RESERVE BANK OF ZIMBABWE
versus
ROYAL BANK OF ZIMBABWE LIMITED
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 17 December 2013 & 19 November 2014

Opposed Application

S. J. Chihambakwe, for the applicant
F. Girach, with him *A. Mambosasa,* for the first respondent
No appearance for the second respondent

ZHOU J: This is a matter for the confirmation or discharge of a provisional order granted by this Court on 20 February 2013. The order placed the first respondent under provisional liquidation in terms of the provisions of the Companies Act [*Cap 24:03*]. The confirmation of the provisional order is opposed by two of the respondent's shareholders, Jeffery Mzwimbi and Durajadi Simba.

The respondent is a company incorporated in accordance with the laws of Zimbabwe, and is a registered commercial bank in terms of the relevant provisions of the Banking Act (*Cap 24:20*). It was incorporated on 6 November 1997 but was only registered as a commercial bank on 8 May 2002. In August 2004 the first respondent was placed under curatorship by the applicant owing to problems occasioned by its poor lending practices and corporate governance issues. Its assets were acquired by a new entity known as Zimbabwe Allied Banking Group.

The first respondent was given back its banking licence in September 2010. It was not long after that that problems manifested themselves, which included serious undercapitalisation, persistent liquidity challenges and repeated losses. The first respondent failed to meet the minimum capital requirements for commercial banks which was US$12.5 million then. It continued to suffer loses. The unchallenged evidence of the applicant is that

as at 31 May 2012 the first respondent required no less than US$11.4 million dollars in order to comply with the minimum capital requirement of US$12.5 million. It imposed a maximum daily withdrawal amount of US$50 on its clients. Apart from failing to pay its creditors, the first respondent failed to give effect to transfers of funds from its clients' accounts into the accounts of third parties. It owed its creditors a total of US$2.27 million as at 31 May 2012. Statutory obligations to the National Social Security Authority, Zimbabwe Revenue Authority and Workers' Compensation Insurance Fund were not being paid. Investigations by the applicant revealed that the first respondent recorded a cumulative loss of US$5.98 million as at 30 June 2012, and that since its re-licencing the first respondent had been using depositors funds to cover its operational expenses resulting in a non-funded deficit of US$4.1 million as at 14 June 2012.

The applicant also makes allegations of mismanagement by the respondent's senior management, as well as violations of the law, among other allegations.

On 27 July 2012 the first respondent surrendered its banking licence to the applicant. It is, therefore, without a licence at this juncture despite holding funds belonging to its clients.

The shareholders of the first respondent who oppose the application admit its problems as set out in the founding affidavit generally. They, explain that the first respondent was exempted by the applicant from meeting the statutory capital reserve of US$12 500 000 up to September 2012. The shareholders allege that attempts to secure investors were frustrated by the applicant. In particular, the allegation made is that the applicant refused to approve an investor who wanted to inject a sum of US$7 million on the ground that the investor was a family trust. They also refer to a failed deal with the Commercial Bank of Africa which, according to them had offered to recapitalise the first respondent. But letters from the Commercial Bank of Africa and the Central Bank of Kenya dated 11 December 2012 show that the Central Bank of Africa took the decision not to proceed with the proposed investment on the basis that it would not be able to meet the new minimum capital requirement of US$100 million.

The shareholders contest the value of the assets and liabilities of the first respondent as stated by the provisional liquidator. According to them the value of US$6 300 000 ascribed to the fixed assets failed to take into account the fact that expired money instruments listed in table 11 of the liquidator's report were covered by landed assets and that upon expiry those assets would return to the first respondent's books thereby raising the value of the fixed assets. They state that the figure of US$5 500 000 recorded in the provisional liquidator

includes an interbank loan of US$529 194 which was due to Banc ABC which has since been dropped in the maturities of July 2012. According to the shareholders there are negotiations under way to restructure and recapitalise the first respondent by converting "debts owed to the major creditors in an admitted amount of US$3 700 000 into equity or long term debt" and obtaining a microfinance banking licence in order to ensure that operations resume and that sufficient funds are raised to settle all the debts.

The applicant contends as follows in para 25 of the founding affidavit:

> "I believe that it is just and equitable for the first respondent (to) be wound up because:-
>
> 25.1 it has no hope of recovery;
>
> 25.2 its liabilities exceed its assets – hence it is insolvent;
>
> 25.3 it is unable to pay its depositors, creditors and statutory obligations – hence it is unable to pay its debts;
>
> 25.4 it is unable to raise the minimum capital required for commercial banks;
>
> 25.5 it has failed to court investors to meet the minimum capital requirements;
>
> 25.6 it has voluntarily surrendered its banking licence to the applicant; and
>
> 25.7 it has poor corporate governance."

The above allegations are admitted by the first respondent.

The inability to pay debts and the "just and equitable" grounds are distinct grounds upon which a company may be wound up in terms of the Companies Act [*Cap 24:03*]

Section 206 of the Companies Act [*Cap 24:03*] provides as follows:

> "A company maybe wound up by the court –
>
> (a) ……..
> (b) ……..
> (c) …….
> (d) ……
> (e) ……..
> (f) If the company is unable to pay its debt;

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

In regard to inability of a company to pay its debts, section 205 of the Act provides as follows:

"A company shall be deemed to be unable to pay its debts –

(a) ……
(b) ……..
(c) If it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

In other words, what is required is proof to satisfy the court that the company is unable to pay its debts. See H. S. Cilliers *et al* (2000) *Cilliers & Bernade Corporate Law 3rd Ed.*, p. 504. A company is deemed to be unable to pay its debts if any of the criteria set out in s 205 are in existence. Section 205 (c) provides that in determining whether a company is unable to pay its debts the court is enjoined to take contingent and prospective liabilities into account. Thus the liabilities need not be regarded as if they are immediately due and payable, but they must be considered for what they are, viz. contingent or prospective liabilities, that is to say as factors having a bearing on the question whether the company is at present unable to pay its debts. *Gillis-Mason Construction Co (Pty) Ltd* v *Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524(T); *Barclays Bank (DC & O)* v *Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937(C) at 950. Also, in order to determine whether a company is unable to pay its debts it is not necessary to prove that its liabilities exceed its assets; it is sufficient if it is shown that the company is in a situation of commercial insolvency. A company is considered to be commercially insolvent if it is unable to meet the current demands upon it, that is to say its day to day or current liabilities in the ordinary course of its business. See *Rosenbach & Co (Pty) Ltd* v *Singh Bazaars (Pty) Ltd* 1962 (4) SA 593(D) at 597; *In re Candida Footwear Manufacturers (Pty) Ltd; Ex parte Spendiff NO: In re Jerseytex (Pty) Ltd* 1988 (1) SA 616(D).

The "just and equitable" section is an omnibus provision in terms of which the court does not confine itself to the facts, but also to considerations of justice and equity. The manner in which the business of a company is being managed can be impugned to the extent

of justifying a winding up by the court. See *Ebrahimi* v *Westbourne Gallaries* [1972] 2 All ER 492(HL); *Moosa NO* v *Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131(T) at 136.

In the instant case while there are disputes regarding some figures, it is not in dispute that the first respondent is heavily indebted and that it is unable to meet its day-to-day liabilities. It is not in dispute, that the depositors who held accounts with the first respondent have not been refunded their money and that the first respondent does not have the capacity to pay the depositors what is due to them. The imposition of a maximum daily withdrawal limit and the failure to pay the statutory obligations are sufficient evidence of a failure to meet the everyday liabilities. The report prepared by the provisional liquidator and the undisputed evidence tendered by the applicant illuminate the first respondent as a failed company with no prospects of ever being able to resume operations as a normal financial institution. Even if one was to accept the unsubstantiated assertion by the shareholders that the first respondent has assets which exceed its liabilities, those assets have not been shown to be liquid assets or readily realisable assets out of which the first respondent can pay its debts.

The business of banking occupies a central role in any economy. It has a potential to destroy confidence in an economy if not properly conducted. The celebrated case of *United Dominions Trust* v *Kirkwood* [1966] 2 QB 431 laid down what constitutes the business of banking. The business entails, among other undertakings, the undertaking to pay cheques drawn upon the banker by his customers in favour of third parties and the conduct of current accounts in terms of which customers must be able to freely withdraw their money whenever the need arises. See also M. Megrah & F. R. Ryder, *Paget's Law of Banking 9th Ed.,* p. 5. The relationship between a banker and its customer is basically a debtor and creditor relationship where an account is in the credit, and all money that lands into the banker's hands for the credit of a current account is to be taken as lent to the banker. See *Joachimson* v *Swiss Bank Corporation* [1921] 3 KB 110; *Hirschorn* v *Evans (Barclays Bank Ltd garnishees)* [1938] 2 KB 801 at 815. The uncontested evidence of the applicant is that the first respondent was unable to allow its customers to withdraw money as and when they needed it and imposed a maximum daily withdrawal of US$50. The provisional liquidator's report also reveals that there was serious abuse of depositors' funds by the first respondent. It is clear, therefore, that the first respondent is unable to pay its debts.

Circumstances in which the courts have granted winding up orders on the ground of the just and equitable provision include disappearance of the substratum. According to the

Longman Dictionary of Contemporary English, 'substratum' means "an idea, quality, etc. which forms the hidden base of something else". In the context of company law, the substratum would be that business or undertaking which in the contemplation of the company's memorandum the company will carry on. The authorities show that in order to determine what the substratum of a company is the court is not necessarily confined to the main object of a company as set out in the memorandum of the company, but is entitled to ascertain the main business which the company actually carries on. *In casu* the name of the first respondent and evidence of its previous undertaking ineluctably show that it was established to carry on the business of banking, as a commercial bank. It has surrendered its banking licence. That means it is unable to carry on the business of banking, although it still owes depositors the funds which they deposited with it.

The failure of the substratum of a company is established by proof that it has become objectively impossible for the company to achieve its objects; the intention of the company is irrelevant. *Pienaar* v *Thusano Foundation* 1992 (2) SA 552; *Re Kitson & Co* [1946] 1 All ER 435(CA) at 439. The intention to obtain a microfinance banking licence as expressed by the shareholders is therefore irrelevant, as that was not the basis upon which the first respondent received the depositors' money. It failed to meet the minimum capital requirement for a commercial bank, and owes large sums of money to creditors. It has not shown that it has the resources to start any banking business by whatever name.

This court has a discretion as to whether or not to grant an order for the winding up of a company. See *Shagelok Chemicals (Pvt) Ltd* v *International Finance Corp & Ors* 2003 (1) ZLR 207(S) at 217E-H; *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd* v *Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410(H) at 414G-415A. That discretion must, of course, be exercised judicially upon a consideration of all the relevant facts and circumstances of the case. The first respondent was placed under curatorship, in 2004. When it was allowed to resume its banking business its financial situation was still in a bad shape. The situation worsened through a combination of factors, which included a failure to moblise resources as well as bad management. It did not show signs of recovery during the period that it was under provisional liquidation. The real losers are the various creditors, including members of the public who held money in their accounts with the first respondent. Justice and equity demand that the first respondent be wound up in order to salvage the little that may be recovered for the benefit of its creditors.

In the result, it is ordered that the provisional order granted by this Court on 20 February 2013 be and is hereby confirmed.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners
Mambosasa Legal Practitioners, legal practitioners for the interveners