Judgment No. HB 126/2003
Case No. HC 2957/2002
X-Ref HC 2813/2000

TAGARIRA BROTHERS (PVT) LTD

Versus

BARBRA LUNGA N.O.

And

INNOCENT NYATHI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 SEPTEMBER & 27 NOVEMBER 2003

V Majoko for the applicant
J Tshuma for 2nd respondent

Judgment

NDOU J: According to the terms of the final order sought in this matter the relief sought by applicant is that:

"1. It be and hereby declared that the applicant is the legitimate purchaser of Sukasihambe Special Express (Pvt) Ltd (in provisional liquidation) as a going concern together with its movable and immovable assets for the total sum of seven million and two hundred thousand dollars ($7 200 000,00).

2. The first respondent be and is hereby ordered to transfer ownership of all assets belonging to Sukasihambe Special Express (Pvt) Ltd (in provisional liquidation) to applicant within seven days of confirmation of this order.

3. The third respondent be and is hereby ordered to give the written consent for the transfer of ownership of the aforementioned assets and

to that end is ordered to sign all necessary documents to give effect to the transfer of ownership as aforesaid.

4. In the event of one or other or both the first and third respondents refusing or failing to sign all necessary documents for the transfer of the assets of Sukasihambe Special Express (Pvt) Ltd (in provisional liquidation) then the Deputy Sheriff of Bulawayo be and is hereby authorised and ordered to sign the documents aforesaid in the stead of one or the other or both first and third respondents.

5. The second respondent shall pay the costs of the application."

The salient facts of this matter are that Sukasihambe Special Express Service (Pvt) Ltd ("Sukasihambe") was placed under provisional liquidation by order of this court dated 6 April 2001, pursuant to an application for voluntary liquidation by Sukasihambe, represented by the first respondent who was then the judicial manager.

The first respondent was "appointed" provisional liquidator of Sukasihambe and in that capacity purportedly exercised powers set out in section 221 of the Companies Act. It should be pointed out that the second respondent disputes that first respondent was appointed provisional liquidator. I will come back to this issue. On 26 September 2002, CHEDA J ordered:

"1. This matter be and hereby is postponed to 7 November 2002 and the rule *nisi* is extended to that day.

2. The Assistant Master be and hereby is directed to convene a meeting of the creditors and shareholders and the provisional liquidator of the applicant before 24 October 2002 for the express purpose of trying to settle this matter, but it shall also be for the purpose of –

(a) allowing all creditors of the applicant to prove their claims;

(b) Allowing I Nyathi to make proposals to the creditors to discharge the debts owed to them by the applicant; and

(c) Allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares.

3. The provisional liquidator shall cause a notice of the aforesaid meeting to be published in a Friday newspaper at least 7 days before the proposed meeting."

At all these stages the first respondent had assumed the role of a provisional liquidator. She was at all material times represented by a legal practitioner. At a meeting attended by, *inter alia*, the second respondent, two bids were submitted. One was for $5 million by Lusinga and the other for $7.2 million by the applicant. The latter bid was accepted by the creditors and the first respondent, acting in her capacity as Sukasihambe's provisional liquidator. It is clear from the papers that although the second respondent initially opposed the application for provisional liquidation he subsequently dealt with the first respondent in her capacity of provisional liquidator. In all his dealings with first respondent, the second respondent dealt with her as provisional liquidator.

It later transpired that up to 10 October 2002, first respondent had not been appointed provisional liquidator of Sukasihambe. This is evident from correspondence and the letters addressed to her and the second respondent by the Assistant Master of this court. One such letter states in part –

> "I refer to our discussion during your visit to this office on 5 September 2002 and advise that no provisional liquidator has been appointed as yet. Although the provisional order issued on 29 March 2001 directs that Barbra Lunga

> should be appointed as provisional liquidator, such appointment has not been effected as she has not lodged a bond of security in compliance with section 274 of the Companies Act [Chapter 24:03].
>
> By copy of this letter I am reminding Barbra Lunga to urgently lodge the aforesaid bond of security …"

(By second respondent's legal practitioner to first respondent's legal practitioner dated 11 September 2002)

> "The writer attended at the Assistant Master's office. In terms of the records at the Assistant Master's office Mrs Lunga was never confirmed as the provisional liquidator as she failed to provide the necessary security. As such, she has never had authority to deal with the company in liquidation and to dispose of its assets. She cannot therefore even make application for the confirmation of the provisional order …"

(By the Assistant Master to the second respondent's legal practitioner and copied to first respondent's legal practitioners and directly to first respondent on 10 October 2002)

> "Further to my letter dated 5 September 2002 I advise that Mrs Lunga has not lodged any bond of security as she has ignored my copy letter sent to her. In view of this development I advise that the proposed meeting for 11 October 2002 cannot proceed as there is no provisional liquidator in place.
> As evident from paragraphs 2c and 3 of the order dated 26 September 2002, there is need for a properly appointed provisional liquidator to be in office before the required meeting can take place. Therefore the meeting cannot proceed as any purported actions from anyone who is not a liquidator will obviously be null and void. For the sake of progress in this matter I suggest that you have the provisional order amended so that we nominate somebody who is willing to timeously lodge the relevant bond of security."

(By Assistant Master to first respondent and copied to the second respondent's legal practitioners dated 14 February 2003)

> "I refer to my lengthy conversation with Mrs B Lunga regarding the Creditors Meeting that had been sanctioned by the court and held before me on 11 October 2002. I wish to point out that at the time of the meeting Mrs Lunga had furnished a security bond to the Assistant Master and her certificate of appointment as provisional liquidator had been issued.

> Therefore all the proceedings at that meeting were proper and binding to all parties. There was nothing amiss."

Even after writing the letter dated 11 September 2002, the second respondent continued to transact Sukasihambe's winding up dealings through the first respondent. His protestation did not translate to a boycott of the activities of the first respondent. The second respondent, however, raised two issues, namely, the *locus standi* of the first respondent and the validity of the alleged sale. I propose to deal with these issues in turn.

Locus standi of first respondent

It is not in dispute that the first respondent was confirmed as a provisional liquidator on 11 October 2002, just before the commencement of the meeting. She only furnished the security bond required by the Assistant Master on that day.

It is trite that a provisional liquidator is appointed as a financial overseer, controller and liquidator. The power of appointment vests with the Master and the court has no inherent power to appoint a provisional liquidator. The Master has an unfettered and sole administrative discretion as to the appointment of a provisional liquidator and it is within his or her statutory powers to give instructions on such appointments. The decision on the sale of the disputed property took place after the first respondent was properly appointed by the Assistant Master on 11 October. The way I understand the applicant the first respondent had already exercised some powers of the provisional liquidator before such appointment. All this was obviously done with the full knowledge of the Assistant Master as evinced by his correspondence. The applicant also used the first respondent to exercise certain

liquidator's duties even before the appointment. The appointment was delayed until 11 October 2002 on account of first respondent's failure to furnish security. Provision of security is pre-requisite to such appointment as rightly observed by learned authors J C Nkala and T J Nyapadi in *Company Law in Zimbabwe* (1995 Ed) at page 436 –

> "Each liquidator, co-liquidator or provisional liquidator must furnish security to the satisfaction of the Master for the due performance of his duties as such before he shall be capable of exercising his duties. If he fails to do so within a fixed time he shall be deemed to have resigned from his office."

I do not think that such acts carried out by the first respondent prior to 11 October 2002 are relevant for the present application, because the decision to sell the company assets was taken at properly constituted meeting of creditors convened by the Assistant Master after first respondent's appointment as provisional liquidator.

I agree with the second respondent's contention that the first respondent should not have been cited as party and that this court cannot order her to perform the duties of provisional liquidator at this stage. I say so because that the provisional order of liquidation was discharged on 7 November 2002. First respondent ceased being a provisional liquidator as of 7 November 2002. This application was only launched on 18 December 2002 so there is no merit in paragraph 2 of the order sought. I do not, however, agree with the second respondent that I should dismiss the entire order sought on the basis of this fact alone.

Alleged invalidity of sale

The second respondent alleges that the sale is a nullity. He relies on sections 218(2)(b) and 274(1) of the Companies Act [*Chapter 24:03*]. These provisions deal with the question of provision of security by the provisional liquidator which I have

meeting of 11 October 2002 to be published, the first respondent acted as provisional liquidator and as such the resultant meeting was a nullity. First respondent was obviously meeting of 11 October 2002 to be published, the first respondent acted as provisional liquidator and as such the resultant meeting was a nullity. First respondent was obviously causing a notice to be published "in a Friday edition of a local newspaper at least seven days before the proposed meeting" as ordered by CHEDA J *supra*. The meeting was convened by the Assistant Master pursuant to paragraph 2 of the same order by CHEDA J which required it to be convened before 24 October 2002. The order says the meeting shall be convened by the Assistant Master but advertised by provisional liquidator. There is no problem with the convening of the meeting but the publicising of the meeting was done by first respondent prior to appointment as such. In any event, the provisional liquidator does not seem to have the power to convene creditors meetings. In light of the fact that the meeting itself was properly convened I do not think a defect in publication in a local newspaper (with no stated prejudice to the second respondent) should render the meeting a nullity. Section 218(4)(b) clearly authorises a provisional liquidator to sell assets. According to section 221(2)(h) powers of alienating assets are exercisable "subject to the leave of the court". Second respondent contends that the first respondent did not have the requisite leave of the court. The order of CHEDA J ordered, *inter alia*, for a meeting to be held for the purpose of "allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares". Clearly a sale was contemplated and a sale did take place duly authorised by the said court order. The applicant's offer was accepted by all the creditors in writing. A tender process was followed and the applicant was the highest bidder.

I agree with the second respondent's contention that a provisional liquidator requires authority of the court to sell any property belonging to insolvent estate. But, disposal of property of the insolvent estate is an essential part of the liquidation process and the liquidator, in consultation with the creditors, is rightfully the person who should administer the process. *Ex parte Serfontain: in re insolvente bedoel Schoeman* 1978(1) SA 246 (O). From the provisions of the Act it is clear that a provisional liquidator cannot alienate assets of any kind, movable or immovable on his or her own initiative. The court or Master should grant leave to sell only in exceptional circumstances. The best interests of the creditors is a factor that should weigh heavily in deciding whether such special circumstances exist or not – *Esharowitz* v *Perold* 1921 CRD 501 and *The Law of Insolvency* (3rd Ed) by C Smith at page 179. *In casu*, there is authority of the court as shown above. Further the overriding factor is that the creditors themselves accepted the applicant's offer as it was in their best interests. In all the circumstances exceptional circumstances were present for the alienation of the assets.

I, accordingly, find that the application should succeed in part as follows:

It is ordered:

1. That it be and is hereby declared that the applicant is the legitimate purchaser of Sukasihambe Special Express (Pvt) Ltd as a going concern together with its movable and immovable assets for the total sum of seven million and two hundred thousand dollars.
2. That the Assistant Master of this court be and is hereby ordered to give the written consent for the transfer of ownership of the aforementioned

assets and to that end is ordered to sign all necessary documents to give effect to the transfer of ownership as aforesaid.

3. That the second respondent shall pay the costs of this application.

Majoko and Majoko applicant's legal practitioners
Webb, Law & Barry second respondent's legal practitioners