ISAAC TIGERE TICHAREVA
(In his capacity as the duly appointed Executor Dative of
Estate Late Isaiah Mudzengi, DR 10/22)
versus
GREYNUT INVESTMENTS (PVT) LTD
and
MASTER OF THE HIGH COURT
and
REGISRAR OF COMPANIES
and
TECKLAH GARIRA
and
ZIMBABWE DEFENCE FORCES - BF

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 19 December 2022 and 30 January 2023

Court application for liquidation

Adv *R Mabwe*, for the applicant
Adv *E Mubaiwa*, for the fourth respondent
Mr *C Bare*, for the fifth respondent
No appearance for the first to third respondents

CHINAMORA J

Introduction

This is an application in terms of s 5(1)(b)(iii) of the Insolvency Act [*Chapter 6:07*], (hereinafter called "the Act") for the liquidation of the first respondent on the basis that it is just and equitable to wind it up. The applicant avers that there is a deadlock between its members and directors. In addition, it is submitted that the forth respondent is dissipating the company's assets, as well as selling assets in its name, thereby creating obligations which the company is unable to fulfill. It has been brought by the executor of the estate of the late Isaiah Mudzengi, who held 70% shares in the first respondent. The application is opposed by the fourth and fifth respondents. In her

opposing affidavit, the fourth respondent states that she the Chief Executive Officer and co-director of the first respondent, and that she has a shareholding of 30%. She raised a point in l*imine* that the application is not properly before the court in that the applicant did not comply with the mandatory provisions of s 5(4)(a) and (b) of the Act, which requires the company's statement of affairs and Master's certificate to be filed with this kind of application. The fourth respondent's final objection was that interested parties had not been joined to these proceedings.

For the fifth respondent, a preliminary point was also raised, that there was no debtor as contemplated by s 5 (1) of the Act. The submission is that the applicant has not shown that the first respondent is a debtor of the estate, as the estate is a shareholder of the first respondent. Further to that, the fifth respondent asserted that the applicant has not, in terms of section 3 of the Act, demonstrated that such a debtor is unable to pay its debt. My view is that the first leg of the fifth respondent qualifies as a point in *limine*, while the second part requires going into the merits of the case. The other point raised by this respondent is that, the applicant has not exhausted alternative remedies provided by section 62 of the Companies and Other Business Entities Act [*Chapter 24:31*]. Finally, the fifth respondent submitted in *limine* that the applicant is conflicted in that he is the executor as well as creditor of the estate.

The applicant objected that the fifth respondent is not properly before the court since the resolution filed in court was given by a board of directors and not trustees, since the fifth respondent is a trust. He argues that the Constitution of the trust does not provide for board of directors, and the resolution does not recognize the office of "a director". I will therefore examine five preliminary points, namely, whether or not the fifth respondent is properly before the court: invalidity of the application for lack of compliance with s 5(4)(a) and (b); defectiveness of the application by reason of absence of a debtor; failure to exhaust alternative remedies; and whether conflict of interest arises. I will now deal with these points, but not necessarily in the order I have listed them.

The points in *limine*

I will begin by addressing the applicant's own ground of objection. To me, the resolution filed by the fifth respondent shows that authority to participate in the litigation was given. Whether the persons who gave authority are described as directors or trustees appears to me to be a splitting of hairs. The resolution, in my view, substantially conforms to what is required to prove authority. In this respect, the jurisprudence in this jurisdiction recognizes the concept of substantial

compliance with the rules where no prejudice is likely to be sustained by any party to the proceedings. This approach has been adopted and applied in a number of decisions of the Supreme Court and of this court. (See *Quinell* v *Minister of Lands, Agriculture and Rural Resettlement* SC 47/04; *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S); *Kutama* v *Town Clerk Kwekwe* 1993 (2) ZLR 137 (S); *Chitungo* v *Munyoro and Another* 1990 1 (ZLR) 52 (H) and *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* HH 446-15).Therefore, this court can condone minor infractions of the rules. In light of the decided cases, the objection has no merit and I dismiss it.

I move to address the point that the applicant has not shown that he is a debtor as required by s 5(1) of the Act, and will consider the other grounds of objection, should it become necessary. The answer to this objection lies in s 2 of the Act which defines a debtor as any person or entity that is capable of incurring a debt, whose estate has been liquidated and includes (a) the estate of such a person or entity; and (b) any such debtor's estate before liquidation. In addition, section 4 (1) of the Act allows the executor of the estate of a deceased person to apply to a court for the liquidation of the estate of the debtor. From these provisions of the Act, it is evident that the applicant can competently file the present application in his capacity as executor of the estate of the late Isaiah Mudzengi. I find no merit in the objection and dismiss it.

The next point in *limine* I will now look at is that the applicant has not exhausted available alternative remedies before approaching this court. In support of its objection, the fifth respondent relied on s 62 of the Companies and Other Business Entities Act [*Chapter 24:31*] (hereinafter referred to as "the Companies Act", which deals circumstances under which liquidation may be sought. Thus, it was submitted that the applicant should have utilized those avenues to seek liquidation and not the route under the Insolvency Act. Apparent from this contention is that the procedures for winding up a company in terms of the Companies Act do not exclude anyone from using the Insolvency Act to achieve liquidation. Rather, it is akin to saying why did you kill a cat by bashing its head with a knobkerrie instead of drowning it in a sack full of sand. In fact, there is nothing apparent from the architecture of s 62 of the Companies Act that precludes the applicant from coming to court for liquidation via the Insolvency Act route. Clearly the routes provided under s 62 of the Companies Act remain alternative ways of coming to court, the prerogative to use them being the applicant's. It is an argument with no valid legal basis, and I dismiss the point in *limine*.

Existence of a conflict of interest has also been raised by the fifth respondent. This point was raised in the heads of argument but not pursued in submissions at the hearing. I have already dealt with s 4(1) of the Act which permits the executor to being this application. As such, the reference to *Rio Zim (Pvt) Ltd* v *Trust Bank Corporation Ltd* SC 87-21 has no relevance. It beggars belief how an application by an executor can undermine the achievement of fair distribution of the company's assets to creditors. At any rate, it is the court which ultimately decides whether it is just and equitable that the company be liquidated. I dismiss this point for lack of merit.

Finally, turning to point in *limine* that the application is fatally defective as the statement of affairs and Master's certificate did not accompany the application, let me examine the relevant statutory provisions. Section 5(4) (a) and (b) provide as follows:

> "4. Every application to the court referred to in subsection (1) except an application by the registrar of companies in terms of subsection 1(e) and the Master in terms of paragraph (h) of that subsection must be accompanied by –
>
> (a) a statement of affairs of the debtor corresponding substantially with Form A of the First Schedule; and
>
> (b) a certificate of the Master, not issued more than four days before the date on which the application is to be heard by the Court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant."

The applicant admitted that the statement of affairs for the first respondent was not filed with the application for liquidation. Secondly, there was no Master's certificate as is required by para (b). Effectively, it was an acceptance that the applicant did not comply with the mandatory provisions set out in s 5(4) (a) and (b) of the Act. In light of the omissions, the fourth respondent relied on *The Garrat Trust* v *Creative Credit (Pvt) Ltd* SC 146-21, where BHUNU JA said:

> "The applicant's failure to comply with the mandatory procedural requirements of the law meant that the application was not properly before the court ... What this means is that the main application that was launched in the court *a quo* without the statement of affairs of the debtor and the master's certificate as required by law was void and to that extent a legal nullity".

Adv *Mubaiwa*, counsel for the fourth respondent, therefore, urged the court to strike this matter off the roll with costs on the higher scale of attorney and client.

In response, Adv *Mabwe* for the applicant, argued that if the applicant did not comply with s 5(4)(a) and (b) of the Act. Counsel argued that the proper course the court should take was provided in s 15(2) of the Act which reads:

> "If the requirements of subsection (1) are not met and a provisional order is not issued in terms of section 14, the Court must dismiss the application for the liquidation of the estate of the debtor and set aside any provisional liquidation order or postpone the hearing for a reasonable period to a determined date so as to allow the applicant to furnish further proof". **[My own emphasis]**

It was submitted that, if an applicant (like the one in *casu*) fails to meet the requirements of s 5(4)(a) and (b) of the Act, s 15(2) of the same statute enjoins the court to postpone the matter to a specific date to enable the applicant to file the statement of affairs. It seems to me that *"the requirements of subsection (1)"* referred to in s 15(2) of the Act is an obvious reference to the need to provide the statement of affairs and the Master's certificate". I do not see anything that contradicts this interpretation and am persuaded that this is the proper approach to take. In coming to this conclusion, I have taken into consideration that the fourth respondent, apart from being a shareholder, is a director of the first respondent. Additionally, it was contended that it was the fourth respondent who could provide the statement of affairs, yet she was using the failure to submit the statement as ground for the court to declare the application a nullity. In this context, my attention was directed to s 43(1)(a) of the Act, which states:

> "When a liquidation order is served upon a debtor as contemplated in section 42 (1), the debtor must -
>
> (a) immediately hand over to the liquidator all books of account, invoices, vouchers, business correspondence and any other records relating to his or her affairs and obtain from him or her a specified receipt in respect thereof;"

To the extent that, in deciding whether or not liquidation should be allowed, in my view, s 15(a) of the Act is underpinned by equity considerations. The provision realizes that it may not always be possible to file the statement of affairs and Master's certificate simultaneously with the application. This is especially so since 43(1) (a) places the obligation to furnish books of account on the company or its management. I do not agree that s 5(4)(a) and (b) precludes the applicant from filing these documents required at a later date to enable the court to evaluate whether it is just and equitable for the company to be wound up. No conceivable reason is evident to me that prevents the applicant from filing the omitted information if further time is given as contemplated by s 15(2) of the Act. It appears that this section condones a failure to comply with s 5(4) of the Act, and allows more time for the omitted documents to be provided in the interest of justice and, particularly, so that the court is not hamstrung when considering whether a company should be

liquidated. In my view, it is desirable and consistent with s 15(2) of the Act to postpone the hearing of the application and give appropriate directions. Since I have decided the application on the basis of s 15(2) of the Act, it would be inappropriate to award costs against any of the litigants. The position I take is that none of the parties has litigated in bad faith, making it unfair to burden any of them with costs simply because they hold a contrary legal view.

Disposition

Accordingly, I grant the following order:

1. The hearing of the application under HC 4887/22 is hereby postponed to 1 March 2023 at 10.00 am.
2. The fourth respondent (as a director of the first respondent) shall file (and serve on the applicant and the other parties) a copy of the statement of affairs of Greynut (Private) Limited and Master's certificate no later than close of business on 14 February 2023.
3. The Master shall file a certificate in respect of Greynut (Private) Limited and serve on the applicant and the other parties no later than close of business on 24 February 2023.
4. Each party shall bear its own costs.

Chatsanga & Partners, applicant's legal practitioners
Samundombe & Partners, fourth respondent's legal practitioners
Murambasvina Legal Practice, fifth respondent's legal practitioners