the Holding company which is a separate persona would merely create further liabilities for the applicant. The first respondent's argument thus amounted to suggesting that since the applicant has the option of "borrowing from Peter to pay Paul" should be disregarded by the court. See J Nkala and T J Nyapadi, *Company Law in Zimbabwe*, p 406 citing *Jarvis v Lazy River Farm (Pvt) Ltd HC-H-388-82*.

As regards the last point about the appointment of the liquidator the applicant submitted that there is no substance in the allegation and no reasonable person would entertain such a suggestion. See *Mahlangu v Dowa & Ors 2011 (1) ZLR 47 (H)* at 51.

In casu the resolution made by the members of the applicant held at Harare on the 29th February 2016 reads in part as follows-

“RESOLVED

“that an application be made to the High Court in terms of Section 206 (a) of the Companies Act [*Chapter 24.03*] for the company to be placed in court supervised liquidation.”

It is this reading that the first respondent failed to grasp. There was therefore no need to advise employees first before a decision is taken to ask the court to place the applicant under judicial management. For this reason I am persuaded by the submissions made by the counsels for the applicant and the first respondent's contention is dismissed as lacking merit.

Coming to the second submission that the company is not solvent, I have carefully perused the statements of accounts filed by the applicant and those by the first respondent. The unavoidable impression I got is that the applicant's liabilities exceeds its assets and is not able to pay its debts. The applicant is clearly insolvent.

As to the last point I found no aorta of truth. No fraudulent activities were committed by the applicant. I was fortified in my belief by the report submitted by the Master's Report which says in part-

“.....

I have studied the application in respect of Burco Zimbabwe (Pvt) Ltd, and it is my view that, from the information available to me, there are no facts that are indicative of any fraud having been committed against the company or any of its creditors.

It appears to me the company failed as a result of the general economic environment of Zimbabwe which saw foreign information technology companies that were Burco Zimbabwe's clients pulling out of Zimbabwe. This inevitably had the effect of pulling the rug from under the feet of Burco Zimbabwe. The other factor which had a profound effect on the viability of Burco Zimbabwe was the unpredictable dynamism of the information technology industry that saw Burco Zimbabwe gaining and losing fiscal devices contracts from the ZIMRA in rather quick succession. With the withdrawal of foreign clients, ZIMRA was the single largest client that Burco Zimbabwe had. The loss of the ZIMRA contract was like the final nail in the coffin of Burco Zimbabwe.

It is my opinion that this company failed not as a result of fraud, but as a result of the general economic environment of Zimbabwe and the volatility of the information technology industry."

It is trite law that although this court has the discretion to refuse confirmation, the discretion is a limited one. Once the applicant has prima facie established grounds warranting the grant of a winding up order, it is for the respondent to show circumstances justifying the discharge of the order, and not for the applicant to establish circumstances justifying its confirmation. The onus rests squarely on the respondent to establish that the applicant is solvent, that it has failed to follow the statutory procedure, and or that the proposed liquidator is disqualified or unsuitable. In my view the first respondent has failed on each score hence the provisional order has to be confirmed.

In the result the following orders are made-

IT IS ORDERED THAT

1. BURCO ZIMBABWE (PRIVATE) LIMITED is placed in liquidation.
2. Theresa Grimmel be and is hereby confirmed as Liquidator of the company.
3. The liquidator of the company shall have the powers set out in section 221 (2) a) to (h) of the Companies Act (Chapter 24.03), and leave to execute those powers be and is hereby granted.
4. The costs of these proceedings shall be costs in the liquidation.

Coghlan, Welsh & Guest, applicant's legal practitioners
Mwonzora & Associates, first respondent's legal practitioners