KHAYA CEMENT LIMITED (Formerly known as Lafarge Cement Zimbabwe Limited)
versus
HHOOPWESTERN INVESTMENTS (PRIVATE) LIMITED t/a AFRIMINING
and
MASTER OF THE HIGH COURT
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 5 & 14 March 2024

Opposed Application

G Ndlovu, for the applicant
Ms *C Magoge*, for the first respondent

ZHOU J: This is an application for the provisional liquidation of the first respondent and for the appointment of Theresa Grimmel as the liquidator in accordance with the requirements of the law. The application is being made in terms of s 6 as read with s 14 of the Insolvency Act [*Chapter 6:07*] ("the Act").

The application is opposed by the first respondent.

The background facts to the application are as follows: The respondent owes the applicant a sum of US$510 979.80 together with interest thereon at the rate of eight percent per annum calculated from 19 January 2021 to the date of payment in full. The amount was awarded pursuant to arbitral proceedings. The arbitral award was registered as an order of this court on 12 January 2022 pursuant to an application instituted under Case No. HC 5560/21. After the registration of the award the applicant caused a writ of execution against movable property to be issued, and property belonging to the first respondent was attached and sold in execution. The sale realized a sum of US$35 318.50 after deduction of the agent's commission and other costs. On the basis of the above facts, the applicant has instituted the instant application seeking a provisional order for the liquidation of the first respondent.

There is a mixing up of the grounds on which the application is being made. The applicant states that the application is being made on the ground that the first respondent is unable to pay its debt, but in the same papers there is repeated reference to it being just and equitable that the order for the provisional liquidation of the first respondent be granted. These are two distinct grounds that must be pleaded separately or alternatively. In the heads of argument the applicant seems to be placing reliance on the two grounds. However, at the hearing of the matter it became clear that notwithstanding the gratuitous reference to the "just and equitable' statement, the actual ground upon which liquidation is being sought is the alleged inability of the first respondent to pay its debt.

In opposition, the first respondent states that the applicant was responsible for frustrating payment of the amounts claimed by unlawfully withholding the first respondent's equipment. The first respondent refers to other proceedings in which it is making claims against the applicant. It further disputes the assertion that it is unable to pay its debt, and mentions that the applicant sold its property which applicant had custody of.

An objection *in limine* taken in the first respondent's opposing affidavit challenging the validity of the founding affidavit was abandoned at the hearing of the matter. The matter was accordingly debated on the merits.

The issue to be decided in this application is whether the first respondent is unable to pay its debt and, if so, whether the provisional order for its liquidation must be granted. The court is also called upon to determine whether it is just and equitable for the order sought to be granted.

Section 6(1) of the Insolvency Act authorizes a creditor who has a liquidated claim of not less than the amount of $200 or the amount that may be prescribed from time to time against a debtor who is unable to pay his or her debts as envisaged in s 3 of the same Act, to approach this Court. The approach will be in the form of an application for the debtor's estate to be placed under liquidation. If the debtor is a company, as is the case in the present matter, the same relief can also be sought on the ground that it is "otherwise just and equitable for the company or private business corporation to be liquidated".

Section 14 (1) provides, *inter alia*, that this Court may grant a provisional order for the liquidation of a debtor if it is satisfied on the face of the documents that the requirements of s 6 have been satisfied. The requirements to be satisfied are that it is just and equitable where the

debtor is not a natural person, partnership or trust or in the case of any other debtor, if the debtor's liabilities exceed his or her assets or the debtor is unable to pay its debts in terms of s 3.

Section 3 of the Act elucidates the content of the concept of inability to pay debts in the context of insolvency. It provides as follows in subsection (1):

> "A debtor is deemed to be unable to pay his or her debts upon proof that the debtor is generally unable to pay debts which are due and payable, or proof that the debtor's liabilities exceed the value of the debtor's assets."

Mr *Ndlovu* for the applicant submitted that the applicant was not alleging or relying on the ground of the first respondent's liabilities exceeding its assets. He submitted that reliance was being placed on the provisions of s 3(2)((b), which states that for the purposes of subsection (1) a debtor is unable to pay his or her debts if "it appears from the return of the officer charged with the execution of a judgment of Court against the debtor that the judgment has not been satisfied after a valid execution thereof."

The first respondent, disputed the assertion that it is unable to pay its debt. It pointed to the fact that the applicant withheld its property and proceeded to attach and sell that same property. It also argued that no attempt was made to enforce the writ at its registered business address which is also the address that appears in the writ of execution.

In order to have a proper appreciation of the essence of the provisions relating to inability to pay a debt one must understand that inability connotes a lack of capacity rather than a lack of the will or desire to pay. In other words, inability does not mean a refusal to pay or neglecting to pay. These latter two reflect a subjective attitude of the debtor who might be having the resources to be able to deploy towards the discharge of the debt but deliberately or negligently refrains from making the payment for whatever reason or motive. Inability, on the other hand, must be assessed objectively by reference to all the circumstances of the case as proved by the evidence placed before the Court. The evidence must show an actual lack of capacity to pay the debt, see *Mannatt* v *MM De Kock & Sons Ltd* 2000 (1) ZLR 543(S), at 544F-545A. Thus, the mere failure to present oneself before the creditor for the purposes of voluntarily paying the debt does not necessarily show inability to pay a debt. This is the reason why the law has provided procedures, in particular, the process of execution, to enable the creditor to recover the debt.

That process applies to recover the debt from a debtor who is unwilling to pay even

where he or she or it has the ability to pay. This reasoning, in my view, explains why it has been held that an application for the winding-up of a company "is not process for the purposes of enforcing payment", and "should not be resorted to in order to enforce payment of a debt". See *Apotex Incorporated* v *Surgimed (Pvt) Ltd* 2002 (2) ZLR 612(S) at 616E-G; *Prudential Shippers SA Ltd* v *Tempest Clothing Co (Pty) Ltd & Ors* 1976 (2) SA 856(W); *Stambolie & Anor v Nyamutamba Transport (Pvt) Ltd* 1985 (2) ZLR 320(H).

Where one seeks to rely on the provisions of s 3(2)(b) to show inability to pay, the relevant return from the officer who is responsible for the execution of a judgment of Court would be a *nulla bona* return of service. Where the Sheriff has not rendered a *nulla bona* return there can be no proof of inability to pay a debt. In the instant case there was no *nulla bona* return of service. Instead, the return that is being relied on pertained to the first respondent's goods that were in the custody of the applicant which were then attached by the applicant in execution. The applicant clearly misled itself by attaching only the goods that were in its possession and neglected to look for other goods belonging to the first respondent at its identified address. In fact, it is disconcerting that the applicant ignored the address for execution that is stated in the writ of execution that it caused to be issued, and paradoxically attached the goods in its custody in order to thereafter allege inability to pay the debt.

The return rendered by the Sheriff in this case does not in any way prove that the judgment could not be satisfied. It is therefore not evidence of inability to pay the debt.

As regards the "just and equitable" ground for seeking the liquidation of a company, this court has held that this is an omnibus provision in terms of which the court does not confine itself to the facts alleged but also to considerations of justice and equity, *Reserve Bank of Zimbabwe* v *Royal Bank of Zimbabwe Ltd & Anor* 2014 (2) ZLR 716(H) at 722F. It must be born in mind always that the liquidation of a company is a matter of interest not just to the one creditor at whose instance it is being instigated, but also to the other creditors of the company, the shareholders, the employees and the general public to whom the company provides a service. In this case this court has already found that the company has not been shown to be unable to pay its debt. But there is the additional factor that this is a liquidation that seems to be sought as a way of enforcing payment of the debt. This conclusion is reached based on the conduct of the applicant of attaching only the first respondent's goods that were in its custody and selling them

and thereafter alleging inability to pay a debt even without making any attempt to enforce the writ at the address that is stated in the writ. No equitable grounds have been advanced to justify the liquidation of the company under such circumstances.

In view of the conclusion reached that none of the grounds alleged to justify the liquidation has been established, the question of the discretion that the court has in relation to the liquidation of a company does not arise *in casu*.

In the result, IT IS ORDERED THAT:

1. The application be and is dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Magoge Law, first respondent's legal practitioners