WFD NETWORK (PRIVATE) LIMITED

and

J.W. JAGGER WHOLESALES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 30 September 2010

Mr *D. Ochieng*, for the applicant

Adv *Zhou*, for the respondent

CHIWESHE JP: The applicant seeks the winding up of the respondent on the basis that it is deemed to be unable to pay its debts by virtue of s 205 (a) of the Companies Act [*Cap 24;03*].

In its founding affidavit sworn to by Jacobus Johannes Ellis, a director, the applicant states that it has been supplying the respondent with goods since 2009. The respondent has not been paying for these goods. Statements covering July 2009 are filed of record showing various amounts owed by the respondent. As at 31 August 2009 the respondent owed the applicant the sum of $248 991.66. It further owed various sums in the months succeeding August 2009. The cumulative debt is substantial. Demand for payment was made on 18 March 2010 and served on the respondent’s managing director at respondents’ registered address. On 26 March 2010 the respondent agreed that it owed the sum of $698 408.07. Three weeks have lapsed since demand was made. The respondent, argues the applicant, should be deemed to be unable to pay its debts in terms of s 205 (a) of the Companies Act [*Cap 24:03*]. The respondent has accordingly committed an act of insolvency as contemplated in s 11 of the Insolvency Act [*Cap 6:04*]. The applicant further argues that the respondent has failed to pay its debt as contemplated in s 206 (f) of the Companies Act and it is just and equitable that the respondent be liquidated in terms of s 260 (g) of the same Act. The applicant proposes to appoint Theresa Grimmel as the provisional liquidator. The Master of the High Court has been furnished with the necessary bond of security. The master has no objection to the appointment of Theresa Grimmel.

The respondent opposes this application. It admits that it owes the applicant the sum of US$698 408.01 but denies that it is unable to pay its debts. The respondent says that it entered into negotiations with the applicant wherein it sought the rescheduling of its debt. No agreement was reached in this regard because the applicant was negotiating “in bad faith”. Further the respondent has obtained a suitable guarantee of $250 000.00 to partly pay its debt. It is in further negotiations with the applicant for the payment of the outstanding balance. The respondents have also provided title deeds to its properties as security for the debts.

The issues to be decided in applications of this nature are aptly summed up in the headnote to the South African case of *ABSA Bank Ltd vs Rhebos Kloof (Pty) Ltd and Others* 1993 (4) SA 436. It reads,

“The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up because it is commercially insolvent is whether or not it has liquid or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading. Once the Court finds that the company cannot do so, it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345 (1) (c ) reads with s 344 (f) of the Companies Act 61 of 1973. Whilst it is true that, if the company is solvent in the sense that its assets exceed its liabilities, the Court has a discretion to refuse a winding up order in those circumstances, it is one which is limited if there is a creditor whose debt the company is unable to pay.”

The applicant argues that s 205 (a) of the Companies Act is a deeming provision. Once certain criteria are met a company is regarded as being unable to pay its debts, regardless of whether or not it is factually able to do so. Therefore, argues the applicant, all it needs to show in terms of s 205 (a) of the Companies Act is that the respondent is indebted to it in a sum exceeding $100.00 which is due, a demand has been delivered to the registered office of the respondent for payment and that for the following three weeks the respondent neglected to pay, secure or compound the sum due. These requirements have been shown to have been met avers the applicant.

The respondent on the other hand argues that the applicant must show that the debtor is unable to pay its debt and not merely that there has been a delay or a failure to pay the debt. Winding up terminates the life of a company. It cannot be taken save for good cause. The term “unable” refers to incapacity to pay the debt. The respondent says it has sufficient assets to pay the debt. The respondent also avers that the parties have been involved in negotiations in terms of which the applicant intended to acquire shares in the respondent. The present application seeks to arm-twist the respondent because negotiations have not been finalised as per the applicant’s expectations. In the alternative the respondent argues that even if the applicant has established an act of insolvency, this court has a discretion to dismiss the application. In support of this submission the respondent quotes the case of *Croc Ostritch Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H)*.*

I agree with the respondent in that “the court has an inherent discretion to refuse to order liquidation, notwithstanding the proven existence of grounds for liquidation. This discretion derives from two sources. Firstly s 206 of the Companies Act [*Cap 24:03*] gives the court the discretion in this regard by the use of the word ‘may’. Secondly, the court has a discretion flowing from its inherent jurisdiction to prevent abuse of process.” (See the Croc-Ostritch Breeders case above.)

I also agree with the respondent that it has shown on a balance of probabilities that it has assets whose combined value exceeds the debt complained of. Indeed a bond of security has been issued in favour of the applicant to secure this very debt by way of title deeds. The respondent has also secured a bank guarantee to meet part of its debt. For this reason I would hold that the respondent is able to pay this debt and that winding up would be “seriously disproportionate in its prejudicial effect upon the respondent.” (Croc – Ostritch Breeders case *supra*)

It is common cause that the parties have engaged in serious negotiations in terms of which the applicant would have secured fifty per cent of the shares of the respondent. These negotiations have failed. Whilst it has not been conclusively shown that the applicants are doing so, it is possible they have lodged this application in order to influence the outcome of these negotiations. Should that be the case it would amount to harassment of the respondent, which would be an abuse of court process.

For these reasons I would, as I hereby do, dismiss the application with costs.

*Coghlan, Welsh & Guest*, applicant’s legal practitioners

*Gill, Godlonton & Gerrans*, respondent’s legal practitioners