WILLDALE LIMITED
versus
PHIBION GWATIDZO N.O
and
TERRIERS-LAXTOP BANKS
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 1 April & 12 May 2021

Opposed application

Advocate *Girach*, for the applicant
L. Madhuku, for the 1st respondent
R. Stewart, for the 2nd respondent

TAGU J: This is a court application filed for the removal of the first respondent as liquidator of Willdale Transport Services (Private) limited (Willtrans) together with an interdict against 1st Respondent holding a Special Meeting of the Creditors then set for 20 May 2020 to ratify his decision to sell Willtrans' assets, or in the alternative, a declaration that the Special Meeting was a nullity and setting aside any resolution which may be passed authorizing or ratifying the sale, and consequently, the sale of the assets having been done unlawfully, the same should be set aside. Finally, the Applicant seeks a mandamus, directing the first respondent to disclose all information relating to the sale of the Willtrans' assets.

The background facts are that Applicant is a 50% shareholder and first creditor of Willdale Transport Services (Private) limited (the company) which is under final liquidation. The other partner is the second respondent, Terriers-Laxtop-Banks (second creditor) holding the other 50% shares. The first respondent, Phibion Gwatidzo was appointed on 5 June 2019 as the liquidator, and on 7 August 2019 as the final liquidator of Willdale Transport Services (Private) limited. The first respondent then later called for creditors meeting where he advised them that he had disposed of Willtrans' assets and that Terriers Services (Private) Limited had withdrawn its claim against the company. Concerned that the first respondent had not sought the approval of the creditors for the purported sale of assets, particularly in light of the withdrawal Terriers Services (Private)

Limited's claim the Applicant sought clarification in respect of the sale, i.e. what assets have been sold and at what price and to which party. Despite several demands by the Applicant the first respondent refused to supply the requested information. It was then brought to his attention that he had disposed of the assets without authorization from the creditors. It then dawned to the applicant that the first respondent had in fact sold the assets to second respondent Terriers–Laxtop–Banks, thus preferring one creditor over another. The first respondent's legal practitioners were then advised through e-mail that the sale had been carried out without lawful authority and is a nullity. In response the first respondent's legal practitioners sent to the applicant's legal practitioners a Notice of a Special Meeting to be held on 8 April 2020, in which creditors would be asked to pass a resolution to "authorize and or ratify the decision of the Liquidator to dispose of the insolvent company assets".

The Applicant is of the view that the 1st Respondent acted unlawfully in a manner which is contrary to the provisions of the Insolvency Act [Chapter 6.04] and must be removed from his position. In the event that the meeting has already been held it must be set aside, and if a resolution has been passed such a resolution should be declared a nullity.

The first and second respondents opposed the application. The first respondent opposed the application and the relief sought by the Applicant on three main grounds, namely that:

1. The Applicant has not satisfied the requirements under section 80 of the Insolvency Act (the Act);
2. The conduct complained of by the Applicant was cured with Applicant's own participation, and
3. The relief sought by the Applicant has been overtaken by events.

These three grounds were treated as points *in limine* by the parties' counsels and the second respondent supported the three grounds. I will have to dispose of these three grounds first before dealing with the merits of the application.

REQUIREMENTS UNDER SECTION 80 OF INSOLVENCY ACT NOT SATISFIED

The respondents' contention was that in order to succeed in an application to remove a liquidator under s 80 of the Insolvency Act [*Chapter 6.07*], the Applicant must show that it is in the interests of the proper administration of an insolvent estate, must ask court to declare the

liquidator disqualified from being a liquidator of the estate, remove from office any person who has been appointed as liquidator and declare such a person disqualified from being elected or appointed as a liquidator under the Act during his or her life time or for such other period as it deems determines. The applicant must prove all the three requirements and not only one.

In its answering affidavit the Applicant maintained that it met the requirements set out in section 80 of the Insolvency Act. In particular, it alleged that it need not met all the requirements but that as long as one of the requirements has been met the court can declare the liquidator disqualified. In its heads of argument, the applicant submitted that the respondents' contention that all requirements have to be metis bad in law in that s 80 of the Act provides as follows:

> "If it is in the interests of the proper administration of an insolvent estate, the Court may, on the application of the Master or any other interested party-
>
> (a) declare any person disqualified from being a liquidator of the estate, and
> (b) remove from office any person who has been appointed as liquidator, and
> (c) declare such a person disqualified from being elected or appointed as liquidator under this Act during his or her lifetime or for such other period as it determines."

However, both Applicant and Respondents referred to section 80 of the Insolvency Act [*Chapter 6:07*] which reads as follows-

> "**80. Leave of absence or resignation of trustee**
>
> At the request of a trustee, the Master may permit him to absent himself from Zimbabwe or may relieve of his office, in either case upon such conditions as the Master may think fit to impose and subject to his giving such notice of his intention to absent himself from Zimbabwe or to resign as the Master may direct."

I found no relevancy of s 80 of the Insolvency Act [*Chapter 6:07*] to the removal of a liquidator from office by the court. Neither was I able to determine whether the requirements suggested by the respondents and or the applicant have been met or not as the section referred to by the parties does not deal with the removal of a liquidator. For this reason, I dismiss the point *in limine.*

CONDUCT COMPLAINED OF CURED BY APPLICANT'S PARTICIPATION

The argument advanced by the first respondent was that on 20 May 2020 he convened a special meeting of creditors for the purpose of ratifying the sale of the assets of the estate. The creditors voted and the majority in value ratified the sale. He said the applicant participated in the meeting and voted. He therefore submitted all the information that was required at the meeting.

The Applicant denied that their complaint was cured by their participation at the meeting. It submitted that the reason for their attendance was that the liquidator had said in his notice of the special meeting that he wanted to deal with the applicant's concerns it had raised before, as one of the items on the agenda. When the voting to ratify occurred the Applicant opposed the vote and only voted out of abundance of caution.

In my view the Applicant did not attend solely for the purposes of ratifying what the liquidator had done but to hear about their concerns. In any case when it came to voting for the resolution to authorize the liquidator to sell the assets and to ratify what the liquidator had done the Applicant opposed it though its opposition was defeated by the alleged creditors. Therefore, the Applicant's participation at the special meeting cannot construed as curing the Applicant's concerns. I therefore dismiss the second point *in limine*.

RELIEF OVERTAKEN BY EVENTS

The first respondent submitted that the interdict sought to stop the holding of the special meeting has been overtaken by events in that the meeting was held on the 20 May 2020, and the alternative relief rendered moot. Further the requirements of an interdict have not been met since there are many effective remedies like requesting for a meeting of creditors and or approaching the Master with its queries. The applicant maintained that all the creditors who are not members of or related to the second respondent voted against the sale. The members of the second respondent, having an interest in the sale, should not have voted on the same, and had they not voted, the resolution would not have passed. It submitted that as a matter of law the resolution concerned is fatally defective.

In its relief (d) the Applicant prayed that the Special Meeting to be held on 20 May 2020, be cancelled or in the alternative, if the Special Meeting has already been held by the time of the granting of this order, that the same be set aside and that any decision thereat be declared a nullity. I found some merit in the submission by the applicant and the point *in limine* is dismissed.

The applicant and the second respondent are shareholders and creditors of Willdale Transport Services (Private) limited which is under liquidation. They hold 50% shares a-piece. They appointed the first respondent as the liquidator of the company. The first respondent then disposed of the company assets without the creditors' authority. He even called a meeting of creditors where he advised the creditors that he had already disposed of the assets of the company

under liquidation. Further he advised them that the second respondent had withdrawn its claim against the company. Concerned that the first respondent had not sought the approval of the creditors for the purported sale of assets, particularly in light of the withdrawal of second respondent claim the Applicant sought clarification in respect of the sale. By letter dated 24 February 2020 the first respondent did not tell the applicant who the purchaser of the assets was. By letter dated 27 February 2020 the applicant followed up the issue and told first respondent did not courteously respondent. The applicant wrote a further letter dated 4 March 2020, and again the first respondent did not tell the applicant, who is also a major shareholder to whom he had sold the assets. Another letter dated 9 March 2020 was sent to first respondent but he did nothing about it. The first respondent then sent out Notices of a Special Meeting of creditors of Willdale Transport (Private) limited for the purpose of passing the following proposed resolution "*That the creditors hereby authorize and or ratify the decision of, Liquidator to dispose of the insolvent company's assets.* The proposed resolution was to allow the Liquidator to sell the assets of the company (which he had already sold without authority of creditors and the Master of the High Court) and to pay out the proven claims and liquidation expenses and to distribute the residue, if any, to the residual beneficiaries, in a timely manner. The Applicant then discovered that the Liquidator had sold the assets to the second respondent thereby preferring one creditor ahead of others. The Applicant is of the view that the resolution was meant to conceal the facts and what he had done without authority and wanted their blessing for he had colluded with the second respondent. To the applicant the Liquidator is impartial and must be removed as a liquidator.

The court having heard submissions from the respondents' legal practitioners asked Mr *L Madhuku* if the Insolvency Act has a provision that allows ratification of the liquidator's actions and his initial response was that this can happen at common law and that there was no such provision in the Act. He later referred the court to s 179 which I did not find to be valuable to the issue raised.

What is clear from the facts of this matter is that the Liquidator proceeded to dispose of the assets of the insolvent company without the authority of the creditors and or the Master of the High Court. In so doing he seemed to have colluded with the second respondent and sold the assets to the second respondent thereby preferring one creditor over the others. Despite several requests to disclose as to what he disposed, to whom and for what value the Liquidator failed to provide such

information to a major creditor, i.e. to the applicant. When it was brought to his attention that what he had done was illegal he reacted by calling for a Special Meeting of creditors to authorize him to sell the assets which he had already sold and to ratify what he had done without authority. For these reasons I am satisfied that there was collusion between the first respondent and the second respondent and he acted unreasonably and partially. He therefore exhibited signs that he is not a proper and fit person to remain a liquidator. The Applicant's concerns are therefore valid. In *Lytton Inv. (Pvt) Ltd* v *R.F. Saruchera N.O. & Anor* HH 816/16, at page 4 of the typed judgment, this Honourable Court stated as follows:

> "In my view, the applicant was entitled to come to court in the face of such unreasonable intransigence. Contrary to the first respondent's argument, there is nothing in the Companies Act that provides a person in the applicant's position to seek relief from the court. The applicant was a creditor in the insolvent company and had successfully proved its claim. It was entitled to express surprise if its debt was to be whittled down almost to nothing by what manifestly seemed a mistake by the liquidator. It had a right to protect its assets. It did not need to wait for the mistake, if indeed it was, to be escalated and duplicated onto the liquidator's final distribution account. A liquidator sits in a fiduciary position in relation to both the insolvent company and the creditors. The first respondent should simply have addressed the applicant's query."

In casu if the first respondent had addressed the applicant's query timeously, this matter would not have reached this far. For these reasons I will grant the order sought.

IT IS ORDERED THAT

a) 1st respondent be removed as liquidator of Willdale Transport Services (Private) Limited (in liquidation);
b) 3rd respondent be and is hereby directed to appoint a new liquidator;
c) 1st respondent be and is hereby restrained from selling any of the assets of Willdale Transport Services (Private) Limited (in liquidation) until he has made full and complete disclosure to creditors at a duly convened meeting in regard to any proposed sale and has obtained the approval of creditors at such a meeting;
d) The Special Meeting to be held on 20 May 2020, be cancelled or in the alternative, if the Special Meeting has already been held by the time of the granting of this order, that the same be set aside and any decision thereat be declared a nullity;
e) The 1st respondent be and is hereby directed to disclose all of the particulars of the purported sale of the assets of Willdale Transport Services (Private) Limited to the

applicant within twenty-four hours of the granting of this order, and shall make available to the 3rd respondent for access to any other interested creditor.

f) The purported sale of assets belonging to Willdale Transport Services *Private)* Limited be and is hereby set aside.

g) In any event, that the costs be awarded against the 1st respondent, on a higher scale to be paid for in his personal capacity and not as a charge against the liquidation of Willdale Transport Services (Private) Limited.

Honey & Blanckenburg, applicant's legal practitioners
Mundia & Mudhara, 1st respondent's legal practitioners
Matizanadzo & Warhurst, 2nd respondent's legal practitioners