

ISAAC TIGERE TICHAREVA  
(In his capacity as the duly appointed Executor Dative of  
Estate Late Isaiah Mudzengi, DR 10/22)  
versus

GREYNUT INVESTMENTS (PVT) LTD  
and  
MASTER OF THE HIGH COURT  
and  
REGISTRAR OF COMPANIES  
and  
TECLA GARIRA  
and  
ZIMBABWE DEFENCE FORCES – BENEFIT FUND

HIGH COURT OF ZIMBABWE  
CHINAMORA J  
HARARE, 25 April & 20 October 2023

### **Court application for liquidation**

*Adv R Mabwe*, for the applicant  
*Mr E Samundombe*, for the fourth respondent  
*Mr C Bare*, for the fifth respondent  
*Mr B Maruva* and *Mr J Zuze*, for the liquidator

### **CHINAMORA J**

#### **Background facts**

This application was filed in terms of section 5(1)(b)(iii) of the Insolvency Act [*Chapter 6:07*] (“the Act”), for the liquidation of Greynut Investments (Pvt) Ltd (“the first respondent”) on the basis that it is just and equitable to wind it up. It was brought by the executor of the estate of the late Isaiah Mudzengi, who held 70% shares in the first respondent. The application is opposed by the fourth and fifth respondents. In her opposition, the fourth respondent states that she the Chief Executive Officer and co-director of the first respondent, and that she has a shareholding of 30%. When this matter was first heard, I reserved judgment on preliminary points raised by the

parties and, in due course, delivered a full judgment dismissing those preliminary points. As a result, the matter was argued on the merits. This is my judgment after hearing submissions on the merits.

The applicant seeks an order for provisional liquidation of the first respondent on the basis that it is just and equitable that it be wound up. He avers that there is a deadlock between its members and directors. The case articulated in the founding affidavit is that, the first respondent does not have a functional board of directors after the death of the late Mudzengi. The applicant avers that, because the company had only two directors (the deceased and the fourth respondent), no valid and binding decisions can be made by one remaining director.

In addition, the applicant submits that the fourth respondent is dissipating the company's assets, as well as selling assets in its name, thereby creating obligations which the company is unable to fulfill. The relationship between the two shareholders has since deteriorated to the extent that the mutual trust that once existed, is totally gone. The applicant submits that a deadlock has arisen because, he (as executor of the estate of the late Mudzengi) and the fourth respondent have failed to agree on key decisions important for the company, like electing other company directors. He also alleged that the fourth respondent was selling the deceased's personal stands without following the requirements of the law. In this respect, the applicant pointed to sales without the authority of the Master of the High Court ("the Master"); dealing with the estate of the late Mudzengi without the authority of the executor, thus creating unlawful transactions which would affect the estate and the company under liquidation. The applicant is concerned that the fourth respondent is misappropriating money realized from the sale of the stands. He urges the court to grant an order for provisional liquidation of the first respondent, in order to safeguard the interests of the public, prospective purchasers of stands, those who have already purchased, beneficiaries and other stakeholders.

A further averment by the applicant is that the fourth respondent defied an agreement signed on 20 July 2015, whilst Mudzengi was still alive, which stipulated that the first respondent does not sell stands. This agreement appears on pp 37-42 of the record, marked Annexure "E". Another issue raised by the applicant is that, the fourth respondent was intransigent in not cooperating with the applicant, prompting him to approach this court for an interdict on 24 May

2022 under HC 3139/22, which is Annexure “F” on pp 43-45 of the record. The terms of this order, which the fourth respondent did not oppose, are as follows:

“INTERIM RELIEF GRANTED BY CONSENT

Pending the determination of this matter on the return date, the applicant is granted the following relief:

1. The 1<sup>st</sup> to 3<sup>rd</sup> respondents shall co-operate with the applicant in the execution of his statutory duties.
2. The 1<sup>st</sup> to 3<sup>rd</sup> respondents be and are hereby interdicted from disposing of stands for commercial value in a certain piece of land situate in the district of Gwelo, being Lot 1 Bucks of Fife Scott Block, measuring 155.3658 hectares.
3. The 1<sup>st</sup> to 3<sup>rd</sup> respondents be and are hereby interdicted from receiving any sums for payment of the said stands or previous sales through the 1<sup>st</sup> respondent company and/or in the name of the deceased either in cash or through the 1<sup>st</sup> respondent’s company;
4. Consequently, any payment for stands in respect of the property known as a certain piece of land situate in the district of Gwelo, being Lot 1 Bucks of Fife Scott Block, measuring 155.3658 hectares or any disposal of portions thereof, whether in the past or future shall be executed through the applicant and the elected designated account”.

I need to comment on the statement of affairs as it, obviously, is relevant to the application before me. The statement confirms that the property belongs to the late Mudzengi and not the first respondent. In this regard, the agreement expressly says that:

“Isaiah Mudzengi is the registered owner of a certain piece of land situated at Lot 1 Bucks Farm in Gweru of 10949 surveyed but not developed low and medium cost stands”.

This means that the first respondent only has personal rights in the property based on the agreement it signed with Mudzengi before his death. Thus, the applicant contends that the first respondent is not entitled to receive the proceeds from the sale of stands, and that the fourth respondent should account for any money received to the executor (i.e. the applicant). While the statement of affairs indicates that 50% cash was received by the first respondent on the sale of the stands, no documentary evidence was provided to the court to substantiate this allegation. In this connection, books of accounts, like a balance sheet were not availed to the court. (See paragraphs 2.4-2.5 of the applicant’s Answering Affidavit). Further, the applicant avers that claim that the fourth respondent contributed US68 000 towards the company was not supported by any document. (See paragraph 3.1 of the applicant’s Answering Affidavit). It is for this reason that the applicant averred that, failure to show any paperwork proves mismanagement and that the company is no longer liquid, and that it should be wound up.

For the reasons set out above, the applicant asks for an order for the first respondent to be wound up. Such an order, argues the applicant, would be in the interests of the public, prospective purchasers of stands, people who have already purchased and beneficiaries.

As I have already indicated, the fourth and fifth respondents opposed the application. I will first examine the fourth respondent's opposition. She begins by explaining that Greynut Investments (Private) Limited was formed as a family business that did not have reserved funds. Then continues to assert that the company's objective was to generate income through sale of stands. In addition, the fourth respondent asserted that there was no basis for liquidating the fourth respondent. She denied a deadlock in the appointment of directors, she said that she wrote a letter to the applicant (on 22 August 2022) asking him to convene a meeting in order to appoint a director. She added that her letter was ignored. While the fourth respondent admitted collecting proceeds of the sale of stands, she averred that the funds were used "for the purpose for which they had been collected". She added that she had shown willingness to co-operate with the applicant, and did not impede the applicant in the administration of the deceased's 70 % shareholding in the company. The first respondent submitted that she had the capacity to service the land in question from funds received from the sales of stands. Thus, she asked the court to dismiss the application for liquidation.

On its part, the fifth respondent in its opposition, began by stating that it is an interested party, having purchased 300 stands from the deceased Mudzengi in September 2022. Those stands are part of a sub-division Lot 1 Bucks of Fife Scott Block, measuring 720.9133 hectares situate in the district of Gwelo. The fifth respondent averred that it paid 65% of the purchase price to the first respondent, and was to be utilized to develop those stands. Additionally, the fifth respondent argued that the first respondent was solvent enough to pay its debt and, for that reason, the application for liquidation should be dismissed by this court. In support of this argument, the fifth respondent says the applicant has not produced evidence to show that the first respondent was in financial distress. It was also contended that no proof had been availed by the applicants establishing that the stands in question belong to the estate of the late Mudzengi. Finally, it alleged that the applicant's decision making is poor, and an affidavit by one Margaret Mhembere ("Mhembere") was attached this complaint. Mhembere's accusations against the applicant relate to the administration of a different estate, namely, Estate Late Chipo Willard Matereke. This

deponent alleges that the applicant converted the money she had paid to buy a property in the estate of the late Matereke. Not only that, Mhemhere also averred that the applicant misrepresented that the property belonged to the estate in fact, it belonged to the Government of Zimbabwe. However, I note that no report of theft of trust funds or fraud was made to the police against the applicant. I will now look at the law that applies to liquidation of companies.

### **The applicable law**

The position of the law as it pertains in this jurisdiction is set in Section 5(1)b of the Insolvency Act, which provides as follows

**“5 Application by debtor for liquidation of trust, company, private business corporation, co-operative or other debtor other than a natural person or partnership**

(1) An application to the court for the liquidation of a debtor other than a natural person or partnership may be made-

(a) by the debtor itself if it has resolved that it be liquidated by the court in terms of a liquidation resolution and the debtor is not protected by law, agreement or any other legally enforceable reason, from passing such resolution; or

(b) by the company, or by one or more directors or by one or more members for an order to wind up the company on the grounds that-

(i) the directors are deadlocked in the management or the company, and the members are unable to break the deadlock, and

A. irreparable injury to the company is resulting, or may result, from the deadlock; or B. the company's business cannot be conducted to the advantage of members generally, as a result of the deadlock;

(ii) the members are deadlocked in voting power, and have failed for a period that includes at least two financial years to elect successors to directors whose terms have expired”

In an application of this nature, what is pleaded is that there is a deadlock between the parties and it is just and equitable to wind up the company. The applicant, in *casu*, has pleaded the existence of a deadlock and that he is now hamstrung in making decisions beneficial to the company, its creditors, beneficiaries and interested stakeholders. Litigation based on this kind of provision has happened many a time in South Africa, and their jurisprudence on this subject is helpful to us. The equivalent provision in the South African statutes is section 81(1)(d)(iii) of the Insolvency Act 1936. That provision has been interpreted in various cases, and the key words that have received clarification from decided cases are “deadlock”, “just and equitable”. For example, in *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic*

*Prospecting & Investments (Pty) Ltd and Others* 2014(5) SA 1 (SCA), MALAN JA, at para. 10, defined “deadlock” as follows:

“The ordinary meaning of ‘deadlock’ is a ‘condition or situation in which no progress or activity is possible; a complete standstill; lack of progress due to irreconcilable disagreement or equal opposing forces’. Regarding the phrase ‘just and equitable’, MALAN JA held in *Thundercats* (supra), at para. 15, stated that the concept is a recognition of the fact that a limited company is more than a mere judicial entity with a personality of its own and that there is recognition for the fact that “behind it, or amongst it, there are individuals with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure”.

From judicial interpretation, it is evident that a situation or circumstance which has the effect of impeding the smooth flow of a company’s administration creates a deadlock. Also clear is that the expression “just and equitable” imports in it the concept of fairness. Put differently, the court must subject the exercise of legal rights to equitable considerations, i.e. to consider the fairness or otherwise of the decision to wind up the company. Let me return to the concept of a deadlock. This was succinctly explained in the unreported Kwazulu-Natal High Court Case of *Wynand Cornelius Van Zyl v Boat Lodge Investments CC & Ors* Case No 9417/19, where HENRIQUES J stated:

“In the case of a "domestic" company, ie a company with a small membership ... winding-up is just and equitable where the "deadlock" principle, derived from *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA), can be applied; this is "founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership”

These remarks are very interesting, particularly, in this case where the first respondent is a small family company which had two directors. In fact, this has been pleaded by the fourth respondent in her founding affidavit. Deadlock, is the applicant’s principal reason for seeking the relief of winding up. I must mention that deadlock must not be viewed in the literal sense. This

was clarified by the court in *Van Zyl v Boat Lodge Investments CC supra* went to say, quite appositely, that:

“... it is not necessary to establish literal deadlock: it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement between the members . . . (e.g constant quarrelling between the only two shareholders with voting rights as such, who are also the only two directors, leading to a situation where they are not on speaking terms”.

Once a finding of a deadlock is made, in my view, a winding up order can be granted on the basis that the deadlock renders it just and equitable to grant the order. This rationale was given in *Apco Africa (Pty) Ltd & Anor v Apco Worldwide Inc.* 2008 (5) SA 615 (SCA) in the following words:

“There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in *Loch v John Blackwood Ltd* [1924] AC 783 (PC) at 788, is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director's conduct of those affairs”. **[My own emphasis]**

The issue of existence of a deadlock as a basis for liquidating a company is intricately linked to the just and equitable principle. The linkage was clearly shown in the English case of *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 (HL). It was stated that winding up is usually ordered by the court in four situations, namely: (1) where there has been a disappearance of the substratum; (2) where there exists justifiable lack of confidence among members; (3) where, in practical terms, the relationship resembles that of a partnership and lacks the protection of a more formal corporate structure; and (4) where the parties are deadlocked. It can be gleaned from the case law that if the members of a company cannot harmoniously work with each other, it is manifestation that they are deadlocked.

Having set out the law relevant to liquidation, I will move on to apply the law to the facts.

### **Analysis of the case**

The applicant has, in his founding affidavit, related to instances which he relies for the submission that a deadlock exists. It is interesting that in her opposing affidavit, the fourth respondent does not significantly deny the applicant's allegations. Section 5(1)(b) of the

Insolvency Act requires a deadlock between the directors of the company to exist. This provision requires evidence demonstrating that the deadlock would result in irreparable harm; or that the business cannot be conducted to the advantage of the shareholders. In addition, it must be shown that the shareholders have unsuccessfully attempted to resolve the deadlock.

The applicant's case for a deadlock is fully articulated in the founding affidavit. He avers that following the death of Mudzengi, the first respondent no longer has a functional board of directors. The company now has one director, who is the fourth respondent. If one has regard to the application papers, it is apparent that the applicant is concerned that the company is operating without at least two directors as required by law. (See Section 195 of the Companies and Other Business Entities Act [*Chapter 24:31*]). The situation now obtaining is that the applicant (as executor of Estate Late Mudzengi) and the first respondent are not seeing eye to eye on key issues concerning the running of the company. As deposed in his affidavit, the applicant is worried that the first respondent is creating liabilities for the company which it is financially unable to meet. Essentially, the argument is that the fourth respondent is effectively dissipating assets of the estate. Yet, the correct procedure is that, the sale of property in a deceased estate property by private treaty requires the authority of the Master. In fact, only a duly appointed executor has the authority to sell property in a deceased estate. This has a negative impact on the estate and the company.

What is more perplexing is that the first respondent is not cooperating with the applicant, who is the executor of the estate. Even her failure to accept the elementary legal position that she cannot deal with the stands without the authority of the applicant or the Master confirms the applicant's allegation of a deadlock. Also pertinent to note is that the applicant had to obtain a court order to as the fourth respondent to co-operate and to interdict her from selling property which was arguably part of the estate. Even when the order was granted with her consent, the record shows that the fourth respondent did not abide by the terms of that order. In my consideration of whether or not it is just and equitable for the first respondent to be wound up, I have also noted that the statement of affairs does not show a healthy financial state of the company. Apart from the fourth respondent's averments, there is no independent financial document to verify the allegations. Additionally, I observe that contrary to the fourth respondent's



claim that the first respondent had authority to sell stands on behalf of Mudzengi, the agreement unequivocally provides:

“This agreement does not constitute a partnership or a joint venture of landowner and the developer. Developer (i.e. first respondent) shall not be an agent of the landowner. For the avoidance of doubt, the landowner is an independent contractor herein”.

In light of the foregoing, I hold the view that a case for the winding up of the first respondent has been demonstrated. I am inclined to grant the relief sought.

Having come to the conclusion that the order of winding up of Greynut Investments (Private) Limited is justified, I turn to consider the issue of costs. In relation to the liquidation application, the question of the costs does not really arise as costs will be the costs in the liquidation of the first respondent.

In the result I make the following order

1. The first respondent. Greynut Investments (Private) Limited be and is hereby finally wound up.
2. Subject to Section 42 of the Insolvency Act [*Chapter 6:07*], Knowledge Mumanyi is hereby appointed as final liquidator of Greynut Investments (Private) Limited with the powers set out in Part X of the Insolvency Act.
3. The costs of the liquidation application be costs in the liquidation of the first respondent.

*Chatsanga & Partners*, applicant’s legal practitioners

*Samundombe & Partners*, fourth respondent’s legal practitioners

*Murambasvina Legal Practice*, fifth respondent’s legal practitioners