RADIATOR AND TINNING (PVT) LTD
and
RADIATOR AND TINNING (PVT) LTD
WORKERS COMMITTEE
and
WALTER DUBE
and
LITOS CHIKWANDA
and
BORNFACE MAMBO
and
SENA SENA
and
IGNATIOUS GWEMBA
and
CLETLO NDLOVU

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 25 October 2010 & 19 January 2011

Advocate *A. Ochieng*,for applicant
A. Marara, for the respondents

MTSHIYA J: This is an opposed application where the applicant seeks confirmation of a provisional liquidation order granted on 24 March 2010, which order read as follows:-

> "1. The applicant, RADIATOR & TINNING (PRIVATE) LIMITED, is provisionally would up, pending the grant of an order in terms of paragraph 3 of the discharge of this order.
>
> 2. Subject to subs (1) of s 274 of the Companies Act. [*Cap 24:03*], THERESA GRIMMEL is appointed as provisional liquidator of the above company with he powers set out in s 221(2)(a)-(g) of the Act.
>
> 3. Any interested party may appear before the court sitting at Harare on 5 May 2010, to show cause why a final order should not be made placing the applicant company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.
>
> 4. A copy of this order shall be served on the applicant at its registered office.
>
> 5. This order shall be published once in the Government Gazette, once in the Herald and once in the Chronicle newspapers in a Friday edition. Publication shall be in the short form annexed to this order.

6. Any person intending to oppose or support the application on the return day of this order shall:

(a) give due notice to the applicant at Coghlan Welsh & Guest, Legal Practitioners, 3rd Floor Executive Chambers, 16 George Silundika Avenue, Harare, ref N. Moyo
(b) serve on the applicant a copy of any affidavit which he files with the Registrar of the High Court."

The applicant, in its application filed on 9 March 2010, has, in terms of s 207 of the Companies Act [*Cap 24:03*], ('the Act') petitioned this court for the above relief because, as per the founding affidavit:-

"(i) the company is unable to pay its debts;
(ii) the company has resolved, by special resolution, to wind up;
(iii) I believe that it is just and equitable that the company be wound up, so that the assets of the company can be liquidated to provide for some equitable distribution to creditors".

In its founding affidavit the applicant also states the following:-

"Applicant has 102 employees, and its outstanding wage bill is US103 215-00. The company has no prospect of generating enough money to settle this bill".

Indeed on 22 February 2010, at a special meeting of shareholders held at Helier, Jersey, the Directors of the applicant had passed the following resolutions:-

- "It was resolved that the notice period required for the holding of a Special General Meeting be waived.

- It was resolved that Radiator & Tinning (Private) Limited be put into "Members Voluntary Liquidation", due to the inability of the Company to continue to meet it's obligations.

- It was resolved that Jeremy Hodgskin, ID No. 08 051413K00, be empowered to do all things and sign all documents in regard to effecting and facilitating this liquidation.

- It was resolved that Robert Charles Jenkinson, ID No. 63010327K00, be empowered to do all things and sign all documents in regard to effecting and facilitating this liquidation.

- It was resolved that Theresa Grimmel be appointed Liquidator"

The second resolution above relating to members voluntary liquidation is the one to occupy us in this judgment. It is on the basis of that resolution that the applicant then approached this court for the relief it seeks.

The provisional order quoted in full at p 1 of this judgment, was published in both the Herald and The Chronicle on 9 April 2010 and 30 April 2010 respectively.

On 10 May 2010 the respondents filed a Court Application (i.e case no. HC 3093/10) for joinder in terms of Order 13 r 85 of the High Court Rules 1971. In the founding affidavit in support of that application, the second respondent, representing the view of all other respondents, stated the following as the basis of their application to be joined to the proceedings:-

> "4. The respondent through its legal practitioners filed a court application being a petition for its winding up on 9 March 2010 without consulting the workers committee since it is an interested party which is directly affected as one of the applicants' creditors.
>
> 5. On 22 April 2010, upon arrival at the workplace with other workers, we saw that the gate was locked. Upon enquiring that is when I was given a letter by the liquidator to the effect that a court application for liquidation had been made by the respondents.
>
> 6. On 30 April 2010, we had a meeting as the workers committee and resolved to duly appoint Messrs Matsikidze & Mucheche as our legal practitioners to act on our behalf. A copy of the extract of minutes has been attached herein as Annexure 'A'.
>
> 7. Being representatives of employees and the application in question being one which affects the welfare of such, with respect I submit that we should be joined to the application so as to give us an opportunity to be heard as an interested party. The applicants have a direct and substantial interest in the matter for which the joinder is being sought herein.
>
> 8. With respect I humbly submit that an order of this Honourable Court allowing the joinder will enable the respondents to be heard by this Honourable Court during the proceedings of the petition."

The record does not show how that application was handled.

However, it appears upon the respondents' application having been opposed by the applicant, this court, on 26 May 2010, issued the following order:-

> "1. The matter is referred to the opposed roll.
>
> 2. The provisional order be and is hereby extended until the matter is resolved on the opposed roll.

3. The applicants in Case No. 3093/10 shall file their Notices of Opposition within 10 days of service of this order".

On 8 June 2010 and in terms of the above order the respondents (applicants in case no. 3093/10) filed their notice of opposition in which they raised the following points *in limine*:-

"NON COMPLIANCE WITH THE PROCEDURE

With respect, I am reliably advised by my esteemed counsel, which advice I embrace that the procedure as laid down in s 25A(4)(a) and (5)(c) of the Labour Act [*Cap 28:01*] was not followed before the matter was filed in this Honourable Court. It is respectively submitted that the applicant should have conducted a Works Council meeting with the workers in order to discuss its financial status and the way forward but this was not done. At the same time nothing was attached to the petition to the effect that such communication had been done to the workers. I will leave my legal counsel to deal with the legal issues in the Heads of Arguments to be filed with this Honourable.

EXISTENCE OF MATERIAL DISPUTE OF FACTS

This matter if full of material disputes of facts which can only be cured by leading evidence from witnesses as will be elaborated from para 3 downwards. I therefore pray that the Honourable Court allows oral evidence to be led during the hearing"

At the hearing of this matter and after listening to addresses on the points *in limine*, I allowed the parties to also address me on the merits of the application. I indicated then that my finding on the points *in limine* would dictate whether or not I should proceed to determine the application on the merits.

In making submissions on the points *in limine,* Mr *Marara* for the respondents pointed out that in view of the fact that this was a voluntary winding up of the applicant (company), the procedure adopted was flawed. He said in terms of the law and since this was a voluntary winding up, the employees (herein represented by the respondents) were supposed to have been consulted. He correctly pointed out that in its answering affidavit the applicant clearly admitted that this was a members' voluntary winding up. This was indeed in line with the shareholders' second resolution which specifically made reference to 'Members Voluntary Liquidation.' Mr *Marara* also said that in the given circumstances, s 25A (5)(c) of he Labour Act [*Cap 28:01*] was clear on the need for workers to be consulted in situations of such a voluntary winding up.

Mr *Marara* went on to submit that the fact that the applicant had not produced audited accounts and the respondents disputed what was presented, meant that there were triable issues

in the matter (i.e the disputes of fact could not therefore be resolved by way of application). He therefore urged the court to deny the applicant the relief it seeks.

Advocate *Ochieng*, for the applicant, submitted that the applicant had properly proceeded in terms of s 207 of the Act. He said if the matter was one of voluntary winding up, there would have been no court proceedings. He also said that although the resolution was 'imprecise' the applicant had followed the correct procedure. Advocate *Ochieng* submitted that winding up through the court was a public process and to that end the applicant had complied with the provisions of the Act.

Advocate *Ochieng* did not agree that there were material disputes of fact

For reasons I shall give here below, I am persuaded to agree with the respondents that the procedure followed by the applicant is fatally irregular and therefore the provisional order granted by this court on 24 March 2010 should not be confirmed.

Section 199 of the Act provides for the following two modes of company winding up:

"(a) by the Court or

(b) Voluntary"

Sections 206 and 207 of the Act then provide for circumstances under which a company may be wound up by court and how the process may be commenced. Given the import of the resolution that led to this process and the applicant's own admission in the answering affidavit, I shall not concern myself with the provisions of those sections of the Act. The resolution upon which the application is anchored specifically refers to "Members Voluntary Liquidation". The resolution does not therefore bring us into the ambit of ss 206 and 207 of the Act. The members' resolution, in my view, dictates that we be guided by the provisions of ss 242 and 243 of the Act. The said sections provide as follows:-

"**242 Circumstances in which company may be wound up voluntarily**

A company may be wound up voluntarily-

(a) when the period, if any, fixed for the duration of the company by the articles expires or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(b) if the company resolves by special resolution that the company be wound up voluntarily.

243 Notice of resolution for voluntary winding up

(1) In this section-

"workers' committee" means a workers' committee appointed or elected in terms of Part VI of the Labour Relations Act (*Cap 28:01*].

(2) A resolution for the voluntary winding up of a company shall not be deemed to have been passed unless the company has given not less than four weeks' notice of the resolution-

(a) to the Registrar of Labour Relations referred to in s 121 of the Labour Relations Act [*Cap 28:01*]; and
(b) to the company's workers' committee or, where the company has no worker's committee, to the company's employees:

Provided that this subsection shall not apply in relation to a company all of whose employees are officers of members of the company.

(3) Where a company has passed a resolution for its voluntary winding up it shall-
(a) within two weeks after passing the resolution, give written notice of it to the master and the Registrar; and
(b) within one month after passing the resolution-
(i) publish notice of it in the Gazettee; and
(ii) …..
(iii) …..

(4) …….

(5) ……

In *casu*, a special resolution "that the company be wound up voluntarily" was indeed passed. Advocate *Ochieng* submitted that the resolution was imprecise. I disagree.

The special resolution quoted at p 2 of this judgment clearly expresses the wishes of the members and is unambiguous. That position enjoys full support from the applicant's own averments. Applicant admits to the passing of the special resolution and also that it has a workforce it owes wages and salaries. The affected employees are not members of the applicant. It would, in my view, be highly irregular for this court to amend or indeed to interfere with the applicant's resolution. As I have already said, the applicant's resolution dictates that the procedure it should have followed is the one provided for in ss 242 and 243 of the Act quoted above.

It is also important to note that s 2A(3) of the Labour Act [*Cap 28:01*] provides as follows:-

"This Act shall prevail over any other enactment inconsistent with it"

Section 243 of the Act removes any possibility of inconsistence between the two pieces of legislation. The said section caters for the interests of the workers in a situation of a voluntary winding up of a company such as *in casu*. Furthermore the provisions of s 243 of the

Act are in line with the spirit of the law as captured in subss 5 & 6 of s 25A of the Labour Act [*Cap 28:01*].

All in all, my finding is that, as per its resolution of 22 February 2010, the applicant should have followed the procedure laid down in ss 242 and 243 of the Act as read together with subs 5 & 6 of s 25 A of the Labour Act [*Cap 28:01*]. The applicant departed from its resolution and proceeded in terms of s 207 of the Act. That action by the applicant does not enjoy the support of the resolution it purports to be the basis of the relief it seeks. Even without taking into account the fact that there might be disputes of facts, as argued by the respondents, the point *in limine* on the procedure adopted should succeed on the basis of it being fatally irregular. The application cannot therefore succeed. I therefore order as follows:-

The application for the confirmation of the provisional order granted by this court on 24 March 2010 be and is hererby dismissed with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Matsikidze & Mucheche, respondents' legal practitioners