BOKA INVESTMENTS (PRIVATE) LIMITED
versus
THIRDLINE TRADING (PRIVATE) LIMITED
and
ONCLASS INVESTMENTS (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 5 March and 25 April 2013

C. Nhemwa, for the applicant
J. Muchada, for the 1st and 2nd respondents

PATEL J: This an application for the confirmation of a provisional order, granted on 23 February 2011, for the winding up of the 1st and 2nd respondents (the respondents). The latter companies were the tenants of the applicant and jointly operate a tobacco auction floor under the trade name of Zimbabwe Industry Tobacco Auction Centre (ZITAC) together with their sub-tenants.

The applicant avers that the respondents have failed to satisfy an arbitral award for moneys owed that was granted in its favour on 16 April 2010 and registered by this Court on 19 May 2010. Together with sales commission and arrear rentals due, the total amount that the respondents owe the applicant stands at US$460,800. The applicant further contends that the respondents' confirmed liabilities of US$1,630,800 exceed their assets of less than US$100,000 and that they have no prospect of recovery in the future as they were not granted an auction licence for the 2011 season.

The respondents' preliminary objection is that the provisional order in this case was granted unprocedurally for a number of reasons. On the merits, they contend that the applicant has ignored their goodwill and volume of business, approximating US$6 million annually, which must be included in the valuation of their tobacco auction business. Therefore, their assets far exceed their liabilities. Their auction licence for 2011 was not granted because of an interdict by this Court preventing the Tobacco Industry Marketing Board from issuing the licence. The respondents have applied for the interdict order to be set aside and the matter is still pending. Moreover, soon after the provisional order was granted, the provisional liquidator voluntarily

vacated the leased premises. Both the interdict and provisional liquidation were manipulated by the applicant to wrongly evict the respondents under the guise of liquidation. Before their provisional liquidation, the respondents had loan facilities with ZABG Bank and did not owe any arrear salaries to their employees. Again, their trading debts due were normal and the income that would have been generated in 2011 would have sufficed to satisfy those debts. The provisional liquidator's interim report is grossly inaccurate in understating their assets and income and in inflating or falsifying their liabilities. In short, the respondents argue that they are not insolvent and that the provisional order should be discharged with costs *de bonis propriis* or on an attorney and client scale.

Procedural Irregularities

The principal argument for the respondents is that the provisional order *in casu* was obtained unprocedurally in breach of Rules 223, 231 and 232 of the High Court Rules 1971. Firstly, the notice of set-down for hearing on the Unopposed Roll was filed on the Friday instead of the Thursday preceding the next Wednesday of set-down. Secondly, the application and supporting papers were not served on either of the Respondents. Thirdly, the application was filed on 18 February and granted on 23 February 2011, before the period of 10 days for the filing of any notice of opposition had elapsed. Mr. *Nhemwa* concedes these irregularities but submits that they should be condoned in the interests of justice.

Section 4C of the High Court Rules provides for departures from the Rules and directions as to procedure:

> "The court or a judge may, in relation to any particular case before it or him, as the case may be –
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> (*a*) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
>
> (*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

In the instant case, the respondents' procedural objections were first raised in an urgent chamber application, filed in March 2011 in Case No. HC 2854/11, wherein the final relief sought was the invalidation of the provisional order for breach of the Rules. This application was dismissed for want of urgency and the respondents lodged

an appeal in Case No. SC 69/11. The respondents then failed to file their heads of argument or to pursue the appeal further and must be deemed to have abandoned it. Again in March 2011, the respondents also filed an application in Case No. HC 2942/11 for the rescission of the provisional order premised on the same grounds, *i.e.* breach of the Rules. The applicant duly filed its notice of opposition, but the respondents have to date neither filed their answering affidavit or heads of argument nor done anything else to pursue that application, and the matter is still pending.

Turning to the interests of the creditors and other parties concerned with this matter, I note that the respondents were placed under provisional liquidation over 24 months ago. In the intervening period, the provisional liquidator has completed the whole process of investigation and issued his interim report confirming that the liabilities of the respondents far exceed their assets. Having regard to this scenario, coupled with the flagrant abuse of court process exhibited by the respondents as described above, it seems to me that this matter must be brought to finality. Moreover, I do not perceive that the respondents will suffer any prejudice in having this matter finally determined as they have had ample opportunity to oppose the confirmation of the provisional order. In the premises, I am inclined to condone the procedural irregularities preceding the issuance of the provisional order so that that the interests of justice are duly served.

Whether Provisional Order has Lapsed

At the hearing of this matter, Mr. *Muchada* raised the new point that the original return date for confirmation of the provisional order was 17 May 2011 and, because the date was not extended, the order lapsed on that date. Consequently, there is no provisional order to be confirmed. Reliance for this submission is placed upon *Ex parte S & U TV Services (Pty) Ltd* 1990 (4) SA 88 (WLD) and *Crundall Brothers (Pvt) Ltd* v *Lazarus N.O. & Another* 1991 (3) SA 812 (ZHC) at 823G-I. As against this, Mr. *Nhemwa* explains that the respondents filed their notice of opposition on 16 May 2011, the day before the return date. Because the matter could no longer proceed on the Unopposed Roll, he argues that there was no need to extend the provisional order once it was opposed. He relies for this proposition on the decision of the Supreme Court in *Militala N.O. & Others* V *Zimbabwe Textile Workers Union & Others* SC 67/11. According to Mr. *Nhemwa*, it was held that a provisional order for

liquidation or judicial management, whether it is opposed or unopposed, does not lapse until it is confirmed or discharged.

My reading of the cases relied upon by both counsel is that they do not meaningfully support their respective arguments. In the *S & U TV Services* case, the applicant applied for and obtained an order for its own provisional winding up. On the extended return day, there was no appearance on behalf of the applicant and the rule *nisi* was therefore expressly discharged by order of the court. An application for its revival 3 weeks later was refused because matters would no longer have been *res integra* at that stage. The *Crundall Brothers* case involved a dispute over a right of pre-emption incorporated in an order of court. The return day of the relevant rule *nisi* was postponed but the rule itself was not extended accordingly. It was held that the postponement of the return day *ipso facto* extended the rule *nisi* to the new return day. In my view, both of these cases are distinguishable on their facts and findings from the present matter and do not really advance the position of the respondents. In the same vein, I do not think that the decision in the *Militala* case can be construed to support the applicant's position. In that case, an appeal against the decision of this Court in Case No. HC 2540/11 was allowed and it was ordered that the provisional order for judicial management of the applicants "remains of full force and effect until discharged in terms of the law". Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives. In any event, I am advised that there are no written reasons for the order of the Supreme Court and I am therefore unable to glean anything from the case to substantiate Mr. *Nhemwa's* submissions in that regard.

Rule 247(3) of the High Court Rules stipulates the procedural requisites of a provisional order for sequestration or winding up as follows:

> "Where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall –
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> (*a*) be in Form 29D; and
>
> (*b*) specify the date and place at which the court will hear argument on the confirmation of the provisional order; and
>
> (*c*) specify the manner in which the provisional order is to be published and, where appropriate, the persons on whom copies of the provisional order, together with all supporting documents, are to be served."

The relevant paragraphs of the provisional order *in casu* are in the following terms:

> "1. The 1st and 2nd Respondents' companies … are provisionally wound up, pending the granting of an Order referred to in paragraph 3 or the discharge of this Order.
> 2. …….
> 3. Any interested party may appear before this Court sitting at Harare on the 17th May 2011 at 10.00 am, to show cause why a Final order should not be made placing the Respondent Company (*sic*) in liquidation and ordering that the costs of these proceedings shall be the costs of liquidation.
> 4. Pending the return day, this Order shall operate as a Provisional Order of winding up.
> 5. …….
> 6. …….
> 7. Any person intending to oppose or support the application on the return day of this Order shall ... give due notice … and … serve … a copy of an affidavit which it (*sic*) files … ."

It is abundantly clear from the Rules as read with the terms of the provisional order that the return day is critical to its confirmation or discharge. What appears from the papers and from submissions by counsel is that the respondents filed their notice of opposition the day before and that the applicant attempted to extend the provisional order. It is not clear how this attempt was made or why it was unsuccessful. What is clear is that provisional order was not confirmed, discharged or extended on the stipulated return day. Ordinarily, this would entail the conclusion that it has lapsed and is no longer extant for the purposes of these proceedings. While this conclusion seems inescapable, I am loath to endorse it in the circumstances of this case for the following reasons.

Firstly, just before the return day, the applicants filed voluminous documentation, 85 pages in total, by way of opposition to the confirmation of the provisional order. After the return day had passed, they did not challenge the order or its continued operation on the ground that it had lapsed. Instead, they awaited the filing of the applicant's heads of argument and responded by filing their own heads of argument on 7 August 2012. Even at that late stage, they did not take the point that the provisional order had lapsed. This objection was only raised at the hearing of this matter, almost 22 months after the return day. In my view, their conduct in this regard is again tantamount to gross abuse of court process.

Secondly, as I have already stated, the respondents were placed under provisional liquidation over 24 months ago. Thereafter, other creditors have lodged

their claims and the provisional liquidator has issued his interim report. At this juncture, it is of cardinal importance to have regard to the general advantage and benefit of all the persons concerned or interested in the matter. The Court should be less inclined to interfere at a late stage in the winding up process than it would be at an early stage in that process. See *Ma-Afrika Groepbelange (Pty) Ltd & Another* v *Millman and Powell N.N.O. & Another* 1997 (1) SA 547 at 566A-E, in the context of an application for the removal of a liquidator. In the instant case, the general balance of convenience is overwhelmingly in favour of treating the provisional order as having remained operational up to the present time. Moreover, the interests of justice dictate that the matter be finally determined to enable all the parties concerned, including the respondents, to know where they stand. Having regard to all of these factors, I take the view that the failure to extend the return day of the provisional order should not be regarded as being fatal to its continuing validity. Accordingly, I deem it appropriate to exercise my discretion under Rule 4C to condone that failure and to proceed with this matter on the basis that the provisional order remains in full force until it is confirmed or discharged.

Grounds for Winding Up

Section 206 of the Companies Act [*Chapter 24:03*] specifies the circumstances in which a company may be wound up:

> "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 its 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."

It is clear that the circumstances enumerated in this section are to be read disjunctively and not conjunctively. With particular reference to paragraph (f) of section 206, section 205 provides that:

> "A company shall be deemed to be unable to pay its debts –

> (*a*) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred United States dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
>
> (*b*) if the execution or other process issued, on a judgment, decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or
>
> (*c*) 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."

For the purposes of section 205(c) as read with section 206(f), the test that is generally applied is that of commercial insolvency. See *RAG (Pvt) Ltd* v *Huizenga N.O.* 1986 (2) ZLR 203 (S) at 206A-B. With reference to the equivalent provisions of the South African Companies Act 61 of 1973, the test was expounded in *ABSA Bank Ltd* v *Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 (C) at 440F-H as follows:

> "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 realisable 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 … and is accordingly liable to be wound up."

As regards the just and equitable criterion set out in paragraph (g) of section 206, which postulates not facts but only a broad conclusion of law, it is necessary to take into account all the relevant circumstances, including the competing interests of all the parties concerned. See *Moosa N.O.* v *Mavjee Bhavan (Pty) Ltd & Another* 1967 (3) SA 131 (T) at 136H. There are five broad categories that that have been identified for winding up on just and equitable grounds: the disappearance of the company's substratum; the illegality of its objects and fraud committed in connection therewith; a deadlock in the management of the company's affairs; grounds analogous to those for the dissolution of a partnership; and where there is oppression. See

Hughes v *John Dory Trucking (Pty) Ltd & Others* 2008 (5) SA 300 (N) at paras. 16-17. These circumstances are not exhaustive and it is open to the courts to identify other circumstances or devise other categories in the future. The first step is to determine the facts relevant to the formation of an opinion as to justice and equity. The second step is for the court to decide whether or not to exercise the discretion to wind up. See *Asla Devco (Pty) Ltd* v *Bubesi Investments 74 (Pty) Ltd* [2011] ZAWCHC 24 (WC) at paras. 29-32.

Whether Respondents should be Wound Up

Dealing with the commercial solvency of the respondents prior to the granting of the provisional order, it is fairly clear, despite their attempt at denial, that they had several outstanding liabilities. These included the following: lease fees and good tenancy deposit owing to the applicant, sums due to several financial institutions, and levies due to the Ministry of Agriculture and Tobacco Industry Marketing Board. After they were placed under provisional liquidation, they have incurred further liabilities in the form of overdue wages and salaries and related statutory levies. According to the provisional liquidator's interim report, submitted on 11 May 2011, the respondent's liabilities stand at US$6,937,633 while their assets are estimated at US$300,000, leaving a negative solvency of US$6,663,633.

The respondents dispute most of their liabilities before their provisional liquidation. They also dispute the extent of liabilities tabulated by the provisional liquidator as being inflated and inaccurate. In my assessment, their assertions in this regard are not borne out by the documentary evidence adduced by them. For instance, in their letter dated 4 June 2010, addressed to the applicant, the respondents admit the accrual of deposit rent, monthly rentals and commissions, and openly plead for time to pay off the arrears due. Moreover, their liability for these amounts is confirmed in the arbitrator's interim award in April 2010 and the final award in September 2010.

In light of all of the documentation before the Court, it is clear that, before the provisional order was granted in February 2011, the respondents did not meet their liabilities as they arose. It is equally clear that, after February 2011, their inability to satisfy their indebtedness has been exacerbated by the accumulation of further liabilities. In this regard, I am not persuaded by the argument that their predicament has been deliberately orchestrated through the machinations of the applicant in collusion with the provisional liquidator. Critical to this argument is the interdict of

this Court restraining the Tobacco Industry Marketing Board from issuing an auction licence to the respondents. This interdict was granted many months ago in November 2010 and remains in force to this day. The respondents claim to have challenged it but have not demonstrated what further steps they have taken to have the matter finalised in their favour.

Related to the auction licence is the argument that, but for the interdict, the respondents would have generated approximately US$6 million in the 2011 season and would have been more than able to meet their normal trading debts. They further contend that their goodwill and volume of business must be included in the valuation of their tobacco auction business. By their calculation, that business is worth US$18 million and, therefore, their assets far exceed their liabilities. In my view, this contention is entirely spurious and fallacious in the present context. From a commercial perspective, goodwill based on prospective revenues may be treated as an asset in valuating a company's business when it is sold or transferred as a going concern. However, goodwill is utterly valueless and cannot assist in discharging the company's debts and liabilities as and when they arise. I am fortified in this view by *The Shorter Oxford English Dictionary* definition of "goodwill" as:

> "the privilege, granted by the seller of a business to the purchaser, of trading as his recognised successor; the possession of a ready-formed connection of customers, considered as a separate element in the saleable value of a business."

In the final analysis, it is abundantly clear that the respondents did not and presently do not have liquid or readily realisable assets available to meet their liabilities as they fall due in the ordinary course of business. I am adequately satisfied that they are not in a position to carry on normal trading and are therefore commercially insolvent. It follows that they are unable to pay their debts within the meaning of section 205(c) as read with section 206(f) of the Act. This is sufficient to warrant a final order for their liquidation.

In view of this conclusion, it seems unnecessary to consider the additional or alternative ground for winding up envisaged by section 206(f) of the Act. However, for the sake of completeness, it may be as well to do so. As I have already indicated, the interdict against the issuance of an auction licence still stands and effectively operates to hamstring the respondents from carrying out their operations. The further practical impediment to their business is the requirement of the Tobacco Industry

Marketing Board that they rehabilitate the auction floor infrastructure. Thus, even if they were duly licensed, they do not have the requisite capital base in order to rectify the necessary infrastructure. What all of this means is that the substratum of the respondent companies has effectively disappeared. Moreover, whilst they remain in legal existence, they will continue to incur further liabilities in the form of bank interest and charges, unpaid wages and salaries and attendant statutory levies. To avoid further financial prejudice to the applicant and other creditors, it is imperative that the respondents be liquidated so as to enable the proportional sharing of their remaining assets amongst all of their confirmed creditors. All in all, it seems eminently just and equitable that the respondents be finally wound up.

In the result, it is ordered that the provisional order for the winding up of the 1st and 2nd respondents granted by this Court on the 23rd of February 2011 be and is hereby confirmed and made a final order.

C. Nhemwa & Associates, applicant's legal practitioners
Dube, Manikai & Hwacha, 1st and 2nd respondents' legal practitioners