HB 75/19
HC 734/19

JAMES MAKAMBA

Versus

KESTREL CORPORATION (PVT) LTD
(Under Provisional Judicial Management)

And

GEORGE MANYERE

And

ECSPONENT ZIMBABWE (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 26 APRIL & 16 MAY 2019

Urgent Camber Application

J. Tshuma for the applicant
No appearance for the 1st respondent
K. Phulu for the 2nd and 3rd respondents

TAKUVA J: This is an application in terms of s301(2) of the Companies Act (Chapter 24:03). The applicant is a member, director and shareholder of 1st respondent. The application is made on an urgent basis in that the 1st respondent and the applicant continue to suffer prejudice due to being unduly placed on judicial management. Applicant therefore seeks discharge of the provisional order for judicial management of the 1st respondent issued on the 19th day of March 2019 under cover of HC 167/19 in that it is not in compliance with section 299 and the requirements of s300 of the Companies Act. The 2nd and 3rd respondents do not have *locus standi* to bring such an application and also acted *mala fide* in the *ex parte* application for provisional judicial management in that they conceled material facts that would have prevented the granting of this provisional order.

Applicant seeks in the alternative a variation of the terms of the provisional order in HC 167/19 so the return date may be brought forward to 3 May 2019 or such other date as the court may deem convenient.

The 2nd and 3rd respondents opposed the application on the following grounds:

(a) No urgency in that the certificate of urgency does not disclose any urgency.
(b) The applicant is aware that the 1st respondent has been owing the debt in question since 2016.
(c) No leave has been sought before bringing this application, therefore it is fatally defective.
(d) The 1st respondent has failed to discharge its indebtedness on demand and is therefore unable to meet its obligations.
(e) There are valid and adequate grounds for placing the 1st respondent under judicial management in that applicant has completely failed to settle its obligations.

The 2nd and 3rd respondents prayed for the dismissal of the application with costs on a high scale.

Issues

Did 2nd and 3rd respondents have the locus standi to apply for the order?

The starting point is section 299 of the Companies Act (The Act) which states:

"Judicial Management Instead of Winding Up

299. Circumstances in which provisional judicial management order may be obtained:-
(1) Subject to section 300 the court may –
(a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company; grant a provisional judicial management order; or

(2) Before an application referred to in paragraph (a) of subsection (1) is filed with the court, a copy of the application including the supporting affidavits and other documents shall be lodged with the Master who may report to the court on why circumstances which appear to him to justify the court in postponing or dismissing the application, and in such event the Master shall transmit a copy of his report to the applicant.

S207 Petition for winding up company

(1) An application to the court for the winding up of a company shall be by petition presented, subject to this section by the company or by any 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 in a case falling within subsection (2) of section one hundred and sixty-two by the Minister accompanied, save in the case of a petition by the Minister, by a certificate of the Master, Assistant Master or a magistrate that the security has been found for payment of all fees and charges necessary for the presentation of all proceedings with the appointment of liquidator …

s301 (2) The court or judge may at any time and in any manner, on the application of a creditor or a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management order concerned, vary the terms of a provisional judicial management order, including the date of the return day, or discharge it." (my emphasis)

The applicant's argument is that the 2nd and 3rd respondents are not creditors of the 1st respondent. What happened according to the applicant and is common cause, is that a company called Brainworks Capital Management (Pvt) Ltd entered into a loan agreement to the tune of $2 750 000,00 with the 1st respondent. Subsequently, Brainworks ceded all its rights, title and interest in the aforementioned to the 2nd respondent. This was done without 1st respondent and applicant's consent despite the fact that the loan agreement provides that no party may assign, hold in trust or otherwise transfer any rights or benefit under this agreement, or any document entered into pursuant to this agreement, without the prior written consent of the other party."

Further, applicant argued that the purported cession is null and void. Consequently, 2nd and 3rd respondents cannot refer to themselves as creditors. Their alleged right to claim the sum in issue from the 1st respondent is disputed and the determination of that dispute is the subject of a pending case in the High Court at Harare. Despite these facts, 2nd and 3rd respondents insist

that they are 1st respondent's creditors because applicant and 1st respondent acknowledged their indebtedness to the 3rd respondent. In my view, 2nd and 3rd respondents have missed the point namely that it is the validity of the cession agreement that is being disputed. Also 2nd and 3rd respondents have not simplified the matter by divulging in their founding affidavit the capacity they made the *ex parte* application. It has not been established whether 2nd and 3rd respondents are either, members, creditors, prospective creditors or contributories of the 1st respondent as required by the Companies Act. For this reason I find that their standing to make such an application is in serious doubt.

Nature of Judicial Management

In *International Caporationl Corp (Pvt) Ltd* v *Clairson (Pvt) Ltd* 2002 (1) ZLR 565 (H) the court described the nature and purpose of judicial management thus;

> "Judicial management is a means of affording a company time to surmount a temporary set-back it has suffered in the repayment of its debts or the performance of its obligations thereby avoiding its dissipation through winding up Judicial management is not intended to be an alternative method of liquidation. It is a special dispensation which can be granted only in exceptional cases and implies a temporary reconciliation of conflicting interests; those of the company and those of its creditors. Because of those conflicting interests the Companies Act (Chapter 24:03) requires the court to be satisfied both that there is a reasonable probability that if judicial management is ordered the company will be able to pay its debts or meet its obligations and become a successful company, and that it is just and equitable to afford the company the opportunity to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase its profitability of its operation." (my emphasis)

In casu, it was argued that judicial management is wholly inappropriate for the 1st respondent because it is not a trading company but wholly an investment vehicle. As such there are no financial statements to be produced. This point has been conceled to by the 2nd and 3rd defendants.

It was also argued that the 1st respondent does not fit the requirements in terms of the Companies Act for a company to be placed under judicial management. These requisites in terms of section 300 of the Companies Act are as follows:

(a) The cause of the company's predicament must be identified, though the court may grant an order whatever the nature of the cause, even where the company's difficulties are attributable to disputes or disagreements among those controlling it which may be overcome under the company's domestic procedures.
(b) The company must in fact be unable to pay its debtors or its must be likely that it will be unable in fact to pay them.
(c) There must be a reasonable probability – not a strong probability but not mere possibility – that the company is viable and capable of ultimate solvency and that it will become a successful concern.
(d) While there is no onus to show the payment of the company's debts will be effected within a specific time, payment must occur within what in the circumstances is a reasonable time otherwise judicial management would not be just and equitable in regard to the company's creditors.
(e) Judicial management must be just and equitable with reference to the rights and interests of the members and the creditors in all the circumstances of the case. The overriding consideration is that judicial management should be instituted where it is shown to be in the interests of all members and creditors. See *International Capital Corporation* case *supra*.

Second and third respondents' argument is that 1st respondent is unable to pay its debt to them therefore the requisites have been met. I disagree for two reasons. Firstly, the debt is a subject of pending litigation. Secondly, the parties are engaged in negotiations to resolve the dispute surrounding the 1st respondent's shareholding. It has not been shown that *in casu* there is some difficulty experienced by the 1st respondent that would warrant such a drastic interference by the court.

Applicant denied that it is unable to pay its debts. The Companies Act gives a clear description of inability to pay debts in the following manner"

"205 When company deemed unable to pay its debts

A company shall be deemed to be unable to pay its debts-

(a) If a creditor, by cession or otherwise to whom the company is indebted in a sum exceeding one hundred dollars when due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) If the execution or other process issued, on a judgment decree or order of any competent court in favour of a creditor against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or

(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 perspective liability of the company."

The issue to be determined is not whether a company has incurred debt or even whether the company has paid its debt it is whether the company is able to pay the debt. *In casu* applicant has communicated all efforts to the 2nd and 3rd respondents. These efforts are aimed at settling its disputes and dispose of its obligations. It seems 2nd and 3rd respondents have grown impatient with following due process.

For the above reasons, I come to the conclusion that applicant has established a *prima facie* right warranting the court to grant provisional relief. The applicant and 1st respondent will suffer irreparable harm if the judicial manager starts dabbling in the affairs and assets of the 1st respondent. Further, the judicial manager will be entitled to be paid fees by the 1st respondent. This will cause financial prejudice. The balance of convenience favours the granting of the alternative interim relief in that it affords both parties an opportunity to argue their respective cases on the return date.

In the circumstances, it is ordered that pending confirmation of, or discharge of this order on the return day the following relief is granted:

1. The return day in case number HC 167/19 for confirmation or discharge of the provisional order shall be on 23 May 2019.
2. Pending the return day the provisional judicial manager shall not encumber, transfer or alienate in any way whatsoever any assets of the 1st respondent.
3. Costs shall be costs in the cause.

Scalen & Holderness c/o Webb, Low & Barry applicant's legal practitioners
Mutamangira & Associates, 2nd & 3rd respondents' legal practitioners