CHRISTINE PETA
versus
EDWARD BUWU
and
CRISTED (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, February 7, 2013

C. McGowan, for Applicant
C. Nyika, for 1st and 2nd Respondents

CHITAKUNYE J. The applicant and first respondent lived together in a marital union. During the blissful days of their union they formed a company namely CRISTED (PRIVATE) LIMITED (the second respondent) each one had a 50 percent share in second respondent. An immovable property was acquired and registered in Second respondent's name. This immovable property is the only asset of the company. After several years of cohabiting the marital relationship began experiencing problems which culminated in applicant moving out of the house. Later first respondent moved out as well leaving Second respondent's tenants in occupation. The relationship between applicant and first respondent broke down to an extent that they were no longer on talking terms.

On 4 February 2010, the applicant filed this application for the winding up of second respondent. She alleged that since its inception the company has never traded and in terms of the Companies Act, [*Cap 24:03*] s 206 (c) the company should be wound up. The company has never complied with the companies act requirements such as filing annual returns. Apart from the issue of not complying with the companies act, the relationship between the two shareholders is now untenable.

The respondents opposed the application. Respondents raised points *in limine* in which they contended that; I. this application purportedly in terms of s 206 of the companies act is defective for non compliance with s 79 of the deeds registry act [*Cap 20:05*], that is the applicant should have cited the Registrar of deeds because ultimately the immovable asset owned by

second respondent will have to be sold; ii. The application is not in compliance with rule 250 of the High Court Rules, 1971

ii. The applicant is not competent to bring this application as in terms of s 207 of the companies act she can only do so if there are less than two members remaining.

iii. The applicant has predicated her application on s 206(c) of the Companies Act which provides for the winding up of a company which has not traded within a year from inception. In this case the main purpose of forming the company was to own the house and this was achieved. It cannot therefore be said the company has not traded.

iv. Applicant does not base her claim on s 206 (g) and she could not do so because applicant had other remedies she could resort to besides winding up of the company.

The respondents contended that the breakdown in the relationship between applicant and first respondent cannot be a basis for winding up second respondent. Second respondent is a separate legal entity.

Upon perusal of the papers filed of record and listening to counsel there are a number of factors that are common cause. These include that-

The parties were in a love relationship and cohabiting

That relationship led to the parties forming a company, second respondent

The objects of second respondent are as articulated in the Memorandum and Articles of Association and this included acquisition and owning an immovable property, namely House number 656 Glenwood Drive, Glen Lorne, Harare, in which the parties lived together for a number of years.

Each of the parties owns 50% of the shares in second respondent

When the love relationship went sour applicant left the immovable property. First respondent later left the property and rented it out.

The rental proceeds have not been shared or used in a way that is beneficial to applicant.

It appeared not disputed that first respondent has virtually elbowed applicant out of the company.

Applicant is no longer involved in the management and administration of second respondent.

In the year 2009 applicant obtained an order from the Magistrate court which, *inter alia*, ordered first respondent to pay an amount of USD 300 per month to applicant from rental proceeds.

The first respondent has not complied with that court order despite not having appealed against it. At least no evidence of any form of challenge to that order was tendered justifying the non-compliance with the court order.

It is also common cause that though there are still two share holders with equal shares, first respondent has been the sole shareholder running the company to the exclusion of applicant since the breakdown of their love relationship. This exclusion has been forced on applicant by first respondent.

A careful analysis of the circumstances of this case discredits respondents' points *in limine*. The first point *in limine* was that applicant should have cited the registrar of deeds because the order sought involves the sale of an immovable property which will necessitate entries in the deeds office. A careful reading of the applicant's papers shows that this application is for winding up of second respondent and for the appointment of a liquidator. The powers of the liquidator as stated in s 221 of the Companies Act are wide. It is for the liquidator to decide whether any property should be sold or not.

The contention that applicant is not competent to make this application because there are still two members in the company is misguided. The papers filed of record and submissions made shows that of the two shareholders, one has been effectively booted out and so the company is now run and operated by one shareholder. In effect only one member remains. This in my view fits in the requirement to s 207 (i) (a) of the Companies Act.

The respondents contention that applicant restricted herself to s 206 (c) of the companies act and that since the company was formed to own a property of which it owns this ground is unsustainable, is rather shortsighted. Whilst indeed applicant cited s 206 (c), she did not end there. She went on to cite the breakdown in the relationship between the shareholders and directors to an extent that only one shareholder is in effect remaining. She complained about the way she was kicked out of the company those facts clearly fit into s 206 (g). this the respondents seemed to recognize when in their opposing affidavit they said s 206 (g) would not succeed because there are other remedies in terms of s 208(2) which provides that…

Section 206 of the Companies Act states that: -

"A Company may be wound up by the court—

(a) …

(b) …..

(c) If the company does not commence its business within a year from its incorporation or suspends its business for a whole year;

(d) ….

(e) ….

(f) ……

(g) If the court is of opinion that it is just and equitable that the company should be wound up."

Whilst there was some contest as to whether s 206 (c) is applicable bearing in mind that the company owns a house, there was no disagreement that s 208 (g) may be applicable. The disagreement on this subsection is whether there is alternative remedy or not in terms of s 208. The circumstances of the case are such that there is no dispute that the company was formed by the applicant and second respondent at a time they were lovers and living together. They are the two shareholders and directors of the Company. The facts that are common cause show that that personal relationship is no longer there. Applicant has been kicked out of the company and first respondent is operating the company alone without involving applicant. The applicant has been left in the dark about the goings on in the company. The parties are virtually not communicating.

The circumstances fit that scenario envisaged in s 206 (g) of the Companies Act. In *Ebrahimi* v *Westbourne Galleries* (1972) 2 ALL ER 492 (HL) the basic factors of the just and equitable principle were set out as-

1. The fact that an association which is formed or is continued on the basis of a personal relationship which involves mutual confidence such as exists when a pre-existing partnership is converted into a limited liability company can properly be wound up on the just and equitable principle.

2. If it is agreed expressly, or if it can be implied, that all the members or shareholders shall participate in the management of the business, the exclusion of one or more of the

shareholders from the conduct of the business of the company will offend the just and equitable principle.

3. The principle may also be properly invoked in those cases where there are restrictions on the transfer of the member's interests in the company such that when confidence is lost or a member is removed from management, he cannot take out his stake and go elsewhere."

Where applicant establishes a *prima facie* case that the above factors exist court may grant an application for winding up of the company so affected. In *Sultan* v *Fryfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 at 193A- C, CHATIKOBO J commenting on the above guidelines stated that:-

> "What emerges from these guidelines is that if there is justifiable lack of confidence in the conduct and management of the company's affaires which systems from the conduct of the directors with regard to the company's business or if there exists a deadlock between members of the company, then a company can be wound up on the 'just and equitable' principle. The 'deadlock' principle is founded on the analogy of a partnership and is confined to small, domestic companies. If, in such a small domestic company, the personal relationship of confidence and trust similar to that which must prevail between partners is eroded and the members cease to act towards one another honestly and reasonably and with friendly co-operation in managing the affairs of the company, then those members who are not responsible for the destruction of that relationship will be entitled to claim that it is just and equitable for the company to be wound up on that ground."

In *casu* there is no doubt that confidence and trust has been lost as between the parties. First respondent has effectively barred applicant from participating in the affairs of the company as shareholder and as director. Despite a court order requiring him to pay some proceeds from the company's activities to applicant, first respondent has defiantly refused to do so. Clearly applicant can no longer enjoy her interests in the company. The only way to protect applicant's interests and ensure she benefits from her investment is to order that the company be wound up.

The respondents contention that applicant has other remedies is without merit. As aptly noted by CHATIKOBO J in the *Sultan* case, at p 193 E-D, the alternative remedy envisaged under s 208(2) of the Act must be realistic and sufficient. The learnt judge stated thus-

> " I perceive this to mean that there should, in the particular case, be a realistic, sufficient and reasonable remedy, other than a winding up order, by which the applicant's interests in the business can be protected. Where such a remedy exists and it can be resorted to with minimal expense and bickering, it would be unreasonable for the applicant to insist that the company be wound up. If, however, the alternative remedy is one which involves protracted negotiations whose outcome is uncertain at the time the proceedings are determined, the court should be reluctant to decline to wind-up the company. The alternative remedy, to be a realistic option, must be available to the applicant when he launches the proceedings and, I venture to suggest, it should be one which is capable of restoring the lost confidence between the 'partners'."

I am of the view the alternative remedy alluded to by respondents are not capable of restoring confidence let alone assure applicant of the safety of her interests in the business. As already allude to above applicant obtained a court order in a bid to secure some of the interests in the company but first respondent has not honored that. First Respondent has not shown that he will respect any remedy that would protect applicant's interests in the company.

I am of the view that the winding- up of the company is the only way available to applicant. The application for the appointment of a liquidator should therefore be granted.

The last clause in applicant's draft is a prayer to be paid 50% share of the rentals received by the second respondent as an equal share of the proceeds. This appears to be a recitation of the order she claimed to have been granted at the magistrate court. If the order has not been complied with there are ways to enforce it rather than through this application. In any case parties did not address their minds on this relief.

In her answering affidavit and heads of arguments applicant asked to be awarded costs on a higher scale. In her founding affidavit she had not asked for costs at this stage. It would appear it is respondents' attitude in opposing the application that spurred applicant to now seek an award of costs.

Whilst it is true that the application would not have been costly had respondents not opposed the application, the question is whether such opposition can be said to have been without just cause,

I am of the view that the circumstances of the case do not justify an award of costs against respondents at this stage.

Accordingly it is hereby ordered that:-

1. The second respondent, CRISTED (PRIVATE) LIMITED, be and is hereby provisionally wound-up pending the grant of a final order for the winding up of the company or the discharge of this order.

2. Subject to sub-section (1) of section 274 of the Companies Act, chapter 24:03, WILBERT NYAMUPFUKUDZA be and is hereby appointed as Provisional liquidator of the Second respondent with the powers set out in section 221(2) (a) to (g) of the Companies Act [*Cap 24:03*].

3. The respondent Company and any other interested party may appear before this court sitting at Harare on…….day of…… 2013, to show cause why a final order should not be made placing the Second respondent in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.

4. A copy of this order shall be served on Second respondent and Edward Buwu, presently of 656 Glenwood Drive, Glen Lorne, Harare, who is one of the two directors and shareholders of Second respondent.

5. This order shall be published once in the Government Gazette and once in a daily Newspaper circulating in Harare.

6. Any person intending to oppose the application on the return day of this order shall:-

   6.1 give due notice to the applicant's legal practitioners Messrs Venturas & Samukange of 2nd Floor, Tanganyika House, Corner Third Street and Kwame Nkrumah Avenue, Harare.

   6.2 Serve on the applicant and on the respondents a copy of any affidavit, which he files with the registrar of the High Court.

Venturas & Samukange, applicant's legal practitioners
Chikumbirike & Associates, respondents' legal practitioners