Judgment No. HB 74/10
Case No. HC 1097/10
Xref HC. No. HC 2044/05, HC 57/06
Xref HC. No. HC 1002/06, HC 178/06
Xref No. HC 1649/05, HC 1933/05 & HC 933/06

REBECCA SIZIBA **APPLICANT**

AND

BAMSLOVE INVESTMENTS (PVT) LTD **1ST RESPONDENT**

AND

MARTIN SIMMONS **2ND RESPONDENT**

AND

REGISTRAR OF COMPANIES **3RD RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 9 JULY 2010 AND 22 JULY 210

Mr. S. S. Mazibisa for applicant
Mr. M. Nzarayapenga for 1st and 2nd respondents

Judgment

MATHONSI J: This matter came on a certificate of urgency with the Applicant seeking a provisional liquidation order of the first Respondent setting out an array of reasons why this should be done. The grounds for seeking a winding up order as can be gleaned from the founding affidavit are that:-

(a) the shareholders are not on talking terms and their relationship has seriously deteriorated over the years as seen by endless litigation that has been playing out in the Courts between them.

(b) the company has failed to lodge a statutory report or hold a statutory meeting for more than 6 years and there are no annual returns lodged either. It should be recalled that first Respondent is a private company and as such this requirement does not apply to it. See section 124 of Companies Act, [Chapter 24:03]

(c) the company has no bank account and no deposits are being made into a bank.

(d) very little gold is being deposited at the Reserve Bank of Zimbabwe suggesting that the company is dealing illegally in gold that is being mined.

(e) the company is not paying taxes and other statutory deductions and has not been paying its accounts.

(f) no dividend has been declared for over 6 years.

(g) attempts to resolve the matter amicably have failed and there is a high risk that second Respondent is plundering the assets of the company.

At the commencement of proceedings, the attention of Applicants' counsel was drawn to the provisions of sections 200 and 207 of the Act providing for the jurisdiction of the master and the requirement for a master's certificate in a petition for winding up. Section 207(1) is peremptory by virtue of the use the word "shall" and it reads:-

> "An application to the court for the winding up of a company s<u>hall</u> be by petition presented, subject to this section, by---contributory or contributories--- accompanied --- by a certificate of the Master, Assistant Master or a Magistrate that due security has been found for payment of all fees and charges necessary for the prosecution of all the proceedings until the appointment of a liquidator."

There is no such certificate in this application and, although counsel for the Applicant undertook to regularise the defect, that has not been done. As it is the application for winding up is without a certificate for security in clear breach of the mandatory provisions of section 207(1) of the Act.

In the circumstances a provisional liquidation order cannot be granted. I would otherwise dismiss the application for that reason alone but for the fact that I take judicial notice of the fact that the matter has a chequered history spanning a number of years. There has been litigation after the other which has not resolved anything and the situation has not been helped by the emotions running very high which have roped in even counsel for the parties. There is therefore need, in the interests of justice to mop up the situation.

The Applicant and the second Respondent have been fighting for control of the first Respondent company for a number of years. All in all seven applications have been filed by either of them in this Court. This culminated in an order granted by consent on the 17th May 2007 in terms of which Applicant lost her directorship in first Respondent and was interdicted from conducting any business in the name of the company and visiting its operation centres in Zimbabwe without written consent.

Since her banishment from the company the Applicant has remained only as a shareholder of the company with 40% shares against second Respondent's 60% shareholding. However, it does appear that after inviting Applicant to about two shareholders' meetings in 2007, the Respondents have either not held any such meeting at all or ignored Applicant completely for almost 3 years. She has not received any notice to attend a general meeting

and has not been allowed access to any books of account of the company. More importantly during all the years of Applicant's banishment, not only has the company failed to convene an annual general meeting, it has also failed to provide her with the accounts of the business.

In terms of section 125 (1) and (2) of the Act:

"(1) Subject to this section, every company shall, within the period specified in subsection (2), hold general meetings to be known and described in the notice calling such meetings as annual general meetings of that company.

(2) Annual General Meetings of a company shall be held:-

(a) in the case of the first meeting, within a period of 18 months after the date of the incorporation of the company concerned; and

(b) thereafter, within not more than 6 months after the end of every ensuing financial year of the company; and

(c) within not more than 15 months after the date of the last preceding meeting of that company".

Subsection (5) of section 125 allows the Registrar of Companies to direct that such meeting be held on application by an interested party. In this case, it would appear that once an order was made removing the Applicant from directorship and preventing her from visiting the place of business of the company, the Respondents started running the business to her complete exclusion without convening the annual general meeting. There is criminal sanction for failure to comply with the above provisions showing that non-compliance is a very serious breach.

Section 128(2) empowers the court to compel a company to hold its meetings and to also give any ancillary or consequential directions regarding those meetings.

A company is required by law to maintain proper books of account in respect of all sums of money received and expended by the company and where no books exist as to give a true

and fair view of the state of the company's affairs and explaining all transactions, this is a serious violation of the law; see section 140(1) and (2) of the Act.

It has not been disputed that the Applicant has not had access to the books of account of the company, if at all they exist and that no dividend has been declared in those troubled years. *Mr Nzarayapenga* who appeared for the Respondents submitted that the first Respondent is a "healthy entity" and that it employs about 105 employees on a fulltime basis. I tend to agree with *Mr. Mazibisa* for the Applicant that if indeed this was the case, the Respondents should not have any difficulty in declaring a dividend. One should add that all this should reflect on the books of account.

It is not clear why the Respondent would only keep its "clear set of annual returns" at Paracor and TJ Accounting and why even these have not been made available to the Applicant. The Applicant is a shareholder who holds a substantial stake in the business and as such she is entitled to all accounts of the business including monthly management accounts. She must be informed of the financial performance and general activities of the business. For management to go more than two years without submitting financial reports to shareholders is unacceptable especially where a dividend has not been declared.

The grounds relied upon by the Applicant in her founding affidavit in seeking a liquidation order, are not grounds upon which liquidation can be ordered. Except for the allegation that the company is unable to pay its debts which is embodied in item (e) above, the rest in the list, even if proved would not entitle the Applicant to an order for winding up. For instance the

breakdown of relations between shareholders is not sufficient ground for winding up, so is the rest of the claims.

It has not been shown that the company is unable to pay its debts and in any event this remedy would be available to an unpaid creditor. That there is an outstanding ZESA bill of just above $700-00 cannot give rise to winding up. In any event I have a discretion to refuse to order liquidation notwithstanding proven grounds for liquidation as stated by GILLESPIE J in *Croc-Ostrich Breeders of Zimbabwe (Pvt) LTd v Best of Zimbabwe (Pvt) Ltd* 1999(2) ZLR 410 and 414 F-G:

> "Such a discretion is deliberately provided for by the use of the permissive "may" in the enactment providing the grounds of winding up by the court (section 206). Even without this the court would, in the proper case, have the discretion flowing from its inherent jurisdiction to prevent abuse of its process. These two sources together provide a judicial discretion, based on all the relevant circumstances of any case, to withhold an order of winding up even if grounds have technically been established."

See also *CF Tuckers Land and Development Corp (Pvt) Ltd v Soja (Pty) Ltd* 1980(3) SA 253(W) at 257C.

The first Respondent employs 105 employees on a fulltime basis and its mines must be doing well. I am of the view that its problems and in particular its inability to declare a dividend for all these years is attributable to maladministration. While most of the Applicant's concerns may be founded they point to a company run in complete disregard of the law and corporate governance. If the application had been made in compliance with the Act, consideration would have been given to placing the company under judicial management.

As it is now my options are limited to ensuring compliance with the law and the protection of Applicant's interests. Regarding the costs of suit I am of the view that none of the parties have fully succeeded in this matter as would entitle them to an order for costs in their favour.

Accordingly it is ordered as follows:-

(1) That the application for liquidation of the first Respondent be and is hereby refused.

(2) That the first and second Respondents be and are hereby directed to convene an annual general meeting to which the Applicant should be invited and notified in terms of the provisions of the Companies Act, [Chapter 24:03], such meeting to be convened within 30 day of this order.

(3) That the first and second Respondents should produce all books of account of the company for the years 2007, 2008; 2009 and 2010 (so far) reflecting the true and fair view of the state of the company's affairs.

(4) That the said books of account should be made available for inspection by the Applicant or her nominee or assign within 21 days of this order.

(5) That at the meeting referred to in Clause 2 above, the exact stake of the Applicant and the second Respondent in the company should be determined.

(6) That each party shall bear its own costs.

Mathonsi J………………………………………………………

Messrs Cheda and Partners, applicant's legal practitioners
Messrs Dube-Banda, *Nzarayapenga and partners* 1st respondent's legal practitioners