ZIMBABWE INTERNATIONAL TRADE FAIR COMPANY

Versus

VIKING PLASTICS (PVT) LTD

AND

BONGANI NDLOVU N.O

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO 4 APRIL, 2013 AND 25 APRIL 2013

N. Mangena for the applicant
No appearance for the respondents

Court application for the discharge of a provisional judicial management order.

MUTEMA J: Economic challenges, liquidity crunch, viability problems, competition – the list is not exhaustive for these and other phenomena which have conspired to hamstring a lot of business entities in this country with the consequent result of threatening their very existence. Too ghastly to contemplate are the possible consequences. But is the flagrant abuse of court process the panacea to these ills? It is my considered view that it certainly is not. It only provides temporary refuge.

On 12 April, 2012, under case number HC 3387/11 applicant obtained summary judgment in an opposed application in an amount in excess of US$16 591-00. This judgment was closely followed by a writ of execution issued on 17 April, 2012. The Deputy Sheriff proceeded to attach 1st respondent's movables on 7 May 2012. On 14 May, 2012 1st respondent in HC 1528/12 filed an urgent chamber application seeking an order for provisional judicial management which was granted on 22 May, 2012. That provisional judicial management order contained the following notable features:

(a) the 2nd respondent volunteered to be appointed provisional judicial manager;

(b) 26 July, 2012 was set as the return date for the confirmation of the provisional order;

(c) all actions, summons and writs were stayed pending the return date.

The applicant has lodged the current application in terms of section 301 (2) of the Companies Act, [Chapter 24:03]. That section provides:

> "301 (2) The court or a judge may at any time and in any manner, on the application of creditor, a member, the provisional judicial manager, the Master or any person who would have been entitled to apply for the provisional judicial management order concerned, vary the terms of a provisional judicial management order, including the date of the return day, or discharge it."

The following pertinent issues are material to the outcome of this application:

(i) the return date for the provisional judicial management order was pegged at 26 July, 2012. On that date, the order was further extended to 15 November, 2012. Thereafter there was no further extension made which means that the provisional order is lying dormant.

(ii) on 26 July, 2012 applicant's current legal practitioners wrote to 2nd respondent lodging applicant's claim as per the judgment in HC 3387/11. The letter fell on deaf ears prompting another follow up correspondence dated 8 August, 2012. On 24 September, 2012 2nd respondent replied advising that he was aware of applicant's claims but the provisional order had been extended to 15 November, 2012 to allow for time to advertise and file a statement of affairs. He undertook to keep applicant informed of new developments. It should be noted that on 9 July, 2012 applicant's legal practitioners of record had also written to 1st respondent's erstwhile legal practitioners requesting for an update of the judicial management and any reports filed with the Master's office. Nothing was provided.

(iii) the provisional judicial manager has not to date been issued with a certificate of appointment by the Master. He also has not lodged a bond of security with the Master.

(iv) the provisional judicial management order has not yet been advertised;

(v) no meeting of creditors has been convened by 2nd respondent.

The bottom line here is that the process of provisional judicial management has clearly failed to take off not because of applicant's fault but that of the respondents.

Over and above the foregoing, it is pertinently laughable (excuse the pun) that in the founding affidavit by Zenzo Moyo, the 1st respondent's managing director, in the urgent chamber application for provisional judicial management order, in annexure "H", he gave a list of applicant's creditors and what it owed each as follows:

1. Zesa Pension Fund–Rentals = $92 920.71 (which, as at, May, 2012 stood at $126 952.60)
2. Applicant – Rentals = $16 591.00
3. Zesa = $ 5 900.00
4. Bulawayo City Council = $ 1 301.67
5. Legal Costs = $ 1 200.00

   Total = $ 117 913.38

It is settled law that the object of a judicial management order is not an experiment of jiggling around to see whether any judicial manager might be able to turn around a distressed company's fortunes at his/her leisure. It is to avoid the drastic remedy of winding up when a company is in financial difficulties due to mismanagement or some other cause, and there is a reasonable probability that under carefully controlled management it will surmount its difficulties. Section 300 (a) (ii) of the Companies Act, [Chapter 24:03] expressly requires such a reasonable probability to be established in an application for a provisional judicial management order under Section 299(i)(a), lack of opposition does not entitle the court to dispense with this requirement: R H Christie, Business law in Zimbabwe, Juta & Company Ltd 1998 at page 422.

This is so even *in casu* where there is lack of opposition on account of failure to file notices of opposition and heads by the respondents. Inspite of that, it goes without quarrel that in view of the foregoing circumstances surrounding the 1st respondent's precarious financial position, coupled with failure to put even the provisional judicial management machinery into motion, there is nothing to suggest that a reasonable probability exists that the company can at all be enabled to pay its debts and become a successful concern or that it is just and equitable to let it continue wallowing in its current dormant state of provisional judicial management.

The conduct by the respondents in this matter points to only one thing, *viz* that the provisional judicial management order was not applied for in good faith. It was simply designed

to frustrate the applicant who was on the verge of recovering what is duly owed to it thereby delaying execution. I find such conduct to amount to abuse of court process. In this regard, the words of MACDONALD ACJ in *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975(1) RLR 260 AT 265 D – F bear useful repetition for driving the point home. The learned acting CHIEF JUSTICE said:

> "There are numerous ways in which the legal process in civil cases may be abused by unscrupulous litigants, and of these, by far the most common, persistent and deleterious in its adverse effect on the administration of justice is the use of such process to delay the enforcement of just claims. It is this aspect of the administration of the civil law which more than any other has tended to bring it into disrepute and there can scarcely be a more important duty imposed upon the courts than to suppress firmly and without delay any manifestation of this all too common abuse. The greater the law's delays, the greater the temptation for unscrupulous litigants to defend claims solely to gain time and, in the result the evil, unless it is eliminated at its first appearance, tends to escalate."

I found similar abuse of court process along similar lines in *Ellingbarn Trading (Pvt) Ltd v Assistant Master and Another*, HB 82/13, a matter I also heard on the same day. I do not know how many more such cases have found their way into the system but such conduct has to be nipped whenever it rears its pernicious head for the sake of smooth and credible administration of justice. A warning must be sounded to both the legal practitioners who institute such litigation as well as those who rush to certify the litigation as being urgent that in future they may find themselves being visited with costs on attorney-client scale *de bonis propriis.*

In the result I make the following order:

(1) the provisional judicial management order granted in favour of the 1st respondent on 22 May, 2012 be and is hereby discharged in its entirety;

(2) the 1st respondent shall pay the applicant's costs of suit on the scale of legal practitioner and client.

Coghlan and Welsh, applicant's legal practitioners