

**ELPHAS KAWA**

**VERSUS**

**VICTOR MUZENDA N.O**

**AND**

**ZEXCOM (PRIVATE)LIMITED  
(in provisional liquidation)**

**AND**

**THE ASSISTANT MASTER OF THE HIGH COURT**

**AND**

**THE REGISTRAR OF DEEDS**

**AND**

**GEORGE ZINGANI**

**AND**

**FUNGAI MARUFU**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 18 OCTOBER 2013 AND 23 JANUARY 2014

*Advocate H. Moyo* for the applicant  
*Mr G. Nyoni* for the 1<sup>st</sup> and 2<sup>nd</sup> respondent

Opposed matter

**MAKONESE J:** On the 17<sup>th</sup> July 2013, the Honourable KAMOCHA J directed that case numbers HC 419/13 and HC310/13 be consolidated and heard at the same time. He further recused himself in both matters and directed that they be placed before me for set down and argument.

I heard the matters on 18<sup>th</sup> October 2013 and reserved judgment. The matters have a long history dating back to the year 2009. Various applications and counter-applications have been launched by the parties and there is no end in sight to the dispute. It is hoped that the judgment in these consolidated applications will bring finality to the bitter acrimony between the contesting parties.

The Applicant (Elphas Kawa) is a shareholder of the 2<sup>nd</sup> Respondent (Zexcom Pvt Ltd), (in provisional liquidation) in terms of an Order granted by this Honourable Court on the 27<sup>th</sup> February 2013. By virtue of the order, 1<sup>st</sup> Respondent was interdicted and prohibited from disposing, selling or in any way alienating or encumbering all or any of the immovable properties of the 2<sup>nd</sup> Respondent. The Applicant seeks confirmation of the Provisional Order, which *inter alia* seeks the nullification of all agreements of sale which the 1<sup>st</sup> Respondent purportedly entered into with the 5<sup>th</sup> and 6<sup>th</sup> Respondents or any other person purporting to dispose of 2<sup>nd</sup> Respondent's immovable properties.

The Applicant, under case number HC 310/13 seeks the removal of 1<sup>st</sup> Respondent from the office of the Provisional Liquidator and other ancillary relief. The facts and circumstances in the application for removal of 1<sup>st</sup> Respondent from office are identical to the facts and circumstances of the application for confirmation of the provisional order interdicting 1<sup>st</sup> Respondent from alienating or disposing of any assets belonging to 2<sup>nd</sup> Respondent.

#### CONFIRMATION OF PROVISIONAL ORDER (HC 419/13)

I, therefore, propose to deal first with the application for confirmation of the provisional order granted under case number HC 419/13. The legal issues addressed in this matter are however interlinked to those issues for consideration under case number HC 310/13. The 1<sup>st</sup> Respondent has raised a point *in limine*, contending that the Applicant is not properly before the court. 1<sup>st</sup> Respondent argues that in terms of section 213 (a) of the Companies Act [Chapter 24:03], no action or proceeding can be brought against a company under liquidation without the leave of the court. Section 213 (a) of the Companies Act provides that:-

*“in winding up by the court-*  
(a) *no action or proceeding or proceedings shall be proceeded with or commenced against the company except by leave of court and subject to such terms as the*

*court may impose.*”

It is clearly stated in paragraph 5 of the Applicant’s Founding Affidavit that the 2<sup>nd</sup> Respondent is cited in the proceedings merely as an interested party and no order is sought against the company. The 2<sup>nd</sup> Respondent is an interested party to the extent that the assets which are being administered by 1<sup>st</sup> Respondent which are the subject matter of the dispute are vested in the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent avers that proceedings have been brought against the 2<sup>nd</sup> Respondent because it has been cited as a party to the proceedings and that this is at variance with the provisions of section 213 (a) of the Companies Act. This assertion is without logic. By citing the 2<sup>nd</sup> Respondent as a party to the proceedings, 2<sup>nd</sup> Respondent is merely being given an opportunity to comment on the order sought. Presumably, before filing opposing papers on behalf of the 2<sup>nd</sup> Respondent, 1<sup>st</sup> Respondent would have been expected to approach the creditors and shareholders for their views on the matter on behalf of 2<sup>nd</sup> Respondent, which views would then have been expressed in his affidavit. The 1<sup>st</sup> Respondent clearly failed to do so and indeed usurped the powers of the shareholders and filed his own views. The order that is being sought is against 1<sup>st</sup> Respondent and it is clear that there is no action or proceedings against the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> Respondent is in exactly the same position as the Assistant Master of the High Court who is cited as 3<sup>rd</sup> Respondent, only as an interested party with no consequential order being sought against him.

I have no hesitation in finding that the technical preliminary point raised by 1<sup>st</sup> Respondent is ill-advised and has no merit. I would dismiss the point *in limine* and deal with the merits of the application.

The Provisional Order was granted on the 27<sup>th</sup> February 2013. The Court in the exercise of its discretion deemed the matter urgent before granting the order sought. It would be folly for me to attempt to revisit the issue of urgency at this stage. The matter warranted urgent attention in that the assets of the 2<sup>nd</sup> Respondent were being disposed of and there was no serious effort by 1<sup>st</sup> Respondent to establish that the proceeds thereof were being properly accounted for.

In seeking confirmation of the provisional order, the Applicant has pointed out that 2<sup>nd</sup> Respondent is not in final liquidation and is still operating under the Provisional Order for liquidation granted on 4<sup>th</sup> December 2009. 1<sup>st</sup> Respondent is not the liquidator of the 2<sup>nd</sup> Respondent and was never appointed as such. In consequence, 1<sup>st</sup> Respondent does not have any

authority to dispose of 2<sup>nd</sup> Respondent's assets. It is settled and beyond argument that a Provisional Liquidator has no power in terms of Section 221(2)(h) of the Companies Act to dispose of the Companies assets. See the case of *Nyathi v Tagarira Brothers* SC 74/05.

There is no court order which authorises the 1<sup>st</sup> Respondent to sell 2<sup>nd</sup> Respondent's immovable properties. In the result, the 1<sup>st</sup> Respondent was, and is not in a position to lawfully dispose of any assets of the 2<sup>nd</sup> Respondent. Any such disposals are null and void and must be set aside. Applicant avers that 1<sup>st</sup> Respondent has deliberately and with intent to defeat the present action attempted to transfer the immovable property unlawfully sold to 5<sup>th</sup> Respondent, after the granting and service of the Provisional order upon him. It is clear that any sale of any immovable property to 5<sup>th</sup> Respondent not sanctioned by the Court and the Assistant Master of the High Court is of no consequence and must be set aside. In respect of the 6<sup>th</sup> Respondent, 1<sup>st</sup> Respondent was not forthright on providing information regarding sale of property belonging to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent has generally not dealt with the assets of the 2<sup>nd</sup> Respondent in a legal and transparent manner. Although he admits having received payment for the properties that he has unlawfully sold, the proceeds of such sales remain unaccounted for and misappropriated. To this end, therefore, it is imperative for this Honourable Court to confirm the Provisional Order so that 1<sup>st</sup> Respondent is compelled to give a full account of his dealings in relation to the 2<sup>nd</sup> Respondent's assets since the date of his appointment as a Provisional Liquidator.

APPLICATION FOR REMOVAL OF 1<sup>ST</sup> RESPONDENT FROM OFFICE OF PROVISIONAL LIQUIDATOR(CASE NO. HC 310/13)

I now turn to deal with the issues raised under case number HC 310/13. In this matter the Applicant seeks the removal of the 1<sup>st</sup> Respondent (Victor Muzenda) N. O, from the office of Provisional Liquidator of 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent was appointed to such office by the 3<sup>rd</sup> Respondent on 17<sup>th</sup> February 2010 in accordance with the terms of the court order placing the 2<sup>nd</sup> Respondent under a winding up order granted on 4<sup>th</sup> December 2009.

In terms of Section 273 (1)(b) of the Companies Act a liquidator may be removed from office for the following reasons:-

- (a) misconduct, including failure to satisfy the lawful demand of the Master or of a Commissioner appointed by the court.
- (b) failure to perform any duties imposed on him by the Act.
- (c) any other good cause.

Notwithstanding the fact that the provisions refer to the removal of a liquidator from office, it is respectfully submitted that the same provisions apply in the case of an application for the removal of a Provisional Liquidator. The 1<sup>st</sup> Respondent has averred that the courts have always been hesitant to remove liquidators; trustees and executors where the winding up process is nearing completion. 1<sup>st</sup> Respondent referred the court to the case of *Ma Afrika Greoplienge Pty v Millman and Powell NNO* 1997(1) SA 547.

The above case is authority for the proposition that the act of removal of a liquidator is a drastic process which should only be resorted to where the court is satisfied that a proper case has been made for the removal of such liquidator. I must hasten to underline the fact that this general rule should be applied after examining each case on its own merits. The principle on the cited case takes into account a situation where the liquidation process is nearing completion and where the liquidator has already done considerable work in the winding up exercise. In *casu*, the situation is entirely different one. The 1<sup>st</sup> Respondent has failed to demonstrate that he has exercised his duties for the benefit of the 2<sup>nd</sup> Respondent and the shareholders. He has not conducted his activities in a transparent manner. He has not properly accounted for the assets of the 2<sup>nd</sup> Respondent. In the four years he has held the position of provisional liquidator he has sold or attempted to dispose assets belonging to 2<sup>nd</sup> Respondent without lawful authority. He has failed to properly account for the proceeds thereof. He has not acted in the best interests of or for the benefit of the 2<sup>nd</sup> Respondent and the shareholders. He has however been spirited in his efforts to remain in the position of provisional liquidator without showing any interest for the shareholders. It seems evident that the 1<sup>st</sup> Respondent is benefitting from his current position and is quite comfortable for the *status quo* to be maintained.

In his Heads of Argument, the 1<sup>st</sup> Respondent states in paragraph 5 as follows:-

*“Removal from office*

*The issue of rendering an account, to surrender of documents, etc, as prayed by the*

*applicants, only arises after the issue of whether or not to remove 1<sup>st</sup> Respondent has been decided.*

*In fact, the prayer to render an account may be superfluous as it follows naturally if he is ordered off the position of a liquidator or provisional liquidator.”*

This submission by the 1<sup>st</sup> Respondent reveals the thinking of the 1<sup>st</sup> Respondent and what his real intentions in the matter are. If he is ordered by the court to relinquish his position as liquidator he will consider himself absolved of any responsibility to render an account in respect of 2<sup>nd</sup> Respondent's assets. In the meantime, however what is more revealing from the submission is that the 1<sup>st</sup> Respondent has not rendered an account. The court is therefore justified in concluding that the 1<sup>st</sup> Respondent is either unwilling or unable to account for his activities since he became provisional liquidator. In this regard it is incumbent upon the court to ensure that 1<sup>st</sup> Respondent's activities are placed in check in accordance with the provisions of the Companies Act. It is clear that the 1<sup>st</sup> Respondent has not taken the opportunity to refute the allegations of impropriety, which allegations are of a serious nature. 1<sup>st</sup> Respondent has chosen to studiously stone wall the allegations in the papers filed of record. It is trite that one of the most important functions of a liquidator is to keep creditors and all interested parties including shareholders informed of the proceedings in relation to the liquidation process so that creditors can monitor the payments and receipts to ensure that everything is properly done. The 1<sup>st</sup> Respondent has not called a single meeting with the creditors and has even defied a directive of the Assistant Master to hold such a meeting. The creditors have not had a chance to examine 1<sup>st</sup> Respondent's accounts or to know how he is utilizing the funds that have been received for and on behalf of 2<sup>nd</sup> Respondent. In the case of *Standard Bank of SA v Master of High Court* 2010 (4) SA 405, the court held that liquidators are required to act with the right motivation in the best interests of the creditors and that at the very least they must have knowledge of the relevant legal principles relating to their duties and functions. In another South African case cited in the Applicants Heads of Argument of *Spurling v Brever* 1955 (1) SA 398, the Court held that a liquidator may be removed from his office “on good cause shown” in accordance with the provisions of the Companies Act and that this was not an exhaustive definition. The court has a discretion to remove a liquidator if there is some unfitness on the part of the person who holds such office and if it is satisfied on evidence that it is desirable to do so in the interests of all the interested parties in the liquidation. In my view the same principles apply to a provisional

liquidator.

Having carefully considered all the facts presented to me in this application I am satisfied that the 1<sup>st</sup> Respondent is not fit to continue as provisional liquidator for these reasons:-

- (a) disposing of 2<sup>nd</sup> Respondent's assets without lawful authority
- (b) disposing of 2<sup>nd</sup> Respondent's assets without the consent of the Assistant master of the High Court .
- (c) failing to convene creditor's meetings from the year 2009 to date, a period in excess of 4 years
- (d) failure to render a proper account of the assets of 2<sup>nd</sup> Respondent
- (e) failure to account for proceeds of assets of 2<sup>nd</sup> Respondent sold without lawful authority.
- (f) failure to perform the duties of a liquidator in accordance with the provisions of the Act.
- (g) failure to satisfy a lawful demand by the Assistant Master to convene a creditors meeting and to render an account.

I hold the firm view, therefore, that it is in the interests of the 2<sup>nd</sup> Respondent and the liquidation process that 1<sup>st</sup> Respondent be removed from office forthwith to protect whatever assets of the 2<sup>nd</sup> Respondent remain.

In view of the conduct of the 1<sup>st</sup> Respondent in the conduct of these entire proceedings, which border on abuse of his appointment as Provisional Liquidator the costs awarded should reflect the displeasure of the court.

I accordingly make the following order:-

1. The Provisional Order granted to the Applicant on 27<sup>th</sup> February 2013 under case number HC 419/13, be and is hereby confirmed save for the 6<sup>th</sup> Respondent against whom the provisional order is hereby discharged.
2. The 1<sup>st</sup> Respondent shall pay costs of the application on an attorney and client scale.
3. It is hereby declared that 1<sup>st</sup> respondent does not hold the office of liquidator of the 2<sup>nd</sup> Respondent and accordingly all actions all deeds of whatsoever nature, performed or undertaken by him while purporting to hold the office of liquidator be and are hereby declared null and void and of no force or effect.
4. 1<sup>st</sup> Respondent be and is hereby removed from the office of Provisional Liquidator of the

- 2<sup>nd</sup> Respondent with effect from the date of this Order.
5. 1<sup>st</sup> Respondent be and is hereby ordered to render to 3<sup>rd</sup> Respondent full accounts in respect of all financial activities undertaken by him in respect of 2<sup>nd</sup> respondent with effect from 17<sup>th</sup> February 2010 to the date of this order, such accounts to be filed with 3<sup>rd</sup> Respondent within ten (10) days of the service of this Order upon 1<sup>st</sup> Respondent.
  6. 1<sup>st</sup> Respondent be and is hereby ordered to surrender to 3<sup>rd</sup> Respondent all assets of 2<sup>nd</sup> Respondent including movables and immovables, documents, deeds, records, including financial records, bank accounts, liquidation files, legal documents, equipment and any other assets whatsoever nature in his possession within ten (10) days of this order failing which the Deputy Sheriff be and is hereby authorized to carry out a diligent search and recover all such assets from 1<sup>st</sup> Respondent.
  7. 3<sup>rd</sup> Respondent be and is hereby to appoint Barbra Lunga as Provisional Liquidator of the 2<sup>nd</sup> Respondent with powers conferred by Section 221(2)(a) or (g) of the Companies Act [Chapter 24:03].
  8. 1<sup>st</sup> Respondent shall pay the costs of this application on an attorney and client scale.

*Joel Pincus, Konson & Wolhuter*, applicant's legal practitioners  
*Messrs Moyo and Nyoni*, 1<sup>st</sup> respondent's legal practitioners



Judgment No. HB 10/14

Case No. HC 419/13

Xref HC 310/13