TSHISIKU BUSINESS MANAGEMENT (PTY) LTD
versus
KRAU (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14 January 2016

Opposed application

D Ochieng, for the applicant
S D Maruza, for the respondent

FOROMA J: This is an application for confirmation of the provisional order for liquidation of respondent which was opposed. At the end of argument the court granted a final order for the liquidation of the respondent. The reasons for granting the final order for liquidation are given herein below.

On 21 January 2015 this court granted a provisional order for the liquidation of the respondent Krau (Private) Ltd on the basis of the applicant's claim that the respondent had committed two acts of insolvency namely (i) that the respondent had failed to pay its debts in terms of s 205 (a) of the Companies Act [*Chapter 24:03*] and (ii) that it was just and equitable that the respondent be liquidated as contemplated by s 206 of the Companies Act as it had stopped operating and had no prospect of recovery.

Confirmation of the provisional order for liquidation was opposed by Hortecia Forbes a South African shareholder in the applicant company and who disputed the assertion that a resolution to place the respondent under liquidation had been passed by the applicant company authorising Nicholas Georgiou Eleftheriades to take the necessary action and sign the required document to give effect to the resolution.

Confirmation of the provisional order for liquidation was also opposed by Yawani Chemiri whose opposing affidavit was on behalf of the respondent which basically disputed that the respondent had stopped operations and that it had no prospects of recovery. He placed in issue the financial management of the respondent which he attributed to Nicholas

Georgian Eleftheriades style of management. He suggested (without explaining why applicant's debt had not been paid) that respondent could pay any proven debts from which the respondent benefited. The respondent also filed an opposing affidavit from one Canaan Mutanda a 10% shareholder of the respondent who strongly disputed that the respondent had stopped trading but did not profer any explanation as to why the applicant's debt had not been paid as claimed in the applicant's founding affidavit.

In its answering affidavit the applicant pointed out that Hortecia Forbes was not a director of the applicant but a shareholder and as the resolution Annexure TBM1 on p 6 of the papers indicated it is a resolution of the applicant's directors which H Forbes could not have been party to. His affidavit clearly cannot be properly relied upon as evidence that the applicant did not validly resolve that as a creditor owed money by the respondent it take steps for the liquidation of the respondent in other words that the affidavit of Nicholas Georgio Eleftheriades was false.

Indeed a special meeting of directors is not a meeting of the shareholders. It will be noted that Hortecia Forbes did not dispute the acts of insolvency that the applicant relied on for moving that the respondent be placed under provisional liquidation.

The respondent through Yawani Chamiri disputed that the respondent had stopped operations. The applicant in its answering affidavit explained why it formed the impression that the respondent had stopped operating even though I did not understand it to be persisting with the contention that the respondent had stopped trading. Clearly therefore this ground for liquidation could not properly form the basis for moving the court to confirm the provisional order for respondent's liquidation.

Having successfully dislodged the one ground put forward for liquidation it is important to determine whether the respondent committed an act of insolvency namely failed to pay its debts justifying confirmation of the provisional order for the respondent's liquidation.

In terms of para 7 of the applicant's founding affidavit the applicant averred that the applicant loaned US$658 850.00 to the respondent between March 2011 and November 2012 which amounts were due on demand by the applicant which demand for payment was made on the 21 October 2014 through Coghlan Welsh and Guest (the applicant's legal practitioners) addressed to the respondent's accountant CS Tsokonyai Accounting Services P/L which accepted service of the letter of demand. The letter of demand gave the respondent 3 weeks within which to pay failing which an application for the liquidation of the respondent

would be pursued as had been instructed by the applicant. No payment was made at the expiry of 3 weeks given although the indebtedness was expressly admitted through the respondents' accountants. Clearly this failure to pay the debt gives rise to the inference in terms of s 205 (a) of the Companies Act [*Chapter 24:03*] that the respondent is deemed to be unable to pay its debts which is an act of Insolvency Act [*Chapter 6:04*]. In its opposition the respondent did not dispute the debt owed to the applicant nor did it put in issue that it failed to pay the said debt whether as claimed by the applicant or in any lesser amount when demand was made. It is trite that the decision to allow a demand for payment to go unanswered in circumstances where an answer is reasonably expected to be given in itself is a strong objective indication that the respondent accepts its liability and inability to pay-*Mc Williams* v *First Consolidated Holdings Pty Ltd* 1982 (2) SA 1 A at 10E-H.

In casu the respondent despite the expressed risk to being liquidated in the event of a default did not do so much as reply – a clear indication of an act of insolvency (inability of pay debts).

No proper explanation was advanced for the respondent's attempt to disown its own financial statements by disputing them several months after it had published them. It should be appreciated that the financial statements were prepared by its own accountants in fulfilment of a statutory obligation. I found it very difficult to believe that the respondent was being sincere in its attempt to discredit its own financial statements especially after publishing them.

As liquidation is a process that exists for the protection of insolvent companies and their creditors alike and designed to allow an orderly distribution of assets and prevent a rush for company assets likely to result from creditors being left to rampage in their competition for relief this court found that the applicant had clearly shown that the respondent should be wound up.

For the foregoing reasons among others the court ordered the confirmation of the provisional order for the liquidation of the respondent company.

Coghlan Welsh and Guest, applicant's legal practitioners
Chingore & Associates, respondent's legal practitioners