Judgment No. HB 250/12
Case No. HC 1837/12
X REF HC 2363/12

REGINALD MCGILLIVRAY DAWSON

And

SUSAN JANE DAWSON

And

RED QUEEN TRADING (PVT) LTD

Versus

NERRY INVESTMENT (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 3 OCTOBER & 6 DECEMBER 2012

Mrs H. Moyo for the applicants
T. Mpofu for the respondent

Opposed Court Application

KAMOCHA J: On 4 July 2012 this court issued a provisional order in the following terms:

"Interim relief granted

Pending the final determination of this matter it is hereby ordered that:-

1. Nerry Investments (Pvt) Ltd (herewith called "the company') be and is hereby placed under provisional liquidation pending the grant of a final order of liquidation or the discharge of this order as the case might be.
2. Barbra Lunga of Impact Trust and Executors (Pvt) Ltd be and is hereby appointed the Provisional Liquidator of the company with powers set out in section 221 (1) and (2) of the Companies Act [Chapter 24:03].
3. The existing directors of the company be and are hereby divested of their powers and authority in such capacities.
4. Any interested party may appear before this honourable court sitting at Bulawayo on the …………… day of ………………………2012, to show cause why a final order should not be made placing the company under final liquidation and confirming the other

relief granted herein and ordering that the costs of these proceedings shall be costs of the liquidation.

5. Any interested parties may inspect a copy of this application at the office of the Deputy Registrar of the High Court of Bulawayo or at the office of the applicant legal practitioners Messrs Joel Pincus Konson & Wolhuter, 1st Floor Public Library Building, 100 Fort Street/8th Avenue."

The terms of the final order being sought are:-

"1. That the provisional order of this honourable court winding up Nerry Investments (Pvt) Ltd be and is hereby confirmed.

2. That Barbra Lunga of Impact Trust and Executors (Pvt) Ltd is hereby appointed in her personal capacity as the liquidator of the company.

3. That the costs of this application shall be costs of the liquidation."

The return date of the provisional order was 23 August 2012. Upon receipt of the provisional order the respondent filed an urgent chamber application on 13 July 2012 under case number HC 2363/12 wherein it sought an order anticipating the hearing date for the provisional order. The application was filed notwithstanding the fact that the respondent had not filed any opposing papers to the confirmation of the order and that the provisional order had not yet been published in the respective publications in order to give any other interested parties an opportunity to respond to the provisional order. That urgent application was, however, not persisted with and was abandoned.

On 18 July 2012 respondent filed its notice of opposition and John Josias Moyo deposed to an affidavit wherein he averred that he was a director of the respondent company and was, in that position, authorized to depose to the affidavit in terms of a board resolution passed by the directors of the company on 13 June 2012. He confirmed that the resolution had not lapsed. While confirming that the application was properly served on the respondent the deponent stated that having read the provisional order and applicant's affidavits all he needed to do was to raise a point *in limine* as he saw no need to delve into the merits of the voluminous and defamatory founding affidavit filed by the applicants.

I pause to observe that the deponent's attitude is very difficult to understand. In one breath he says the averments in the founding affidavit are defamatory and in the next he says he saw no need to delve into the merits of such allegations. In fact the allegations are very serious and detailed. Any injured party would reasonably refute them in order to defend his good name and reputation. For instance the other director of the respondent, Kembo Mohadi, against whom substantial allegations were also made in the founding papers, did not even file

any opposing papers. As stated earlier the allegations are detailed and serious. They should have been refuted if they had been devoid of merit. It is now trite that what is not denied is taken as having been admitted.

In limine the deponent submitted that the provisional order should not have been granted in the first place as the application was allegedly not properly before this court as the applicants allegedly used the wrong procedure.

It was contended that the correct procedure for winding up a company was by court application as expressly provided in sections 206 and 207 of the Companies Act [Chapter 24:03]. The provisions were mandatory and could not be remedied under Rule 229 of the rules of court, so the argument went.

The relevant provisions of section 206 of the Act provide as follows:-

"A company may be wound up by court –

(a) If the company had by a special resolution resolved that the company be wound up by the court.
(b) …
(c) …
(d) …
(e) …
(f) …
(g) If the court is of the opinion that it is just and equitable that the company should be wound up".

Section 207 provides that an application to the court for the winding up of a company shall be by petition presented by the company or creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties together or separately or …

The despondent of the opposing papers contended that the above provisions of the Act were violated by the applicants when they filed a chamber application instead of a court application. The despondent through his legal practitioners submitted that it should have been by a court application. In his view failure to comply with the law would not be condoned by either rule 229C or rule 4C.

The despondent's other contention was that the applicants had also failed to comply with section 5 of the Companies (Winding Up) Rules published in RGN 841/72 which sets out the information which ought to be included in an application for liquidation.

The despondent's allegations are without merit as the objects and nature of the company were clearly stated in the found affidavit. The petitioners are directors of the respondent company and went on to detail the reasons for seeking an order for its winding up. They named Barbra Lunga of Impact Trust and Executors (Pvt) Ltd as the provisional liquidator. She was willing to take up that appointment. This court makes a specific finding that the provisions of section 5 of the Companies (Winding Up) Rules, 1972 were not violated in anyway.

I now turn to the main contention made by the deponent. The despondent's belief is that when section 199 of the Companies Act [Chapter 24:034] provides that the winding up of a company may be by the court it means by court application. Similarly when section 206 provides that a company may be wound up by court it means by court application.

The deponent's submission is clearly faulty and lacks any merit. Quite clearly the word "court" as used in these provisions is used in relation to the High Court as the court of jurisdiction. It does not relate to the procedure to be used in company winding up proceedings. In section 2 of the Act "court" in relation to any company, means the High Court, and in relation to any offence against the Act, includes a magistrates' court having jurisdiction in respect of that offence.

So when any provisions of the Companies Act refer to a court other in a criminal matter they mean the High Court. Similarly when the Companies (Winding Up) Rules make reference to a court what is meant is the High Court.

The procedure for winding up a company is laid down in section 207 quoted above at page 3. For instance a company seeking voluntary winding up has to present an application to the High Court by way of a petition.

A petition means an application to the court. An application can be made to a court or judge. Section 15 (2) of the Interpretation Act provides that:-

> "(2) Any reference in an enactment to a petition to a court shall be construed as reference to an application to the court or to a judge … made in accordance with the rules of the court."

This court has no hesitation in rejecting the deponent's fallacious contention which is devoid of any merit. The applicants were correct in instituting the application the way they did.

As alluded to earlier in this judgment the deponent did not see it fit to address himself to the merit s of the application. He is taken as having no meaningful defence to the merits.

In the result, it is ordered that the provisional order issued by this court on 4 July 2012 be and is hereby confirmed with costs.

Joel Pincus, Konson & Wolhuter applicants' legal practitioners
Messrs G.N. Mlotshwa & Company respondent's legal practitioners